Court of King's Bench of Alberta

Citation: Graham Infrastructure Ltd v Epcor Utilities Inc, 2024 ABKB 453

Date: 20240723
Docket: 1501 00305
Registry: Calgary

2024 ABKB 453 (CanLII)

Between:

Graham Infrastructure Ltd.
(c.o.b. "Graham Infrastructure, a JV")

Plaintiff/Respondent

- and -

Epcor Utilities Inc., Epcor Water Services Inc., Epcor Technologies Inc.
and JKR Excavating Ltd.

Defendants/Applicants

Reasons for Decision
of the
Honourable Justice J.T. Eamon

I Introduction

[1] Graham was the general contractor under a Construction Contract with the Town of Strathmore for the construction of a water reservoir and pump station project on lands belonging to the Town. It is known as the Wildflower project, and I refer to it in these reasons as the "**project**".

[2] The project site is adjacent to, and north of, the East Calgary Regional Waterline ("**ECRW**"). The reservoir was to be connected to the ECRW when completed.

[3] On the night of January 11, 2013, while the project was under construction, a tee fitting on the ECRW failed, resulting in a large water leak from the ECRW and flooding of nearby areas including the project.

[4] Epcor operated and maintained the Town's water infrastructure, including the ECRW, under the Amended and Restated Water, Wastewater, and Storm Drainage Utility Services Agreement dated March 1, 2012 between Epcor Water Services Inc and Town of Strathmore ("**Utility Services Agreement**"). The parties collectively referred to the Epcor Defendants as "Epcor" and I will do the same because it is not necessary to distinguish among them for the purposes of the issues in the present summary judgment application. This is not to suggest they are not separate corporate entities, or that for other purposes in the litigation it would be appropriate to consider their position collectively.

[5] Epcor was promptly notified of the leak through a call by RCMP or the public to its emergency line. Epcor's personnel intended to shut an isolation valve and stop the flow of water to the leaking part of the line, but mistakenly opened the valve further and increased the flow of water. The ECRW continued to discharge water for about 10 to 12 hours until Epcor successfully shut off the water.

[6] By the time Epcor shut off the water, flood waters had accumulated on the project site causing damage allegedly exceeding $2,800,000.

[7] Graham delivered a Notice of Delay to the Town on January 14, 2013, claiming an extension to the contract time to complete the project and claiming impact costs. The Town granted an extension of time.

[8] Graham remediated the site and repaired the flood damage.

[9] Graham had procured and was insured under a course of construction policy of insurance for the project ("**COC Policy**"). The Town was also an insured under the COC Policy.

[10] Graham filed a claim for the remediation and repair costs with its insurer. The insurer paid Graham's claim to Graham.

[11] On January 9, 2015 Graham's insurer commenced a subrogated action in Graham's name against Epcor for its alleged negligence in responding to the leak including by failing to promptly turn off the water flow, increasing the flow of water, and representing to Graham that it had shut off the water when in fact it had increased the flow of water.

[12] Epcor denied the allegations and asserted many defences. The litigation proceeded. In November 2022 Epcor applied for summary dismissal of the action because:

(a) Any losses were suffered by the Town, not Graham.

(b) Epcor is an insured under the COC Policy and subrogated claims by the insurers against its insureds including Epcor are barred.

[13] Applications Judge Mattis dismissed Epcor's application on June 29, 2023. She found in her verbal reasons that the issues could not be summarily decided on the record before her.

[14] Epcor appeals from Mattis AJ's decision. It submits the Court should summarily dismiss Graham's claim against it. The other Defendant, KJR Excavating Ltd, is not involved in the summary judgment proceedings.

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II Standard of review

[15] The review standard is correctness and the appeal is *de novo* (no restriction on new evidence or new arguments), as well established in Alberta law including numerous appellate decisions which are binding on me.

III Legal framework for summary judgment

[16] The framework for summary judgment applications in Alberta is laid down in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 and summarized at para 47 of ***Weir-Jones*** as follows:

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> > a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
> >
> > b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
> >
> > c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
> >
> > d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[17] The outcome does not have to be obvious (***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 at para 12). The judge must take "a hard look" at the merits of a claim (***Weir-Jones*** at para 44).

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[18] Summary judgment cannot be granted if the action presents a "genuine issue for trial" (***Hannam*** at para 13, 151). This phrase means:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> (***Hannam*** at para 159 – 161).

[19] In appropriate cases the Court may make contested findings of material facts in the summary judgment framework (***Hannam*** at para 147), though a "dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial" (***Hannam*** at para 149).

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IV Whether the Plaintiff Suffered a Loss

(a) Introduction

[20] The question posed by Epcor in the first ground of its appeal and summary judgment application is not whether Epcor owed Graham a duty or that Graham's losses if any were too remote.

[21] Rather, Epcor generally submits that Graham did not own the project and was not obliged to remediate the damage to the project that arose from the flooding. Epcor contends that the Town suffered any loss, not Graham. Epcor asserts the Town paid Graham to remediate the site. Epcor points out that the Town could not sue Graham because of a contractual bar in the Utility Services Agreement.

[22] Graham generally submits that it is contractually responsible under Article 18 of the GENERAL CONDITIONS of the Construction Contract for loss and damage to the project from the flood, was obliged to remediate the damage, and therefore suffered a loss for which its insurers are entitled to subrogate against Epcor.

[23] Article 18 of the Construction Contract provides:

> ARTICLE 18. DAMAGE TO WORK
>
> Contractor shall be responsible for all loss or damage whatsoever which may occur on or to the Works, completed or otherwise, until such time as the entire Works have been completed and the Completion Certificate has been issued by Owner. In the event of any loss or damage occurring, Contractor shall, on notice from Engineer, immediately put the Works into the condition they were in immediately prior to such loss or damage, all at Contractor's expense, except where such loss or damage was caused solely by Owner.

[24] In verbal submissions, Graham's counsel pointed out that Article 43 of the GENERAL CONDITIONS of the Construction Contract requires Graham to carry insurance to cover its responsibility. I note Article 43 requires Graham to carry a variety of coverages, including property damage and Graham's liability including contractual liability.

[25] Epcor relies on several pieces of evidence to show that that the parties to the Construction Contract did not rely on Article 18, trigger Article 18 (on the submission that the Engineer had to issue a notice to trigger its application) or behave as if Graham were responsible for the loss. It also invited the Court to infer that the subrogation claim was brought in Graham's name as an impermissible "attempt to circumvent" the contractual limit of Epcor's liability to the Town under the Utility Services Agreement.

[26] Epcor's position mainly requires the Court to assess the factual question whether the Town or Graham suffered the loss. In doing so, the Court must also interpret the Construction Contract to ascertain whether a notice from the Engineer under the second sentence of Article 18 was required to impose liability on Graham for the damage to the project.

(b) The parties' submissions

[27] Epcor contends that Graham and the Town acted as if Graham was not responsible for the loss and did not act or rely on Article 18. Epcor says the Town did not "trigger" Article 18 with a notice to Graham by the Engineer under the Construction Contract. Further:

(a) Graham's sole role was that of general contractor and Graham had no ownership interest in the project;

(b) Graham submitted a notice of delay to the Town's engineer requesting an extension of time to complete the project;

(c) The Town granted Graham an extension of time in response to the notice;

(d) Graham had no expectation that the loss to the project would be Graham's responsibility or expense;

(e) Graham was paid to repair the project site and redo damaged construction work; and

(f) Graham has not advanced a "Graham-specific" claim in this litigation.

(Epcor's Brief, para 11, 31, 36 – 37; Epcor's Supplemental Brief, para 19 - 23; Epcor's Reply Brief, para 12 - 17).

[28] Also in support of its position that the Town and Graham did not act as if Article 18 applied, Epcor submitted that Article 18 could not and did not apply because the Engineer did not notify Graham to restore the works on the project.

[29] As mentioned earlier, Graham submitted a Notice of Delay on January 14, 2013. This written request included both a request for extension of the time to complete the Construction Contract and impact costs, and stated that Graham would advise later the actual extension of time and impact costs when it was better able to assess the effect of the flood occurrence.

[30] In verbal submissions, counsel for Epcor submitted on the basis of this notice, that the Town granted a contract extension to Graham and accepted to pay Graham "impact costs." Counsel relied on Article 30 of the GENERAL CONDITIONS. This article provides:

> The Contract Time may be extended in the event of one (1) or more of the following:
>
> (a) Where changes to the Work are made as provided for in Article 27.
>
> (b) Where the Work is suspended as provided for in Article 11.

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(c) Where the Work is delayed on account of conditions which could not have been foreseen or which were beyond the control of the Contractor and which were not the result of fault or negligence of the Contractor, Contractor's agents or employees, provided however that rain, wind, flood, or other natural phenomena of normal intensity for the area shall not be construed as cause for an extension of Contract Time.

(d) Where delay occurs in the progress of the work as a result of the act or neglect of Owner or Owner's employees, or by other contractors employed by Owner.

(e) Where delay occurs as a result of an act of a public authority.

(f) Where Engineer causes delay in furnishing drawings or necessary information.

(g) Where strikes, lockouts, or labour disputes prevent or substantially interfere with the progress of the Work. ...

(h) Where, in the opinion of the Engineer, Contractor is entitled to an extension of Contract Time.

A claim for extension of Contract Time shall only be considered when submitted by Contractor to Engineer in writing within seven (7) days of the occurrence ... Within a reasonable time ... Engineer will present a written recommendation to Owner stating Engineer's opinion on whether or not an extension of Contract Time is justified; and, if so, the number of days extension due to Contractor. Owner will make the final decision on all requests for extension of Contract Time.

The granting of an extension of Contract Time pursuant to this Article shall not give Contractor grounds to make any claim whatsoever, save on the grounds set out in (b) or (d) above.

[31] Epcor further stated that Graham issued change orders to the Town for the re-work including for re-work by its subcontractors after the flooding incident (Epcor's Brief, para 69). The only evidence cited in support was a short discovery questioning passage where Graham's corporate representative stated Graham issued a change order to a specific subcontractor responsible for site excavation and backfilling work (*ibid*, footnote 79).

[32] Epcor adduced as evidence some extracts from the discovery questioning of Graham's corporate representative, Mr. Dickinson (Bonneville Affidavit, Exhibits C and D). Rule 5.31 permits Epcor to use any of the evidence in an application or trial. I refer to the evidence from the discovery questioning as "read-ins." Only Epcor may read in from the transcript, but if it chooses to do so the answers become evidence in the proceeding that must be considered along with the other evidence and it might be difficult for the party reading them in to challenge or contradict them (***Abt Estate v Cold Lake Industrial Park GP Ltd,*** 2019 ABCA 16 at para 81-84).

[33] Epcor submits that parts of Mr. Dickinson's discovery questioning and his cross-examination amount to Graham's admission that it had no expectation that the loss to the project would be Graham's responsibility or expense. Epcor submits that Graham and the Town acted as if Article 18 did not apply, or waived Article 18, and the Town did not invoke Article 18.

[34] Epcor's submission that Graham had no ownership interest in the project is based on the admission of Mr. Dickinson on discovery questioning (Bonneville Affidavit, Exhibit C, page

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10/lines 24 – 26). I note that there is some evidence from Mr. Dickinson's subsequent cross-examination on affidavit that Graham owned some of the piping that it had installed at the project site (cross-examination of Mr. Dickenson, page 17/lines 2 – 8). Neither party made anything about this in their submissions and for the sake of argument I will assume, in accordance with the admission obtained on discovery questioning, that the entirety of the project belonged to the Town.

[35] Graham admits that the entire claim relates to physical damage to the project and that the entirety is a subrogated claim. Graham incurred liability to the Town for a small amount of engineering overrun costs which were uninsured and advised they are not included in the claim.

[36] Graham submits that it was financially responsible for any damage to the project in the present case under Article 18 of the Construction Contract. The Town was not at fault for the loss. Epcor was at fault. Graham therefore remediated the damage, claimed reimbursement under the COC Policy, and was reimbursed by the insurer under that policy. In oral submissions, counsel contrasted Graham's position with the Town's position, observing that the Town did not submit an insurance claim for the loss or receive payment for a loss because the Town did not suffer a loss.

[37] With respect to the operation of Article 18, Graham responded that its responsibility for damage to the project imposed by the first sentence of Article 18 is not subject to a condition precedent that the Engineer issue a notice. The second sentence of Article 18 gives the Engineer the power to compel the contractor to restore the works, but the power need not be invoked if the contractor is meeting its obligations.

[38] Graham submits that Epcor's position that Graham had no expectation that the loss would be its responsibility is a "gloss which cannot withstand scrutiny when examined within the context of the evidence."

[39] Graham points out that a flood loss is covered under section 1(a) of the Builder's Risk Form in the COC Policy, and that the COC Policy provides for subrogation (section 12 of the Builder's Risk Form as amended by Endorsement 7 and Article VII of the Additional Conditions) as does section 546(1) of the *Insurance Act*, RSA 2000, c I-3. It submits that Graham's insurer indemnified Graham for the loss, so the insurer is entitled to subrogate and advance an action against any wrongdoer other than an insured who was responsible for the flood. It submits that Epcor is not an insured under the COC Policy in respect of the flooding incident.

(c) Analysis

[40] Before assessing the parties' competing submissions, I note that Articles 16 and 17 of the GENERAL CONDITIONS of the Construction Contract exclude modifications to the contract by oral instructions and non-written waivers. Further, Article 17 provides in part:

> ... No provision in the Contract that imposes or may be deemed to impose extra or specific responsibilities or liabilities on Contractor will restrict the general or other responsibilities of Contractor in any way.

[41] Neither party relied on these provisions in their submissions, so in assessing whether Epcor has met its burden I have not considered them and thereby provided Epcor the benefit of the doubt.

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[42] As mentioned, Mr. Dickinson was Graham's corporate representative in discovery questioning and the deponent of Graham's affidavit in response to Epcor's summary judgment application.

[43] Mr. Dickinson testified that as of January 14, 2013 he understood that whatever losses and expenses occurred from the event, it wasn't going to be at Graham's expense or responsibility because Graham was not at fault (cross-examination of Mr. Dickinson, page 11/lines 7 – 11) and the costs to remediate were not Grahams' expenses (*ibid*, page 15/lines 21 – 25).

[44] Mr. Dickinson also testified that if the loss was not caused by Graham its expectation was that the owner or the insurer would compensate Graham (Affidavit of Bonneville October 29, 2020, Exhibit "C" (discovery questioning of Mr. Dickinson), page 145/lines 10 – 18; Dickinson cross-examination, page 11/lines 7 – 11; page 17/ line 25 – p 18/line 7).

[45] When one reads the various passages that Epcor relies on from Mr. Dickinson's evidence in the context of the entirety of his evidence read-in or obtained on cross-examination, it is apparent that his beliefs or opinions are based on unexpressed understandings of the interplay between the Construction Contract and the COC Policy and his expectation as a lay person was that at the end of the day, Graham would not be paying for this loss out of its own pocket. He believed either the Town or the insurer would pay. That is far from evidence that Graham or the Town acted as if Graham was not financially responsible for the loss, acted as if Article 18 did not apply, or attempted to manipulate the payments to help the Town avoid a contractual bar from suing Epcor directly.

[46] Mr. Dickinson testified on cross-examination:

> Q. And sir, I would like to now turn to paragraph 17 of your affidavit where you speak about the insurer's loss.
>
> Sir, you will see at paragraph 17 that the -- you say there that the Project site was physically damaged and the Project was delayed, significantly delayed?
>
> A. Correct
>
> Q. And those would be the damages and the delay costs that were the subject matter of the Notice of Delay that we see at Exhibit E of your affidavit?
>
> A. Related, yes.
>
> Q. And if we look at Tab L of Mr. Bonneville's Affidavit. What we have here are the various categories for which claims were made and payments were received from the insurance company?
>
> A. Yes.
>
> Q. And this is a particularization – there's greater detail that go with it, obviously, but this is a summary form of the types of claims and the amounts of the progress requests that Graham made pursuant to that Notice of Delay and request for costs?
>
> A. No, not exactly, no.
>
> Q. Why is that, Sir?

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A. We submitted a Notice of Delay without any costs to the Town of Strathmore immediately after the incident occurred and it was made clear to us that the Town of Strathmore would not be reimbursing us for those costs. So therefore, we looked to our insurance and through the course of construction insurance to recover those costs. So these claims here are to the insurance company with a fairly detailed breakdown transpired what we were experiencing. This was not to the Town of Strathmore.

We asked the Town of Strathmore for some additional time to allow us to facilitate those works, without them leveraging any form of damages on us, which we were unsuccessful in having the Town do so.

Q. But my point, sir, is that, as you've said earlier, these expenses were not going to be paid by Graham because you weren't at fault. You had no expectation that these were your expenses?

A. That's right, yes.

Q. And from Graham's perspective, it was either going to be the insurance company or the Town that were going to foot the bill for this?

A. Well, we were aware at the Town was also insured on our policy so we knew that the Town -- we may have had, instead of whoever was at fault for causing the break in the first place, but that wasn't proven at the time. That wasn't a course that was taken.

(Transcript, page 14/line 6 - page 16/line 9).

[47] Later in the cross-examination:

Q. And your expectation was that the owner, the insurer, would compensate Graham for having to do the work over again?

A. Yes.

(Transcript, page 18/lines 4 - 7).

[48] Epcor's claim that the Town accepted to pay impact costs under Graham's Notice of Delay is not supported by the evidence.

[49] Article 30 of the Construction Contract provides for extensions of time, but makes clear that the "granting of extension of time ... shall not give Contractor grounds to make any claims whatsoever for additional payment, save on grounds set out in (b) or (d) above."

[50] When pressed in oral argument for evidence that the Town accepted to pay impact costs, counsel for Epcor cited Mr. Dickinson's evidence in discovery questioning at pages 144 – 145. These passages do not provide evidence that the Town accepted to pay impact costs. Counsel could not point to a record indicating the Town or its representative (the Engineer) accepted responsibility for impact costs.

[51] There is no evidence in the summary judgment application that Graham and the Town had a discussion that Article 18 did not apply to the flood or that Graham was entitled to impact costs. It is not plausible that the Town for some reason would give up a claim for almost $3 million under the first sentence of Article 18 without documenting satisfactory arrangements.

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Notwithstanding that the action has been in existence for some years, with the usual opportunities of records discovery and discovery questioning, I was not provided any evidence of any discussions or communications with the Town to the effect that the Town bore financial responsibility, the Town agreed to pay impact costs, the Town should assert a claim under the COC Policy, or the Town and Graham discussed structuring the payments to avoid a contractual bar under the Utility Services Agreement.

[52] In fact, Mr. Dickinson's evidence from the above quotation is contrary to those theories. He said that Graham submitted a Notice of Delay without any costs to the Town immediately after the incident occurred and it was made clear to Graham that the Town would not be reimbursing Graham for the costs so it looked to its insurers (cross-examination of Mr. Dickinson, page 14/ line 18 – page 15/ line 20).

[53] Epcor proved the Engineer did not issue a notice to restore the works under the second sentence of Article 18. However, on the present record I do not agree with Epcor that Graham's responsibility under Article 18 depended on the issuance of such a notice.

[54] The goal of contract interpretation is to "ascertain the objective intent of the parties through the application of legal principles of interpretation" (***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, [2014] 2 SCR 633 at para 49). To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix" (***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 79). Determining the intention of the parties is a "fact-specific goal" that requires a trial court to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (***Sattva*** at para 47; ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37, [2016] 2 SCR 23 at para 27). Contract interpretation is a "practical, common-sense approach not dominated by technical rules of construction" (***Sattva*** at para 47).

[55] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (***Sattva*** at para 48). The relevant contextual background and commercial context known to the parties at the time the contract was made must be considered regardless of whether the contract meaning is ambiguous (***Sattva*** at para 47; ***IFP*** at paras 58, 80-83, 89). Surrounding circumstances must never be allowed to overwhelm the words of the agreement (***Sattva*** at para 57). The Court "cannot use them to deviate from the text such that the court effectively creates a new agreement" (*ibid*).

[56] The law concerning implying terms onto a parties' agreement may have a bearing on the matter. Courts are careful not to rewrite parties' contracts into something they might consider more convenient or fairer. Generally, a court will imply terms only in limited circumstances: (1) the term is so obvious that it is not worth mentioning expressly ("Oh, of course" we mean that!); (2) the term is necessary to give the contract business efficacy; (3) the term arises from established custom or usage (***Catre Industries Ltd v Alberta***, 1989 ABCA 243 at para 23 – 32; ***Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc***, 2013 ABCA 200 at para 106 – 113).

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[57] In the present case the parties did not focus in any detail on the interpretation of Article 18, point to surrounding circumstances that might assist the Court in interpreting Article 18, or clarify whether the contract form was a standard form where surrounding circumstance evidence might have a lesser role or might not be specific to the particular parties as discussed in cases such as ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at paras 27 – 32.

[58] Epcor has not cited any authority, precedent, or rationale for reading the two sentences of Article 18 together or implying a term into the Construction Contract that Graham's responsibility for loss to the project only applied where the Engineer issued it a notice to restore the works. Graham has not submitted authority interpreting the clause either.

[59] I see no basis on the present record to read the sentences together such that Graham's financial responsibility for loss or damage to the project is conditional on the Engineer's issuing a notice. Doing so is contrary to the unambiguous contract language and would amount to making a different contract for Graham and the Town.

[60] The first sentence of Article 18 means what it says: Graham is responsible for damage to the project while under construction. The second sentence empowers the Engineer to compel Graham to restore the work, and clarifies that Graham's financial responsibility does not extend to loss caused solely by the project owner. It does not appear to me to be reasonable, obvious or necessary that the Engineer must issue a notice before Graham is financially responsible to remediate damage not caused solely by the project owner. It would be unreasonable to preclude Graham's contractual responsibility merely because Graham accepted its obligation without the Engineer going to the trouble of forcing it to do so.

[61] Epcor submitted, in its reply brief, that Graham did not submit evidence that Graham or the Town intended to enforce Article 18. In my opinion, Graham's evidence was sufficient:

(a) Article 18 does not require that the Engineer issue a notice under the second sentence of Article 18 to impose financial responsibility on Graham for the cost to remediate the damage. Epcor would need to further show an agreement by the Town and Graham through conduct or discussions that Article 18 did not apply. The onus is on Epcor, not Graham, to show that the Town and Graham departed from this clearly worded provision of their written contract.

(b) Mr. Dickinson's evidence is sufficient to demonstrate a genuine issue for trial, that Graham and the Town acted pursuant to the first sentence of Article 18.

[62] As mentioned, Epcor asserts that Graham issued change orders for the work. It has not provided copies of any change orders or evidence of how they were accounted for between Graham and the Town. These orders might have been issued to document Graham's financial responsibility to effect repairs or to ensure subcontractors (who, unlike Graham, did not bear responsibility under Article 18) would be paid for re-work necessitated by the flood.

[63] On the present record, none of the events, or Graham's evidence, plausibly suggests that either party to the Construction Contract intended or attempted to waive or modify Article 18 or acted as if it did not apply.

[64] Rather, the present record suggests that the property under construction was at the risk of Graham under Article 18 of the Construction Contract. Graham received a contract extension for delay arising from damage not under its control. Graham then incurred over $2.8 million to

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remediate the site. The Town made clear it was not bearing responsibility for these costs, so Graham looked to its insurers. Both the Town and Graham were insured under the COC Policy. Graham, who was responsible to remediate and repair the property, made a claim under the policy and the insurers reimbursed Graham for Graham's cost of doing so.

[65] I agree with Applications Judge Mattis that the matter cannot be fairly resolved in favour of Epcor on a summary judgment application. It might be that Epcor could establish its defence by putting the change orders before the Court or forcing evidence from representatives of the Town as to its intention with Graham. But at this point, Epcor's first ground of appeal remains a defence theory not a proved fact, and as a theory it is speculative.

[66] I do not think Graham is obliged under its obligation to "put its best foot forward" to provide extensive records or other responding evidence to disprove Epcor's speculation. Mr. Dickinson clearly deposed that the Town refused to commit to reimburse Graham so it claimed under the COC Policy. Epcor has not raised considerations on the present record that would reasonably cast doubt over that evidence.

[67] Epcor's first ground of its summary judgment application and appeal fails.

V Whether Epcor is an Insured Under the COC Policy

(a) Introduction

[68] Neither party disputed that if Epcor's activities in attending to stop the water leaking from the ECRW were services within the meaning of Article 1(10) of the Builders Risk Form in the COC Policy, then this subrogated action cannot be maintained. Both sides also agreed that this action does not include the small portion of uninsured loss that Graham suffered.

[69] Article 1 of the Builders Risk Form provides a lengthy list of persons who are deemed to be named insureds. Epcor asserts it is an insured under Article 1 (10):

1. **INSUREDS**

   Wherever reference is made in this Policy to the "Named Insured" it shall be deemed to mean:

   1. The Owner(s); and

   2. The Architect(s); and

   3. The Engineer(s); and

   4. Consultants(s); and

   5. Project Manager(s); and

   6. Construction Manager(s); and/or

   7. Prime Contractor(s); and/or

   8. Sub-Contractor(s) engaged or under contract to perform installation, construction, reconstruction, site preparation, repair, erection, fabrication, testing or demolition operations at the project site; and/or

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> 9. Supplier(s), but only if engaged or under contract to both supply and install materials and equipment intended to enter into and form part of the finished project, while at the project site; and/or
>
> 10. Persons, firms or Corporations supplying services to the Project, at the project site; and/or
>
> 11. Employees, Partners, Officers, Directors and Shareholders of any of the foregoing while acting within the scope of their duties as such; and/or
>
> 12. Entities in whose name an insured is obligated by agreement (or has otherwise undertaken) to provide insurance of a similar nature to the coverage afforded hereby.

[70] Article 1(10) does not require that Epcor be a contractor or sub-contractor. It need only be supplying "services to the Project, at the project site." Article 1(10) requires Epcor to be actually supplying services, in contrast to Articles 1(8) and 1(9) where insured entities need only be under contract or engaged to supply materials or work as provided therein.

[71] Epcor submits that it supplied services to the project, at the project site. By way of summary of its lengthy submissions in three written briefs and verbal submissions, I quote from its supplemental brief where Epcor submits the key evidence supporting its claim to be an insured is:

> EPCOR provided sufficient evidence to the court to make a finding of fact that EPCOR provided services to the Project at the Project site; the only requirement under Article 1. The key evidence before the court in support of a fact finding that EPCOR is an insured under the insurance policy was as follows:
>
> > (a) The Insurance Policy for the Project included a category of insured described as "Persons, firms or Corporations supplying services to the Project, at the project site; ..."
> >
> > (b) Graham's scope of work under the Construction contract expressly included connecting the Wildflower reservoir to the ECRW;
> >
> > (c) Graham was contractually required to coordinate with EPCOR in four different instances under the Construction Contract, including in planning and coordinating any work in the vicinity of the ECRW;
> >
> > (d) EPCOR personnel attended at construction progress meetings on site and were part of discussions regarding planning of work close to or adjacent to the ECRW;
> >
> > (e) EPCOR attended the project site on January 12, 2013 to respond to the water main break.
>
> (Supplemental Brief, para 35).

[72] Graham responds that the evidence does not support that Epcor provided services to the Project, at the project site, and in any event Epcor's alleged negligence arises from Epcor's work on the ECRW, which was neither for the project nor on the project site.

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[73] Graham further submitted most of Epcor's evidence is inadmissible hearsay that is not permitted under Rule 13.18, and that the Court should draw an adverse inference against Epcor because it did not provide evidence from the individuals with firsthand knowledge about Epcor's response to the flood and the services it provided.

[74] Epcor disputed that additional evidence would be material or that an adverse inference should be drawn.

(b) Legal principles

[75] Epcor must demonstrate that it is an insured within the language of the policy and has an insurable interest in the subject-matter insured (***Duri Homes Ltd v Quest Coatings Ltd***, 2023 ABCA 276 at paras 25, 40 – 41, 44).

[76] Interpreting insurance policies, as with any other contract, requires the court to ascertain the objective intent of the parties through the application of legal principles of interpretation (***Duri Homes*** at para 32). However, as discussed in ***Ledcor*** certain modifications or other considerations apply to suit the circumstances of insurance generally and course of construction policies specifically, some of which I will review in the following paragraphs.

[77] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (***Ledcor*** at para 49). Party-specific surrounding circumstances are often less relevant when interpreting standard form contracts, such as those used in the insurance industry, because the parties in those cases do not negotiate terms (***Ledcor*** at paras 28 – 29, 31; ***Duri Homes*** at para 32).

[78] Where the policy language is ambiguous,

> ... general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. ...
>
> (***Ledcor*** at para 50).

[79] If ambiguity still remains after the above principles are applied, the *contra proferentem* rule can be employed to construe the policy against the insurer (***Ledcor*** at para 51). A corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly (*ibid*).

[80] The purpose behind builder's risk policies is crucial in determining the parties' reasonable expectations as to the meaning of an ambiguous provision (***Ledcor*** at para 66).

[81] The Supreme Court of Canada described the policy bases for a broad interpretation of coverage in course of construction insurance policies in ***Commonwealth Construction Co v Imperial Oil Ltd***, 1976 CanLII 138, [1978] 1 SCR 371. De Grandpre J described the purpose of these insurance policies at p 323 - 324:

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> ... On any construction site, and especially when the building being erected is a complex chemical plant, there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in court. By recognizing in all tradesmen an insurable interest based on that very real possibility, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesmen, the courts would apply to the construction field the principle expressed so long ago in the area of bailment. Thus all the parties whose joint efforts have one common goal, *e.g*., the completion of the construction, would be spared the necessity of fighting between themselves should an accident occur involving the possible responsibility of one of them.

[82] Further at p 328 - 329:

> ... Whatever its label, its function is to provide to the owner the promise that the contractors will have the funds to rebuild in case of loss, and to the contractors, the protection against the crippling cost of starting afresh in such an event, the whole without resort to litigation in case of negligence by anyone connected with the construction, a risk accepted by the insurers at the outset. This purpose recognizes the importance of keeping to a minimum the difficulties that are bound to be created by the large number of participants in a major construction project, the complexity of which needs no demonstration. It also recognizes the realities of industrial life. In *Morris v. Ford Motor Co. Ltd*. ... [[1973] 2 All E.R. 1084], the majority in the Court of Appeal refused to accept the existence of subrogated rights because, in the words of Lord Denning, it was not just and equitable to compel the insured to lend their name to an action against their own servant and, in the words of James L.J., such a subrogation in an industrial setting was unacceptable and unrealistic. ...

[83] Or as the Court stated in ***Ledcor*** at para 66:

> ... to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage — in exchange for relatively high premiums — provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. ...

[84] Graham submits that Article 1(10) of the COC Policy requires that Epcor supply services that are an integral and necessary part of the construction. It relies on ***Canadian Pacific Ltd v Base-fort Security Services (B.C.) Ltd***, 1991 CanLII 767 (BC CA). The Alberta Court of Appeal applied similar reasoning to a materials supplier who had supplied parts to a contractor who was supplying and installing a compressor for a plant owner (***Sherritt Gordon Limited v Dresser Canada, Inc***, 1997 ABCA 156 at para 9).

[85] In ***Base-fort***, “insured” included contractors and sub-contractors of Canadian Pacific. The Court found that these terms meant those contractors who are an integral and necessary part of the construction process itself or those "within the mainstream of the construction activities.”.

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Base-fort provided security services that ran parallel to the project but were not an integral and necessary part of the construction process, and was not an insured under the policy.

[86] I agree with Epcor that ***Base-fort*** was decided on different policy wording. I also agree with Epcor that the COC Policy does not require that it be a sub-contractor or that it must provide physical services.

[87] However, I do not agree that Epcor meets the requirement of supplying services merely because the services were provided by Epcor to the Town and public stakeholders pursuant to its duties as manager or operator of the Town's water infrastructure and actually did benefit the project.

[88] Epcor had to coordinate the operation of the ECRW with the construction project and operate the ECRW regardless of the project. This does not necessarily mean it was supplying services to the project whenever its personnel attended the site for any purpose, or whenever it did anything in the course of its role as manager or operator of the Town's water infrastructure that benefitted Graham or the project.

[89] It is unreasonable to conclude that the objective intention of the parties to the insurance contract was that any supplier becomes an insured under the COC Policy no matter how tenuous or coincidental the connection between the services and the project. In my opinion, the requirements that the services be to the project, and at the project site, in the context of the purposes of course of construction policies, demonstrate the parties' intention that the services be an integral and necessary part of the construction process or construction activities. A collateral benefit arising from, or a function relating to, the maintenance, management or control of nearby Town infrastructure, such as an emergency response to a watermain rupture, is not necessarily a service to the construction project.

[90] The existence of an insurable interest is assessed under the factual expectancy test described in ***Duri Homes***. Epcor need not be a contractor or a subcontractor of a named insured to establish the necessary special relationship with the project as a whole that supports an insurable interest (***Duri Homes*** at para 50).

(c) Epcor's involvement in the project or the ECRW

(i) Overview of the evidence

[91] Epcor operated and managed the Town's water infrastructure (including potable water supply and sewer), and had some involvement in certain capital projects, under the Utility Services Agreement. There was no suggestion that Epcor was assigned responsibility for the subject project as part of its responsibilities for capital projects under the Utility Services Agreement.

[92] The project was a water reservoir and pump station. The unit would receive water from the ECRW, and pump water from the reservoir into the Town's distribution system. Both the ECRW and the distribution system were operated and managed by Epcor under the utility agreement.

[93] Epcor was not retained or contracted by Graham to provide services to the project, nor was it a subcontractor of Graham or one of its trades.

[94] The Construction Contract required Graham to coordinate with Epcor in specific circumstances:

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(a) The work would be constructed in stages to accommodate Owner's continued use of the ECRW during construction. Interruption of service from the ECRW was subject to the operational requirements of the Town's potable water supply, as defined by Epcor (Construction Contract, Section 01110 (Summary of Work), para 1.5)

(b) Water for hydrostatic testing of the reservoir would be provided by the Town via the new watermain to the pump station. Graham must provide 2 weeks notice prior to filling the reservoir to accommodate Epcor's operational requirements (Construction Contract, Section 03600 (Hydrostatic Testing and Disinfection), para 2.1.2).

(c) The filling of the reservoir for hydrostatic testing must be coordinated with the Town and Epcor (Construction Contract, Section 03600 (Hydrostatic Testing and Disinfection), para 3.3.7).

(d) The requirements for disposal of the water used to test the reservoir included that Graham obtain approval from the Town and Epcor before releasing any test water to the Town's water distribution system or discharging test water to drain or surface (Construction Contract, Section 03600 (Hydrostatic Testing and Disinfection), para 3.4.4)

[95] The Construction Contract provides that the Engineer is the Town's representative at the site. There is no evidence that Epcor was appointed an inspector under the contract or had formal roles under the Construction Contract other than those four occasions specifically set out in the Construction Contract.

[96] As mentioned earlier, Epcor adduced as evidence some extracts from the discovery questioning of Graham's corporate representative Mr. Dickinson (Bonneville Affidavit, Exhibits C and D).

[97] Mr. Dickinson stated in a read-in that there were two scenarios when Epcor would have been contacted by Graham. First, Graham "had to notify them in advance of any work in the vicinity of the line [meaning the ECRW], even without an interruption to supply". Second, Graham had to notify Epcor if an interruption to supply was required, because Graham was not authorized to interrupt the supply. Only Epcor could interrupt the supply. Epcor attended site meetings periodically and were part of the discussions around any planning for any work close to or adjacent to the line.

[98] Mr. Dickinson further stated in a read-in that Epcor personnel were contacted or notified on three occasions: (1) July through September, 2012 when Graham was excavating the reservoir; (2) an investigation of some components of the existing line before the incident occurred; (3) post-incident work when Graham was completing the connections for the project to the line.

[99] Mr. Dickinson stated that the first occasion was not work within any parameters Epcor had set for proximity working, however Graham notified Epcor on an ongoing basis.

[100] The second occasion that Mr. Dickinson mentioned appears to have occurred in October 2012, when Epcor attended during certain excavation activities. In cross-examination, Epcor's representative Mr. Bonneville testified that Epcor attended as an observer or monitor to ensure the ECRW was safe from harm and to shut it off in the event it were damaged. The excavation

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activities appeared to be of an existing water pipe that had been installed some years before the construction project to connect an anticipated future reservoir to the ECRW.

[101] As to the purposes of these attendances, Epcor's read-ins from Mr. Dickinson's evidence were to the effect that Epcor operated the line (meaning the ECRW) and were present to ensure security of the water supply was maintained at all times for stakeholders and Epcor would have intervened at any time they felt any actions were being proposed that were not aligned with that objective.

[102] Mr. Dickinson further stated that Epcor had a greater role during the work to tie-in to the ECRW.

[103] Also, Graham understood from the start of the project that manipulating any of the isolation valves in the waterline would have been the service that Epcor would have provided to the project.

[104] Mr. Bonneville's affidavit and cross-examination spoke to various attendances by Epcor representatives at the site. His evidence suggests to me that Epcor often attended construction meetings or at the site primarily to monitor and gather information so it could discharge its role as the manager and operator of the Town's water infrastructure to protect and manage the ECRW or other parts of the existing water infrastructure.

[105] Mr. Bonneville described in para 14 of his affidavit more detailed and particular involvement by Epcor starting in mid-2013 to operate valves and monitor piping or water quality when various piping was flushed as part of commissioning the project. His cross-examination demonstrated some ambiguity of which piping Epcor was monitoring or which valves it was operating (cross-examination of Mr. Bonneville, page 45/line 3 – page 53/line 14), and consequently, the location(s) where it provided services.

[106] Epcor also provided a large bundle of minutes of the Construction Contract Progress Meetings obtained in the litigation from Graham that record the presence of its personnel. These do not provide much information about how Epcor participated or why its representatives attended, but the read-ins from Mr. Dickinson's discovery questioning clarify that when Graham felt that the waterline was potentially at risk it notified Epcor and invited Epcor to have discussions or review workplans and, further, there was an open invitation to a couple of Epcor representatives to attend site meetings in an effort to build relationships.

(ii) Location of services

[107] There is some ambiguity in the record of the location of the isolation valves and whether the valves actually were on the project site.

[108] The leak in the ECRW occurred at the tee fitting on the ECRW that connected the ECRW to another existing water pipe that ran to the south side of the project site. As mentioned, the Town had arranged for this pipe to be installed some years before the project, in anticipation of future development of the reservoir.

[109] According to Mr. Dickinson's affidavit, the ECRW and the location of the rupture were not on the project site. They were adjacent to the site. The drawing of the project site reproduced in Mr. Dickinson's affidavit does not suggest that any valves controlling water to and from the ECRW were located on the project site, but it might not be a complete depiction of the system.

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[110] Mr. Bonneville stated in his affidavit that Epcor representatives attended at the project to operate isolation valves to periodically interrupt the water supply from the ECRW, or to stop the leak on the night of the rupture of the ECRW.

[111] Mr. Bonneville did not specifically state that the isolation valves that controlled water into or out of the section of the ECRW passing adjacent to the project site were located on the project site. In cross-examination he agreed that Epcor's personnel were working on the ECRW (cross-examination, page 55/line 13 – page 58/line 7).

[112] If Epcor was working on the ERCW then its personnel were probably not on the project site. In verbal reply submissions, Epcor's counsel appeared to accept or at least not dispute, that the isolation valves were outside the project site.

[113] Having the read the evidence of both parties, I am not confident that the record is sufficient to determine on the balance of probabilities that Epcor's activities in isolating the ECRW generally or in stopping the leak, were actually conducted at the project site in contrast to on the ECRW.

[114] Epcor also participated when Graham was filling the reservoir or commissioning the project. As mentioned, there was evidence that pressure was monitored in lines and lines were flushed.

[115] Epcor's work in these aspects was only generally described in the evidence. I am not confident that the record is sufficient on the balance of probabilities, to ascertain whether or what extent these activities were conducted at the project in contrast to on the ECRW.

[116] In some instances, Epcor attended at the project site to participate in planning for commissioning the project. In my opinion, such planning was integral to the construction process because the Town required Epcor's participation for certain aspects of the construction pursuant to the Construction Contract as listed in para 94 above.

[117] The record is vague as to dates that Epcor attended the site to participate in such planning. The construction minutes do not necessarily record the details of Epcor's participation. It is possible that these attendances occurred after the flooding incident, as the project moved toward testing and commissioning. The date when, if at all, Epcor became an insured might be important if the subrogation bar depends on whether Epcor was an insured as at the date of the rupture (see part V(d) below).

(iii) Whether services supplied to the project

[118] I do not agree with Epcor that it was supplying services "to the project" when it sought to stop the flow of water to the rupture or repair the leak.

[119] As mentioned earlier, Epcor was the manager and operator of the Town's water infrastructure. The mere fact its activities benefitted the Twon and its public stakeholders does not necessarily mean it is an insured under Article 1(10) of the COC Policy.

[120] Mr. Bonneville deposed in his affidavit that on the night of the loss, Epcor reported to the project site to supply emergency services to the site, and immediately supplied services to the project by isolating and repairing the watermain break. Epcor's brief states that Epcor's purpose in attending the site was "in order to stop the flooding of the Premises including the Project Site".

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[121] However, in discovery questioning Mr. Bonneville stated that the emergency arising from the rupture in the ECRW was the danger of losing potable water supply to the Town and that public health was the main concern. “When you run out of water, it’s a public health emergency, evacuating hospitals and stuff.” (Bonneville discovery questioning, page 55/lines 10 – 15; page 57/lines 4 – 8).

[122] In view of the discovery evidence, I refuse to conclude on the present record that Epcor, the manager of the Town’s water infrastructure, attended to stopping a major water leak on a regional watermain as a supply of services to the construction project.

[123] It is more plausible that Epcor was supplying services to the Town under the Utility Services Agreement. The fact that numerous stakeholders within the public, including consumers of potable water, property owners, and constructors, benefitted from this emergency service would not necessarily constitute provision of services to the project.

[124] However, Mr. Bonneville says in his affidavit that Epcor attended to the rupture to supply services to the project site.

[125] It is not appropriate on the present record to choose between these two alternatives. If it were appropriate, I would not accept Epcor’s characterization that the emergency work to stop and repair the leak on the ECRW was a service provided to the project.

[126] As to services other than those relating to the rupture incident, the record essentially indicates that Epcor had involvement during the life of the project that varied in intensity and had different purposes, some of which may have been to supply services to the project and others to perform Epcor’s contractual duties to manage and protect the ECRW and distribution system under the longstanding Utility Services Agreement.

[127] In my opinion, the matters specifically relating to Epcor set out in the Construction Contract (described in para 94 above -- interruptions to the ECRW requested by Graham for the project, the filling of the reservoir for hydrostatic testing, and providing approval for disposal of the test water) are services to the project.

[128] The service interruptions requested by Graham to the ECRW were work to the project, but the record is vague whether those services were provided at the project site.

[129] The pressure monitoring and flushing might have been services to the project, but more information is needed.

[130] In summary, given the general nature of Epcor’s affidavit evidence and read-ins, I am not confident that the record is sufficient to determine whether Epcor was supplying “services to the project, at the project site” or if it was, when it was doing so.

(d) Whether Epcor an insured

[131] Mattis AJ focussed on the nature of Epcor’s services responding to the rupture on the ECRW, on the basis that if Epcor did not meet the requirements of Article 1(10) of the COC Policy, then Epcor could not claim protection from subrogation.

[132] Mattis AJ understood Epcor’s position to be that it was providing project services to stop the flooding to the project site, and Graham’s position to be that Epcor responded to a public health emergency as per its duties under the under the Utility Services Agreement. She concluded that this specific factual issue could not be determined on the evidence in the

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summary judgment application (Oral reasons of Mattis AJ, page 9/line 38 – page 10/line 4; page 10/line 36 – page 11/line 12; page 11/line 33 – page 12/line 3).

[133] I agree with Mattis AJ that this basic factual determination could not be made on the evidence in the present application, at least in favour of Epcor. As mentioned earlier, given the general nature of Epcor's affidavit evidence and read-ins, I am not confident that the record is sufficient to determine that Epcor was supplying services to the project, at the project site during the response to the rupture. As mentioned, the other alternative is that Epcor provided emergency utility services to the Town under the Utility Services Agreement that benefitted public stakeholders such as water consumers, property owners, and property constructors.

[134] In its written submissions, Epcor appeared to suggest a second path to being an insured: that Epcor need only show that it provided services at some time during the project, not necessarily during the flooding incident.

[135] This suggestion is found at para 36 of its Supplemental Brief. It arose in the course of Epcor addressing the application of the hearsay rule to Mr. Bonneville's evidence in this final application. Epcor submitted that its witness had sufficient personal knowledge in relation to Epcor's attendances at the site and involvement in the construction planning process on occasions other than the flooding. Epcor then submitted:

> The fact remains that EPCOR did attend and supply services to the Project site multiple times. Article 1 of the Insurance Policy does not impose any further requirement than that.

[136] Thus Epcor appears to suggest that if it provided services fitting under Article 1(10) at any time during the construction project, then it was an insured and could claim the bar against subrogation.

[137] Though Epcor mentions this possibility in its materials, neither party provided submissions or authority whether, in the face of the policy language, Epcor would be entitled to the subrogation bar in relation to losses caused by activities that did not qualify it as an insured.

[138] I raised with Epcor's counsel during verbal submissions whether it might be sufficient to for Epcor to show that it was an insured under the policy language on occasions other than its response to the flooding incident and whether cases such as ***Condominium Corporation No 9813678 v Statesman Corporation***, 2007 ABCA 216 might apply.

[139] In ***Statesman***, Alberta Court of Appeal held that the insurer of a condominium building could not subrogate against Statesman for fire loss to the condo building. Statesman was developing another building nearby. The latter building caught fire during construction and the fire spread to the condo building. The insurance on the condo building was for the residents, and was not taken out as construction risk insurance by the developer. The insured under the condo building policy included the condo board and the condo owners. Statesman owned condo units in the condo building. Although Statesman was not acting in the capacity as owner of units in the condo building but rather as developer of an adjacent building in relation to the events leading to the fire, subrogation was barred.

[140] The Court of Appeal refused a proposed exception to the subrogation bar for losses caused by an insured not acting the capacity of a condo owner. It observed that cases of coincidence may arise, but an insurer may negotiate exceptions to coverage or subrogation waivers before it issues a policy:

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> [21] Cases of coincidence could arise. An apartment building or condominium building could burn down because a nearby building burned. And the negligent owner or repairman who caused that nearby fire could chance to live in one of the units of the apartment or condominium building. If two vehicles, aircraft or ships collide and burn, the negligent owner/operator of one could happen to own cargo in the other. Indeed, in a small town or remote part of Canada, or in a specialized industry with few participants, such "coincidences" might be fairly common.
>
> ...
>
> [25] I admit that the traditional rule barring an insurer from suing its own insured occasionally yields unpredictable results. But an insurer can negotiate exceptions to coverage or to subrogation waiver clauses before it issues a policy.
>
> (Underlining added).

[141] In response to the Court's inquiry during verbal reply submissions, Epcor's counsel noted there are cases of concurrency, where part of a loss is covered and part is not, and that in such cases the subrogation bar generally applies. He said that the point hasn't come up in the present case, no one has raised it, and it might require some further briefing.

[142] Waiver of subrogation and coverage do not necessarily have the same scope (***Statesman*** at para 35). However, Epcor's case may be one within the limited circumstances contemplated by ***Statesman*** at para 25 of its reasons quoted above, because the insurer specifically limited the circumstances under which Epcor qualified as an insured under the COC Policy.

[143] If the damage was caused only by Epcor's activities that did not qualify as "supplying services to the Project, at the project site", should Epcor receive the benefit of the subrogation bar? Although allowing subrogation might create difficulties in cases where the loss was caused both by an entity's activities as an insured and outside the definition of an insured (such as a conflict of interest for the insurer described in ***Statesman*** at para 56), those might be the necessary outcome of the definition of insured in Article 1(10) in the present case.

[144] The parties proceeded in the summary judgment application on the basis that the relevant time to assess whether Epcor was an insured was during Epcor's response to the rupture in the ECRW. Given the lack of submissions on the this possible subrogation issue, and the ambiguities of the evidence as to when Epcor provided services, the purposes for which the services were provided (ie, whether they were "to the project" or for Epcor's own purposes as utilities manager) and where the services were provided (ie, whether they were "at the project" or on the ECRW), I am not confident that a fair and just determination can be made on the present record. All of these issues should be addressed together, on adequate evidence and submissions.

[145] The same information will be required to determine the second question whether Epcor has an insurable interest in the project. Epcor's counsel acknowledged during the oral hearing that the facts and analysis on this second issue are very similar those relating to the interpretation question.

[146] Therefore, Epcor fails on its second ground of appeal. Its status as an insured must be decided on a better evidentiary record than put forth in the present application, and it has not persuaded me on the present record that it was an insured during the flooding incident.

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VI Conclusion

[147] The appeal from the Decision of Mattis AJ pronounced June 29, 2023 is dismissed. The parties may speak to costs.

Heard on the 14th day of March, 2024.
Dated at the City of Calgary, Alberta this 23rd day of July, 2024.

J.T. Eamon
J.C.K.B.A.

Appearances:

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for the Plaintiff/Respondent

Dennis Picco KC and Simon Elzen-Hoskyn
for the Epcor Defendants/Applicants

No appearance
For the Defendant JKR Excavating Ltd

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