Court of King's Bench of Alberta

Citation: Kudzin v APM Construction Services Inc, 2023 ABKB 425

Date:20230718
Docket: 1701 08473
Registry: Calgary

Between:

Helen Ann Kudzin, Rischa Reynolds, Charles Reynolds, Toni Leblanc, Tim Heath, Andrew Ewan, Samantha Ewan, Judith Ewan, David Robert Palmer, Jenny Marie Palmer, Venita Sobering, John Montgomery, Eleanor McRory (Deceased) By Her Personal Representative John McRory, Lorna Kuhn, Dieter Kuhn, Alaric Fish, Roberta Fish, Scott Lee Egger, Janice Fong, Andrew Kirk, Nancy Kirk, Christian Hery, Veronique Hery, George Biggy, Theresa Biggy, Lindsey Madden, Brendan Madden, Brenda Lea Cook, Robert V. Knowlden, Valerie C. Knowlden, Clifford Alexander White, Johanne Margaret Marie White, John Lloyd Gingles, Kathleen Louise Gingles, Katherine Scott, Theresa Zakli, Mike Zakli, David Graham, Victor George Batycki, Wendy Batycki (Deceased) by her Personal Representative, Jivan Maher, Rambha Maher, Wilmar Homes Ltd., Debra Loraine Reeve, Marie Antoinette Owen (Deceased), David William Owen, Carolyn E. Kennedy, Larry Lehr, Lester Lehr, Eileen Lehr, John Doe I-IV, and Jane Doe I-IV

Plaintiffs

- and -

APM Construction Services Inc., DCR Construction Inc., DCR Inc., David Rowe, Ground Zero Excavation, Ground Zero Grading Inc., ATCO Gas and Pipelines Ltd., ATCO Gas a division of ATCO Gas and Pipelines Ltd., Cam-Tel Communications Ltd. O/A Cam-Tel Line Locating Ltd, Alberta One-Call Corporation, Alberta One-Call Location Corporation, Alberta Social Housing Corporation, The Alberta Social Housing Corporation a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network of Public Housing, the Town of Canmore, ABC Corp. Ltd., DEF Corp. Ltd., Dave Arbeau, Jerry Arbeau, Ben Arends, Andrew Pacaud, Kavon Sharifi, John Doe I and John Doe II

Defendants[1]

Reasons for Decision
of the
Honourable Justice M.A. Marion

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[1] The full styles of causes for all actions involved in this decision are attached as Appendix A. Third-Party Defendants have been omitted in styles of causes.

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I. Introduction

[1] On June 26, 2015, during the course of construction work to expand the Bow River Seniors Lodge in Canmore, Alberta (**Project**), an excavator struck and ruptured (**Rupture**) a live pressurized methane gas line (**Gas Line**) operated by ATCO, causing natural gas to escape. An hour later, escaped natural gas ignited and an explosion (**Explosion**) occurred causing property damage at the site and on nearby properties.

[2] The Explosion resulted in thirteen separate actions. In those actions there are over 90 different plaintiffs and over 20 defendants. There are numerous common parties and hundreds of pleadings, including numerous notices to co-defendants pursuant to rule 3.43 and several third party claims pursuant to rule 3.44. By way of an October 2018 Consent Order (**Farrington Order**), the thirteen actions were ordered to proceed together as much as practicable, with common document production and questioning. One of the actions, started by the Town of Canmore, has been discontinued.

[3] In December 2022, I was appointed case management judge in respect of the remaining twelve actions. In January 2023, at the request of the parties I directed the hearing of this summary dismissal application (**Dismissal Application**) at a full-day special application. At the same time, I directed a separate special application (**Insurance Applications**) to deal with an Originating Application seeking a declaration of an insurer's duty to defend claims made in relation to the Explosion, together with a cross-application to adjourn the Originating Application and have it heard concurrently or consecutively with the Dismissal Application pursuant to rule 3.72. The parties have expressed a desire to have both Applications heard and decided quickly as there is a mediation scheduled for August 2023.

[4] These are my Reasons in respect of the Dismissal Application, by which DCR Inc (**DCR**) and its principal David Rowe (**Rowe**) apply for summary dismissal of eleven actions (**Actions**). The remaining action (Action Number 1701-03619 commenced by ATCO Gas and Pipelines Ltd. (**ATCO**)) is not part of this application.

[5] My Reasons in respect of the Insurance Applications have been prepared and published separately: ***Royal & Sun Alliance Insurance Company of Canada v Co-Operators General Insurance Company,*** 2023 ABKB 426.

[6] DCR/Rowe allege that there is no merit to the claims against them in the Statements of Claim in the Actions and that they should be summarily dismissed. DCR/Rowe acknowledge that a third party claim filed against them in the Actions by the general contractor on the Project, APM

Construction Services Inc (**APM**), is not ripe for summary dismissal and is not included in the Dismissal Application.

[7] The Dismissal Application is opposed by the plaintiffs in the Actions, including the owner of the Project, Alberta Social Housing Corporation (**ASHC**), and various other nearby property owners or their children (**Neighbour Plaintiffs**). APM also opposes the application. Other defendants, including the corporate employer of the operator of the excavator that struck the Gas Line, Ground Zero Grading Inc. (**Ground Zero**), did not participate or take any position on the application.

[8] The determination of this application requires an assessment of whether there is no merit to the claims made against DCR/Rowe, whether there are no genuine issues requiring a trial, and whether the court can fairly deal with those claims summarily on the admissible record before the court.

[9] For the reasons set out below, DCR/Rowe's Dismissal Application is dismissed.

II. Background and Issues Raised in the Pleadings

[10] It would be unwieldy to attempt to summarize all the pleadings in this matter. I have focused below on the key pleadings that are engaged in this application. Even in doing so, I do not purport to precisely describe each and every key pleading in each of the Actions, but rather provide a general summary of them to facilitate my analysis.

A. The Claims

[11] The Actions were filed in 2017 and are comprised of: Action No. 1701-07303 (**Wollner Action**); Action No. 1701-07584 (**Lepper Parents Action**); Action No. 1701-08200 (**Lepper Children Action**); Action No. 1701-05276 **(Hanna-Seed Action**); Action No. 1701-05277 (**Lazdowski Action**); Action No. 1701-08196 (**Palmer Action**); Action No. 1701-08473 (**Kudzin Action**); Action No. 1701-08528 (**ASHC Action**); Action No. 1701-08541 (**Pasemko Action**); Action No. 1701-08542 (**Hatley Action**); and Action No. 1706-00185, which was transferred to the Judicial Centre of Calgary and became Action No. 1801-16715 (**Cherak Action**).

[12] Although there are many nuanced variations in the Statements of Claim, the general crux of the relevant claims in the Actions plead that ASHC was the owner of the relevant lands and the Project, that APM was the general contractor for the Project, that DCR and/or Ground Zero were subcontracted or did work in respect of earthworks and utilities work for the Project, and that an employee of one of these contractors caused the Rupture. The Actions, or some of them, claim negligence, trespass, misrepresentation, and nuisance. In aggregate, the quantified claims involve at least approximately $15 million in damages.

[13] In their brief, at paragraph 50, DCR/Rowe note that, while there are differences in how the various Actions particularize the allegations of negligence, DCR/Rowe have provided a summary. While I should not be taken as adopting DCR/Rowe's summary as a full and complete account of all of the negligence claims or particulars of the claims made in all of the Actions, it is nonetheless a helpful summary. DCR/Rowe's summary of the plaintiffs' negligence claims includes:

(a) failing to warn nearby persons about the potential impact that the Project could have on their property;

(b) failing to safeguard nearby property and persons;

(c) failing to ensure that the plans for the Project met all regulations and guidelines;

(d) failing to take care in arranging for Ground Zero to perform the work;

(e) failing to properly train employees;

(f) allowing unqualified personnel to perform excavation work;

(g) failing to maintain proper equipment for the excavation work;

(h) failing to conduct hazard assessments;

(i) failing to ensure proper workplace safety practices were followed;

(j) failing to take proper or appropriate measures in performing excavation work at the Project;

(k) failing to follow ATCO's requirements;

(l) failing to require that the Gas Line be hand-exposed;

(m) failing to inspect the area to be excavated regarding potential presence of gas lines;

(n) failing to supervise the excavation work;

(o) failing to excavate in a proper and workmanlike manner; and

(p) failing to warn persons that a Gas Line was struck.

[14] DCR/Rowe's Statements of Defence in the Actions generally allege, among other things, that (capitalization from original):

(a) APM was retained by ASHC to perform construction work on the Project;

(b) DCR submitted a bid to perform certain work on the Project with respect to Earthworks and Underground Utilities, as those scopes of Work are identified in the bid documents provided to DCR (the **Work**);

(c) APM sent a letter of acceptance (**LOA**) to DCR with respect to an Earthworks Subcontract for the Project, which Rowe signed on behalf of DCR;

(d) the LOA included Standard Purchase Order Terms and Conditions which reference that DCR's contract may be with ASHC, not APM;

(e) the entire scope of the Work that DCR was originally anticipated to perform was performed by Ground Zero, not DCR;

(f) the Work and any contracts related thereto was assigned to, accepted by, and the subject of a novation of, Ground Zero;

(g) APM, ASHC and their consultants were aware at all material times that the entirety of the Work was being performed by Ground Zero;

(h) APM, ASHC and Ground Zero conducted themselves as accepting and agreeing that Ground Zero was solely responsible for the Work;

(i) on June 26, 2015, an APM employee, Jerry Arbeau (**J. Arbeau**) specifically instructed a Ground Zero employee, Ben Arends (**Arends**), to return to work after Ground Zero instructed its employees to stop work. J. Arbeau instructed Arends to conduct further earth works and, in the course of doing so, Arends caused the Rupture; and

(j) J. Arbeau and Arends were not employees, or under the direction and control, of DCR and Rowe.

[15] In respect of the negligence claims, DCR/Rowe's defence include allegations that:

(a) DCR/Rowe did not owe any duty of care to the plaintiffs;

(b) if DCR/Rowe owed a duty of care, they met the duty of care;

(c) if DCR/Rowe breached a duty of care, they did not cause the Rupture, the Explosion or any damages arising therefrom; and

(d) the plaintiffs did not suffer damages as alleged or at all, or have failed to mitigate their damages. Further, if the plaintiffs suffered damage, the damage was caused by other defendants in the action, including ATCO, Ground Zero (through Arends, Andrew Pacaud (**Pacaud**), Kavon Sharifi and Jason Middlemiss (**Middlemiss**)(collectively the **Ground Zero Individual Defendants**), and APM (through J. Arbeau and Dave Arbeau (**D. Arbeau**)(collectively the **APM Individual Defendants**).

[16] DCR/Rowe further defended on the basis that DCR/Rowe are not liable for the acts of ATCO, APM, Ground Zero or some of their respective employees, and that all DCR employees, agents, contractors and any other person and entity that DCR may be vicariously liable for were properly trained and qualified to perform all tasks required of them with respect to the Work.

B. DCR/Rowe's Third Party Claim

[17] In its third party claim against APM and the APM Individual Defendants, DCR/Rowe claim that APM and its employees breached contractual and common law obligations to DCR/Rowe to follow a "chain of command", by ensuring instructions to Ground Zero workers

flowed through Ground Zero's on-site supervisor, and to supervise and coordinate the Work on the Project in a safe and responsible manner. DCR/Rowe plead that APM assumed liability for damages arising from J. Arbeau's instructions to Arends.

[18] In its third party claim against Ground Zero and the Ground Zero Individual Defendants, DCR/Rowe claim that any DCR contractual obligations relating to the Project were assigned and novated to Ground Zero, or alternatively that Ground Zero was DCR's subcontractor. Ground Zero and the Ground Zero Individual Defendants deny that DCR's contractual obligations were assigned or novated to Ground Zero, but rather plead that Ground Zero was performing work in accordance with a verbal agreement with DCR. DCR/Rowe claim that the Ground Zero Individual Defendants breached duties relating to ensuring safety of the Work, and the provision of information to, and the supervision and training of, Ground Zero personnel.

C. APM's Third Party Claim

[19] In APM's third party claim against DCR/Rowe, that is not the subject of the Dismissal Application, APM pleads that APM subcontracted with DCR to perform the Work and DCR breached that contract. In the alternative, APM pleads that DCR/Rowe assigned their contractual obligations to Ground Zero. APM also claims against DCR/Rowe in negligence raising many similar allegations as raised by the plaintiffs against DCR/Rowe.

[20] In its defence to APM's third party claim, DCR/Rowe repeat many of the allegations they raised in their Statements of Defence.

D. The Contract Issues

[21] The pleadings in the Actions illustrate that important issues will involve the determination of the existence and terms of contractual relationships and obligations in respect of earthworks work for the Project, if any, amongst ASHC, APM, DCR and Ground Zero (**Contract Issues**). For example, some of the pleadings disclose issues as to whether DCR contracted with APM or ASHC in respect of the Work, whether any contractual obligations of DCR were assigned to Ground Zero, whether Ground Zero was novated into any contract for the Work to replace DCR, whether Ground Zero was DCR's subcontractor, agent or something else, or whether Ground Zero was subcontracted to, or working directly for, APM or ASHC at the time of the Rupture.

[22] DCR/Rowe acknowledge that the Contract Issues raised in the APM third party claim and, as noted above, DCR's defence thereto, are not ripe for summary determination and that it does not seek summary dismissal of APM's third party claims.

III. Record

[23] DCR/Rowe filed a 1,144-page Compendium of Evidence (**DCR/Rowe Compendium**) it asserted contained a complete evidentiary record for the Dismissal Application. The Compendium includes a May 18, 2022 affidavit of Rowe (**Rowe Affidavit**), a July 15, 2022 cross-examination of Rowe on his affidavit (**Rowe Cross**), an August 5, 2022 affidavit of D. Arbeau (**Arbeau Tort Affidavit**), a cross-examination of D. Arbeau conducted on January 17, 2023 (**Arbeau Cross**), an August 5, 2022 affidavit of Middlemiss (**Middlemiss Affidavit**) and February 24, 2023 written questions and answers of Middlemiss respecting his affidavit (**Middlemiss Answers**).

[24] The DCR/Rowe Compendium also includes excerpts of a 2019 questioning for discovery of J. Arbeau (**J. Arbeau Questioning**) pursuant to Part 5 of the Alberta *Rules of Court*, Alta Reg 124/2010 (*Rules*) (**Part 5 questioning**) that DCR relies on against APM's opposition to summary dismissal.

[25] In response to the Dismissal Application, the Neighbour Plaintiffs filed and sought to rely on their own 149-page Compendium of Evidence (**PL Compendium**). The PL Compendium included: (1) excerpts from Part 5 questioning transcripts of Rowe [Tab 1] (**Rowe Questioning**); (2) excerpts from Part 5 questioning transcripts of several individual witnesses as parties and employees or ex-employees of various corporate defendants, including Rowe, Middlemiss, Arends, J. Arbeau, and Duane Lamont [Tabs 2-5] (**Other Defendant Questioning**); and (3) certain records produced by parties in the Actions but not exhibited to any affidavit filed in the Actions [Tabs 6-22] (**PL Selected Records**).

[26] DCR/Rowe object to the court's admission or consideration of the entirety of the PL Compendium, other than the Rowe Questioning and an excerpt of the Arends Part 5 questioning (**Selected Arends Questioning Excerpt**) that DCR/Rowe want to rely on.

[27] In response to the PL Compendium, DCR/Rowe filed a 56-page Supplemental Compendium (**DCR/Rowe Supplemental Compendium**) which included, among other things, excerpts from the Part 5 questioning of Middlemiss (**Middlemiss Questioning**) and numerous records produced by APM in the Actions (**APM Records**).

IV. Issues

[28] Rule 7.3(1)(b) provides that a defendant may apply for summary judgment in respect of all or part of a claim on the basis that there is no merit to a claim or part of it.

[29] Summary judgment cannot be granted if the application presents a genuine issue for trial: ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 at para 13; ***Clearbakk Energy Services Inc v Sunshine Oilsands Ltd***, 2023 ABCA 96 at para 5.

[30] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. 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: ***Hryniak v Mauldin***, 2014 SCC 7 at para 49; ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 21.

[31] The proper approach to summary dispositions in Alberta has been laid out by the Court of Appeal in ***Weir-Jones*** at para 47 (emphasis in original):

> [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.

[32] In this case, in order to determine whether summary dismissal is appropriate I must determine the record before the court in light of the evidence relied on and the objections.

[33] Accordingly, the issues or considerations in the Dismissal Application are:

(a) Can the Neighbour Plaintiffs rely on some or all of the PL Compendium?

(b) Can DCR/Rowe rely on the J. Arbeau Questioning?

(c) Can DCR/Rowe rely on the Selected Arends Questioning Excerpt?

(d) Can DCR/Rowe rely on the DCR/Rowe Supplemental Compendium?

(e) Have DCR/Rowe met the burden to show that there is no merit to some or all of the plaintiffs' claims, and that there is no genuine issue requiring a trial?

(f) If DCR/Rowe have met the burden, have the plaintiffs demonstrated from the record that there is a genuine issue requiring a trial?

(g) Is it possible to fairly resolve the claims against DCR/Rowe on a summary basis and, if so, is the court prepared to exercise its judicial discretion to do so?

(h) What is an appropriate order in this case?

V. Analysis

A. Can the Neighbour Plaintiffs Rely on the PL Compendium?

1. The Neighbour Plaintiffs May Rely on the Rowe Questioning

[34] Rule 5.31 provides:

> 5.31(1) Subject to rule 5.29, a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 or 5.18 and any of the evidence in the answers of that other party to written questions under rule 5.28.
>
> (2) Evidence referred to in subrule (1) is evidence only of the questioning party who uses the transcript evidence or the answers to the written questions, and is evidence only against the party who was questioned.
>
> (3) If only a portion of a transcript or a portion of the answers to the written questions is used, the Court may, on application, direct that all or each other portion of the transcript or answers also be used if all or any other portion is so connected with the portion used that it would or might be misleading not to use all or any other portion of the transcript or other answers.

[35] Rule 6.11 provides that the written answers in Part 5 questioning, that may be used under rule 5.31, is evidence that courts may consider when making a decision about an application. Specifically, Rule 6.11 provides:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> (a) affidavit evidence, including an affidavit by an expert;
>
> (b) a transcript of questioning under this Part;
>
> (c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;
>
> (d) an admissible record disclosed in an affidavit of records under rule 5.6;
>
> (e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

[36] The Rowe Questioning transcript is properly useable by the Neighbour Plaintiffs on the Dismissal Application because Rowe is a party and DCR's corporate representative, DCR/Rowe are adverse in interest, and the Neighbour Plaintiffs seek to use that evidence against DCR/Rowe. DCR/Rowe acknowledge that the Rowe Questioning is admissible and useable.

2. The Neighbour Plaintiffs Cannot Rely on the Other Defendant Questioning

[37] DCR/Rowe object to the admission or use of the Other Defendant Questioning on several grounds: (1) it cannot be used because it is not permitted evidence under rule 6.11(1)(c); (2) it is inadmissible hearsay; and (3) it is unfair because it was filed late and not in accordance with the spirit of the procedural scheduling for the Dismissal Application.

a. Rule 6.11(1)(c) and Part 5 Questioning Transcripts

[38] DCR/Rowe argue that the Neighbour Plaintiffs cannot rely on rule 6.11(1)(c) to use the Other Defendant Questioning because those transcripts cannot be used under rule 5.31. The Neighbour Plaintiffs argue that rule 6.11 applies and they can use the transcripts.

[39] Rule 6.11(1)(c) provides that Part 5 questioning may be used in an application if the answers "may be used under rule 5.31".

[40] Rule 5.31 is clear that evidence given by a party in Part 5 questioning is only admissible in evidence under rule 5.31 as against that party but is inadmissible against any other party whether on the same side or not: rule 5.31(2); ***Waquan v Canada***, 2002 ABCA 110 at para 17; ***Syncrude Canada v Canadian Bechtel Limited***, 1994 ABCA 35 at para 5; ***Spady v Spady Estate***, 2022 ABQB 591 at para 62; ***Cicalese v SSMPG Integrating Services Inc***, 2020 ABQB 605 at para 187.

[41] One of the purposes of Part 5 questioning, and the specific purpose of rule 5.31, is to allow a party to get admissions against adverse parties that can be used against the admitting party at trial or on an application without having to otherwise prove those admissions: ***Samsports.Com Inc v Canada Revenue Agency***, 2007 ABCA 151 at para 19; ***Cana Construction Co Ltd v Calgary Centre for Performing Arts***, 1986 ABCA 175 at para 5; ***Alberta-Pacific Forest Industries Inc v Ingersoll-Rand Canada Inc***, 2002 ABQB 791 at para 25, citing ***Mikisew Cree First Nation v Canada et al***, 2000 ABQB 485. The rule limiting the use of the admissions is in place because it is unfair to put into evidence against a person an admission by a different person: ***Syncrude Canada*** at para 10; ***Rallon v Fort McMurray (Hamlet)***, 2006 ABCA 58 at para 7.

[42] There has been some uncertainty about whether rule 5.31 can be relaxed in the context of a summary judgment application. In ***Condominium Plan 9320022 v ACTA General Inc***, 2004 ABQB 932, a respondent argued that the general rule should not apply in a summary judgment application, relying on ***Pete v Terrace Regional Health Care Society***, 2003 BCCA 226 at para 12. In ***Pete***, the British Columbia Court of Appeal held, in the context of summary trials, that the general rule did not prevent discovery transcripts from being used to apprise the chambers judge of the existence of evidence to demonstrate that it would be unjust to decide the issues summarily: ***Pete*** at para 12. The logic in ***Pete*** continues to apply in British Columbia: see e.g. ***Mikhail v Northern Health Authority (Prince George Regional Hospital)***, 2010 BCSC 1817 at para 91–92; ***Everest Canadian Properties Ltd v Mallmann***, 2007 BCSC 311; ***Gill v Fraser Health Authority***, 2022 BCSC 1553 at para 8; ***Ari v Insurance Corporation of British Columbia***, 2022 BCSC 1475 at para 16; ***Reilly v Bissonnette***, 2008 BCCA 167 at paras 45–46; ***Global Pacific Concepts Inc v The Owners, Strata Plan NW 141***, 2013 BCSC 2190 at paras 18–23. However, the Court in ***Condomimum Plan 9320022*** at para 23 described the argument that the general rule should be relaxed in Alberta as an "interesting argument" that did not need to be decided in that case.

[43] In ***Kent v Martin***, 2012 ABQB 507, Justice Tilleman did not allow a party to use Part 5 questioning from one defendant against another defendant in the context of an interim injunction. The party seeking to rely on the questioning proposed that it was not using the statements to prove the truth of their contents, but only to prove that they were made. Justice Tilleman rejected that argument, at para 25:

> I appreciate the distinction that the Plaintiff is attempting to make, but in the end what the Plaintiff seeks is to use evidence given in the questioning of some defendants in an application against other defendants, contrary to express provisions of Rules 5.31(2) and 6.11(1)(c). Distinguishing between statements admitted for the truth of the contents therein and statements admitted as proof that the statement was made is sometimes necessary when considering the rule against hearsay, and even then it can be a difficult distinction. But there is nothing in Rules 5.31 or 6.11 that would suggest that this is a permissible distinction when determining whether evidence from questioning may be admitted.

[44] In ***CCS Corporation v Secure Energy Services Inc***, 2013 ABQB 34 [***CCS QB***], Chief Justice Wittmann (as he then was) also took a different approach than in ***Pete***. He held that a party responding to a summary judgment application cannot use Part 5 questioning from other parties for other purposes, including to raise triable issues. The party seeking to use the transcripts relied on, among other things, rule 6.11. Wittmann CJ said, at para 29 (emphasis added):

> [29] I cannot accept the argument of CCS that answers during the Questioning of a witness, under Part 5, conceded to be evidence only against the party questioned, once admitted, is evidence on the application and can be used for other purposes. That is the substance of CCS's position. It is to be remembered that the expression of the rule in ARC 5.31 and our Court of Appeal's statement in *Mikisew* referred to above, must be considered to be all encompassing. **That is to say, one cannot be permitted to "back door" evidence by saying we agree that when I read in answers to questions, it is evidence only against the party giving the answers and against no one else, but once it is before the Court, the Court can**

> **in effect use it to decide whether there is a triable issue. So, reading in the answers to the Questioning of witnesses pursuant to Part 5, other than Pembina witnesses, will not be allowed as part of the Application Record**. On this application, the Court is not concerned with the evidence against Secure or the Secure defendants. It is only concerned with evidence against Pembina.

[45] ***CCS QB*** was upheld on appeal: ***CCS Corporation v Pembina Pipeline Corporation***, 2014 ABCA 390 [***CCS CA***]. However, the Court of Appeal decision cast doubt on Wittmann CJ's conclusions on the use of Part 5 questioning in response to a summary judgment application. First, in deciding the appeal the majority reviewed all the evidence regardless of whether it had been held admissible or not, and noted at para 87 that, as a result, whether some of the objected-to evidence was legally admissible became academic. Second, in his concurring reasons, Justice Slatter noted that it was not necessary to resolve certain issues and that the dismissal of the appeal should not be taken as necessarily endorsing the conclusions in ***CCS QB***: ***CCS CA*** at para 92.

[46] Since ***CCS CA***, at least one Alberta superior court has refused to allow a party to use Part 5 questioning of witnesses from one party against another party: ***Proline Pipe Equipment Inc v Provincial Rentals Ltd***, 2019 ABQB 983 at paras 26–30. The Court held that the evidence could not be used for "narrative" purposes or otherwise: para 30. Recently the Alberta Court of Justice reached a similar conclusion in ***Burkhardt v Smith***, 2023 ABPC 63 at para 58. See also ***First Capital Holdings (Alb) Corporation v Metropolitan Ventures Inc***, 2015 ABQB 54 at para 58.

[47] In Ontario, courts have recently been more flexible in the use of discovery transcripts in the context of summary judgment motions, including by a plaintiff seeking to avoid summary dismissal in circumstances similar to this case: ***Kolosov v Lowe's***, 2015 ONSC 4761 at paras 75-104; ***Bonello v Gores Landing Marina (1986) Limited***, 2017 ONCA 632 at paras 25–29. However, as was pointed out in ***Yara Belle Plaine Inc v Ingersoll-Rand Company***, 2019 SKQB 90 at para 23, the Ontario Court of Appeal's decision in ***Bonello*** relied on the fact that the Ontario Rules of Civil Procedure had a more flexible rule for use of discovery transcripts on a motion versus at trial (Ontario Rules of Procedure rule 39.04 versus rule 39.11). In contrast, in Alberta, the use of a questioning transcript on an application under rule 6.11(1)(c) is directly linked to the same requirements as rule 5.31.

[48] Rule 6.11(1) restricts the evidence a court can consider on an application. Courts "may consider only" the listed forms of evidence. The rule does not distinguish between different types of applications. Rule 6.11(1)(c) expressly provides that Part 5 questioning can be used if it is evidence that "may be used" under rule 5.31. In turn, rule 5.31(1) provides that a party may use "in support of an application or proceeding ... as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 ...". Rule 5.31(2) provides that "[e]vidence referred to in subrule (1) is evidence only of the questioning party who uses the transcript evidence ... and is evidence only against the party who was questioned".

[49] I agree with the interpretation of these rules that, absent agreement of the parties involved, party A cannot seek to admit, as part of its case, Part 5 questioning evidence of a party adverse in interest (party B) against another party in the action (party C), whether in trial or in an application (including a summary process) regardless of whether party C is adverse or not. There may be

exceptions to this, for example if the witness is no longer available, but no such exceptions have been suggested here.

[50] The Neighbour Plaintiffs argued that they have no other way to get the Other Defendant Questioning evidence before the court. With respect, that is incorrect. Rule 6.8 allows for the questioning of a person for the purpose of obtaining a transcript of that person's evidence for use at the hearing of an application, and the transcript of that questioning is filed and available to be used on the application under rule 6.11(1)(b). Rule 6.8 may be used to question parties or individuals (including employees or former employees of parties): ***Guillevin International Co v Barry***, 2022 ABCA 144 at paras 34–35; ***Gow Estate (Re)***, 2021 ABQB 305 at paras 13–16.

[51] In the context of summary judgment/dismissal applications, this interpretation of rules 6.11(1)(c) and 5.31 is consistent with the obligation of parties to put their best foot forward: ***CCS CA*** at para 56; ***Weir-Jones*** at para 37; ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 11[***Lameman***].

[52] However, as has been recognized in Ontario, such a technical approach could cause delays and increased costs as responding parties use potentially duplicative other ways, for example pursuant to rule 6.8, to put the same evidence before the court. I have some sympathy for that concern, and it may make sense for rule 6.11(1)(c) to be reconsidered in the future or for parties to agree to a more flexible use of transcripts. But unlike the Ontario Court in ***Kolosov***, I cannot characterize the Neighbour Plaintiffs' attempt to use the questioning transcript as only a procedural non-compliance that is correctible under rule 1.5. Rule 1.5 should not be used to effectively amend the *Rules* or to override mandatory or limiting provisions like rule 6.11: see e.g. ***Kwadrans v Kwadrans***, 2023 ABCA 203 at para 35; ***Klein v Wolbeck***, 2016 ABQB 28 at para 20. A material change to the fundamentals of adducing evidence on applications should be the subject of an express provision of the rules: ***CCS QB*** at para 25. In my view, an amendment to the *Rules* to expand rule 6.11(1)(c) would be required to allow the Neighbour Plaintiffs to rely on the Other Defendant Questioning in the way they have attempted.

[53] In conclusion, the Neighbour Plaintiffs are not entitled to rely on the Other Defendant Questioning pursuant to rule 6.11(1)(c) in the Dismissal Application. It is not admitted.

b. Hearsay Exception

[54] The Neighbour Plaintiffs suggested that the Other Defendant Questioning was admissible as a principled exception to hearsay. DCR/Rowe object to it as inadmissible hearsay. The Neighbour Plaintiffs' arguments are not persuasive.

[55] The Neighbour Plaintiffs did not adduce an affidavit and attempt to rely on facts in the Other Defendant Questioning as hearsay pursuant to rule 13.18. As a result, the Other Defendant Questioning does not fit into one of the types of evidence that the court may review on an application under rule 6.11(1). Accordingly, the "open questions" noted by Justice Slatter, in ***CCS CA*** at para 94 (set out below), about the ability of an affiant to review questioning testimony and records and provide hearsay evidence about them as information and belief, are not engaged here (emphasis added):

> [94] Further, R 13.18 permits the use for some purposes of hearsay found in affidavits based on information and belief, so long as the source of the information is disclosed. It remains an open question whether an affiant can depose to belief in a fact, and give as the source of that belief:
>
> > (a) **the fact that a witness gave testimony to that effect, under oath, during questioning, notwithstanding that the party tendering the affidavit could not read in that questioning except against the party being questioned**, or
> >
> > (b) that the fact is disclosed in, or based on, a document listed in the affidavit of records of one of the parties, even though the affiant does not have personal knowledge of the contents of the document.

[56] In addition to the Other Defendant Questioning not falling within one of the types of evidence that can be considered on an application under rule 6.11(1), the Neighbour Plaintiffs have not established that the transcripts would be admissible under a principled exception to hearsay in any event. Hearsay may be admitted into evidence under the principled exception when it meets the necessity and threshold reliability criteria: ***R v Philip***, 2022 ABCA 39 at para 22, citing ***R v Bradshaw***, 2017 SCC 35 at para 1. The Neighbour Plaintiffs do not meet the necessity requirement since they could have used rule 6.8 to effectively call those witnesses to testify: ***Bruen v University of Calgary***, 2019 ABCA 211 at para 30.

c. Procedural Fairness

[57] Given my conclusions above, I do not need to decide DCR/Rowe's procedural fairness argument. I only note in passing that DCR/Rowe did not seek an adjournment of the Dismissal Application to address the Other Defendant Questioning, but rather took the opportunity to file response evidence in case the Other Defendant Questioning was admitted. Had I admitted the Other Defendant Questioning, I would have found that DCR/Rowe had a reasonable opportunity to respond to the Other Defendant Questioning. DCR/Rowe did not suggest other evidence it would have adduced, or steps it would have taken, if the PL Compendium had been provided earlier.

d. Conclusion re Other Defendant Questioning

[58] Based on the foregoing, I have not considered the Other Defendant Questioning on the Dismissal Application.

3. The Neighbour Plaintiffs May Rely on the PL Selected Records Produced in the Actions For a Limited Purpose

[59] Some of the records in the PL Compendium are also in the DCR/Rowe Compendium and are therefore not objectionable and may be used in the Dismissal Application.

[60] However, some of the PL Selected Records are records disclosed by the parties in Affidavits of Records and produced in the Actions, but which are not exhibits to admissible

questioning transcripts or otherwise included as part of an affidavit. The raises a question about the scope and application of rule 6.11(1)(d).

[61] Rule 6.11(1)(d) provides that, when making a decision about an application the court may consider "an admissible record disclosed in an affidavit of records under rule 5.6".

[62] In ***CCS QB***, Chief Justice Wittmann rejected an attempt by a party to use rule 6.11(1)(d) to adduce records as proof of the truth of the contents of the record. In that case, it was not an issue of authenticity or whether the documents were transmitted as indicated by the sender to the receiver and received by the receiver.

[63] In ***CCS CA***, Justice Slatter, after indicating that the Court of Appeal was not necessarily endorsing all the conclusions in ***CCS QB***, stated at para 93:

> For example, R 6.11(1)(d) permits use on an application of "an admissible record disclosed in an affidavit of records". This provision is clearly intended to permit the use of something, and it remains an open question whether it merely repeats the presumptions of authenticity found in R 5.15.

[64] Since ***CCS CA***, two Masters (as they were then known) have reviewed records produced in affidavits of records for "non-hearsay purposes", but not for the truth of their contents: ***First Capital Holdings*** at paras 49–51, 100; ***1490703 Alberta Ltd v Chahal***, 2020 ABQB 33 at paras 70–73. ***1490703*** was affirmed in 2021 ABQB 495)but rule 6.11(1)(d) was not addressed).

[65] Rule 5.15(2) provides that a party who makes an affidavit of records or on whose behalf an affidavit of records is filed and a party on whom an affidavit of records is served are both "presumed to admit" that (a) a record specified or referred to in the affidavit is authentic and (b) if a record purports or appears to have been transmitted, the original was sent by the sender and was received by the addressee. The meaning of "authentic" includes that a document that is said to be an original was printed, written, signed or executed as it purports to have been, and a document that is said to be a copy is a true copy of the original: rule 5.15(1). It also includes that a record is what it purports to be and is not a forgery: ***Waquan*** at para 21; ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc (IMV Projects Inc)***, 2017 ABQB 106 at para 446, rev'd in part 2018 ABCA 305.

[66] The rule 5.15(2) presumptions have exceptions. It does not apply if the maker or recipient of the affidavit of records objects in accordance with rule 5.15(4). Further, it does not prejudice the right of a party to object to the admission of the record in evidence and does not constitute an agreement or acknowledgment that the record is relevant and material: rule 5.15(3). It does not apply if the authenticity, receipt or transmission has been denied by a party in a pleading: rule 5.15(6). And the court maintains a discretion to order that the presumption does not apply: rule 5.15(5).

[67] In my view, the purpose of rule 5.15 is to foster efficiency, consistent with rule 1.2, by creating certain presumed admissions about records so that parties do not need to unnecessarily waste time proving the authenticity of records or that they were sent and received as indicated. In my view, rule 6.11(1)(d) then provides a method by which the court may admit, in an application, the records that are subject to those admissions. In my view, the reference to "an admissible record"

is a reference to the fact that the court must still admit the record into evidence. In my view, if one of the above-noted exceptions to the presumption applies, or if the presumptions are otherwise rebutted, then the record is not "admissible" under rule 6.11(1)(d) and it would not be enough to simply rely on the record. Further, the court may decide the record is not admissible for other reasons, for example if it is not relevant or is privileged. But if the exceptions do not apply, the presumptions are not rebutted, and the record are otherwise admissible, then the records subject to the rule 5.15(2) admissions are admissible records that may be relied on by parties, and considered by the court, on an application under rule 6.11(1)(d).

[68] However, to be clear, records admitted into evidence under 6.11(1)(d) are not admitted for all purposes — at best they are only admitted as authentic records that are true copies of the original, that are what they purport to be, and which were transmitted and received as they purport or appear to have been. They are not admitted to prove the truth of the their contents: ***Canadian Natural Resources Limited*** at para 446.

[69] The parties acknowledged that the PL Selected Records were disclosed in affidavits of records and produced in the Actions. There were no objections to the admission of the records in the PL Compendium on the basis that one of the exceptions to rule 5.15(2) applied and the rule 5.15(2) presumptions were not rebutted. Therefore, the records in the PL Compendium, unless otherwise proven elsewhere in the admissible record, are admissible only for the purposes of proving they are authentic records sent and received on or about the time they appear to have been transmitted. They are not admissible as proof of the truth of their contents. I have only reviewed the PL Selected Records for this limited purpose (unless they are otherwise proven).

[70] In case I am wrong, I have considered whether, if I had completely excluded the PL Selected Records, it would have changed my decision on the Dismissal Application. It would not have changed my decision.

B. Can DCR/Rowe Rely on the J. Arbeau Questioning?

[71] As noted above, the DCR/Rowe Compendium includes an excerpt from the J. Arbeau Questioning conducted under Part 5 of the *Rules*. I have been advised that APM has acknowledged his evidence as some of APM's information. For the reasons noted above, DCR/Rowe is only entitled to rely on that transcript as evidence against APM. However, it does not become evidence at large and DCR/Rowe cannot rely on it as evidence as against the plaintiffs to support summary dismissal of the claims, including as referenced at paragraph 222 of DCR/Rowe's Brief. I have not considered the J. Arbeau Questioning as against the plaintiffs.

[72] In case I am wrong, I have considered whether, if I had admitted the J. Arbeau Questioning against the plaintiffs, it would have changed my decision on the Dismissal Application. It would not have changed my decision.

C. Can DCR/Rowe Rely on the Selected Arends Questioning Excerpt?

[73] DCR/Rowe asserted that it is entitled to rely on the Selected Arends Questioning Excerpt because it is against the interests of the Neighbour Plaintiffs and because the Neighbour Plaintiffs' counsel was the "agent" of the Neighbour Plaintiffs in adducing the evidence. DCR/Rowe provided no specific authority for their position, instead relying on an excerpt from an evidence

text in oral argument. None of the excerpts from the evidence text dealt with alleged admissions made by counsel in seeking to adduce objected-to evidence.

[74] I reject DCR/Rowe's position. It seeks to exclude the Other Defendant Questioning, except specific components that are presumably helpful to DCR/Rowe's position on the Dismissal Application. DCR/Rowe's position, taken to its logical conclusion, could lead to unfairness and absurd results, as it would mean that any time a party seeks to admit objected-to evidence, the opposite party could challenge the admissibility of that evidence but then turn around and cherry-pick and rely on aspects it likes as admissions made by counsel.

[75] I have already found the Neighbour Plaintiffs cannot rely on the Other Defendant Questioning under rule 6.11(1)(c). For the same reasons, it cannot be used by DCR/Rowe against the plaintiffs absent agreement or DCR/Rowe otherwise establishing it is admissible under rule 6.11(1). DCR/Rowe have not established agreement or that they can admit it under rule 6.11(1). Therefore, DCR/Rowe cannot rely on the Selected Arends Questioning Excerpt, including as referenced at para 63 of their Reply Brief.

[76] In case I am wrong, I have considered the Selected Arends Questioning Excerpt to determine if it would change my conclusions on the Dismissal Application if I admitted it. It would not have changed my decision.

D. Can DCR/Rowe rely on the DCR/Rowe Supplemental Compendium?

[77] DCR/Rowe included the complete copy of the Middlemiss Answers in their Supplemental Compendium to correct a minor omission in the version in their original Compendium. This is not objected to and is admissible.

[78] The rest of the DCR/Rowe Supplemental Compendium was filed in response to the PL Compendium.

[79] Given my conclusion about the inadmissibility of the Other Defendant Questioning, I have not found it necessary or appropriate to refer to the correspondence amongst counsel (Tab 6) as they are not included in an affidavit and nobody has suggested they were produced in an affidavit of records or admitted by agreement.

[80] For the same reasons noted above for the PL Compendium, the Middlemiss Questioning transcript is not useable by DCR/Rowe or useable in this application. Further, for the same reasons as above, the APM Records at Tabs 8-19 of the DCR/Supplemental Compendium are admissible pursuant to rule 6.11(1)(d) only for the purposes of proving they are authentic records sent and received on or about the time they appear to have been transmitted. They are not admissible as proof of the truth of their contents.

[81] In case I am wrong, I have considered whether my decision would be different if I admitted and allowed DCR/Rowe to rely on all the materials in the DCR/Rowe Supplemental Compendium as some proof of the truth of their contents. It would not have changed my decision.

E. Has DCR/Rowe Met the Burden to Show No Merit to the Claims and That there is No Genuine Issue Requiring a Trial?

[82] In ***Weir-Jones***, the Court of Appeal described the threshold burden upon an applicant for summary judgment at paras 32–33 (emphasis added):

> [32] A notable aspect of summary judgment applications is that there is no symmetry of burdens. **The party moving for summary judgment must, at the threshold stage, prove the factual elements of its case on a balance of probabilities, and that there is no genuine issue requiring a trial**. If the plaintiff is the moving party, it must prove "no defence". **If the defendant is the moving party, it must prove "no merit"**. The resisting party need not prove the opposite in order to send the matter to trial. **The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial**: see para. 35, *infra*.
>
> [33] **The threshold burden on the moving party with respect to the factual basis of a summary judgment application is therefore proof on a balance of probabilities. If the moving party cannot meet that standard, summary judgment is simply not available**. On the other hand, merely establishing the factual record on a balance of probabilities is not sufficient to obtain summary judgment, because proof of the facts does not determine whether the moving party has also proven that there is no "genuine issue requiring a trial". Imposing standards like "high likelihood of success", "obvious", or "unassailable" is, however, unjustified. A disposition does not have to be "obvious", "beyond doubt" or "highly likely" to be fair.

[83] In argument, the parties addressed claims that DCR/Rowe are vicariously liable for the negligence of Ground Zero/Arends, or that DCR/Rowe are directly liable in negligence. Some of the Actions also plead misrepresentation, trespass and nuisance, but those were not addressed in argument before me. I will focus my analysis on vicarious liability and direct negligence, and address misrepresentation, trespass, and nuisance if I find it necessary or appropriate to do so.

1. Is There No Merit to a Claim that DCR/Rowe are Vicariously Liable for the Actions of Ground Zero?

[84] Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them: ***671122 Ontario Ltd v Sagaz Industries Canada Inc***, 2001 SCC 59 at para 25. It is a species of strict liability because it requires no proof of personal wrongdoing on the part of the person subject of it: ***671122 Ontario*** at para 26.

[85] Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public: ***John Doe v Bennett***, 2004 SCC 17 at para 20 [***Bennett***]; ***Jacobi v Griffiths***, [1999] 2 SCR 570 at para 67, 1999 CanLII 693 (SCC); ***KLB v British Columbia***, 2003 SCC 51 at

para 18; ***Bazley v Curry***, [1999] 2 SCR 534 at paras 30–31, 1999 CanLII 692 (SCC); ***Heikkila v Apex Land Corporation***, 2016 ABCA 126 at para 21 [***Apex***]. Its policy rationales include effective compensation and deterrence of future harm: ***Bennett*** at para 20.

[86] In ***Fullowka v Pinkerton's of Canada Ltd***, 2010 SCC 5, the Supreme Court of Canada set out the framework for determining whether vicarious liability should be imposed, at para 142:

> The question of whether vicarious liability should be imposed is approached in three steps. First, the court determines whether the issue is unambiguously determined by the precedents. If not, a further two-part analysis is used to determine if vicarious liability should be imposed in light of its broader policy rationales: *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 15; *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436, at para. 20. The plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and that the wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought: *Bennett*, at para. 20. The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation: *Bennett*, at para. 20.

[87] The parties spent significant energy in arguing the line of "inherently dangerous" cases, which addresses when a contractor can be liable for its subcontractor's negligence. The parties argued this issue based on the existing precedents, and nobody suggested that a two-stage policy-based analysis as set out above in ***Fullowka*** at para 142 was appropriate.

[88] Accordingly, below I assess DCR/Rowe's potential vicarious liability on the assumption the Contract Issues are resolved on the basis that Ground Zero is held to be DCR's subcontractor. After that, I will consider the potential vicarious liability claims in the event the Contract Issues are determined in such a way that Ground Zero is held not be DCR/Rowe's subcontractor but something else.

a. Is There No Merit to a Vicarious Liability Claim if Ground Zero is a Subcontractor?

[89] The potential for vicarious liability for subcontractor negligence has been the subject of significant judicial consideration in Canada dating back well over a century.

[90] The general rule is that someone who employs an independent contractor is not responsible for the negligence of that subcontractor unless the work is inherently dangerous: ***City of St John v Donald***, [1926] SCR 371 at 383, 1926 CanLII 66 (SCC); ***Savage v Wilby***, [1954] SCR 376 at 379, 1954 CanLII 52 (SCC); ***Lamont Health Care Centre v Delnor Construction Ltd***, 2003 ABQB 998 at para 57; ***Apex*** at para 33; ***Condominium Corporation No 9813678 v Statesman Corporation***, 2009 ABQB 493 [***Statesman QB***], affirmed 2012 ABCA 265 [***Statesman CA***], leave to appeal to SCC refused, 32254 (31 January 2008).

[91] The corollary is that where a party undertakes to do something that is dangerous and is bound to result in damage if done negligently, delegation of the task to an independent contractor

will not exempt the one who delegates that task from liability should the contractor to whom the task is delegated perform the task negligently, thereby causing the kind of damage that is to be expected: ***Lamont*** at para 157, citing GHL Fridman, *The Law of Torts in Canada*, 2nd ed (Toronto, Ont: Carswell, 2002)[***Fridman***] at p 312; ***Savage*** at 379. The duty of the first party is sometimes referred to as a non-delegable duty: ***Apex*** at para 16; ***Lewis (Guardian ad litem of) v British Columbia***, [1997] 3 SCR 1145 at paras 49–51, 1997 CanLII 304 (SCC); ***Statesman QB*** at para 170; ***Statesman CA*** at para 3; ***Evans v Kuvaja***, 2007 ABPC 304 at para 17.

[92] The determination of the Contract Issues will decide whether DCR undertook, or continued to be liable, to conduct the Work. However, DCR/Rowe argue that, even if the Contract Issues are not decided in its favour, and it is decided that Ground Zero was DCR's subcontractor, there is still no merit to any claim that they are vicariously liable for Ground Zero or Arends' conduct. DCR/Rowe argue that the work being done by Ground Zero/Arends at the time of the Rupture: (1) was not inherently dangerous; (2) was collateral to or not within the scope of the LOA; and (3) was done without DCR/Rowe's sufficient knowledge or control. DCR/Rowe argue that each of these arguments take it outside the principles of vicarious liability for inherently dangerous work conducted by a subcontractor. I address these arguments below.

i. Was the Work Being Conducted by Ground Zero / Arends at the Time of the Rupture Inherently Dangerous?

[93] Work is not inherently dangerous just because it, if done in a negligent manner, may have dangerous implications, as that would involve circular reasoning and cover almost all significant physical work being performed by subcontractors on a construction site: ***Apex*** at para 35. In my view, it is also insufficient for a party arguing that work is not inherently dangerous to show that the work could be done safely and without dangerous repercussions, as that too would cover virtually everything done on a construction site.

[94] Whether work is inherently dangerous will depend on the circumstances of the case. Factors that suggest that work is inherently dangerous include if it is dangerous even if carried out with care and in the usual manner: ***Kerrybrooke Development Ltd and Simpsons-Sears Ltd v Ellis-Don Ltd, Westeel-Rosco Ltd et al***, 1986 CanLII 2998 (SKKB)[***Kerrybrooke KB***], aff'd 1988 CanLII 5380 (SKCA), aff'd [1990] 1 SCR 275, 1990 CanLII 129 (SCC); ***Eisert v Martin (Rural Municipality)***, 1955 CanLII 241 (SKCA). Further, work may be inherently dangerous if it is of such a nature that, if the employer were doing the work itself, the duty to take special precautions would be indisputable: ***City of St John*** at 383; ***Savage*** at 380.

[95] DCR and Ground Zero were aware of the Gas Line in the vicinity of the Project. However, there is limited and unclear evidence in the admissible record before the court as to what precise work was being conducted by Arends at the time of the Rupture. The evidence is from the Middlemiss Answers, which confirmed that Arends was instructed to "build a ramp from ground level down into an excavated trench at which footings for the new part of the Bow River Seniors Lodge ... were being constructed, so that the trenches could be compacted", and then Arends used an excavator and snagged the Gas Line causing the Rupture.

[96] DCR/Rowe argue that building a ramp, or excavating and digging ditches, is not inherently dangerous, without more. They rely on several cases involving fires or damage to power lines, all of which I find are distinguishable, not applicable, or do not otherwise assist DCR/Rowe in the way they argued.

[97] In ***Kerrybrooke KB***, in the course of conducting repairs to a roof damaged by a storm, a contractor left mops and tar on a warehouse roof which caused a fire that caused damage to the warehouse. The Court held that the tarring operation was not, in itself, inherently dangerous provided it was carried out with due care and in the usual manner, and the contractor was not liable for the subcontractor's negligence. This case is of limited utility, since tarring of a roof is significantly different than industrial earthworks excavation in the vicinity of a buried natural gas line. Further, ***Kerrybrooke KB*** was decided after a trial and there was some evidence as to the usual manner of conducting the work in the form of a roofing manual. There is little evidence before me as to the usual manner of conducting an earthworks excavation, or ramp construction, in the vicinity of a buried natural gas line, beyond regulated safety code requirements.

[98] In ***Wall v Apollo Roofing & Builders Ltd***, 1972 CarswellMan 126, 28 DLR (3d) 636, the Manitoba Court of Appeal decided the question of whether a contractor was liable for the negligence of a roofing contractor that allegedly used a blowtorch or soldering iron to remove a downspout pipe. The Court found that the removal of the downspout pipe was not inherently dangerous because it could have been done using a tin-snip without any danger of creating a fire hazard. Again, these facts are distinguishable. Further, DCR/Rowe has not adduced evidence that Arends' work at the time of the Rupture could have been carried out differently.

[99] In ***Bowaters Newfoundland Ltd v Lundrigans Ltd***, 1970 CarswellNfld 15, 1 Nfld & PEIR 223 (NSCTD), the Court held that tree cutting near a power line was not inherently dangerous. The Court noted that it would only be in exceptional circumstances that damage to the transmission line could result, and that the power line was in plain view. Cutting trees near a power line in plain view is significantly different than doing excavation work with heavy machinery in the vicinity a buried natural gas line. For example, an owner could not escape liability for negligent excavation by a subcontractor that resulted in an adjoining building collapsing: ***Dalton and Angus*** (1881), 6 AC 740 as discussed in ***Bennett v Imperial Oil Ltd***, 46 MPR 50 (Nfld SC) at 59–60, 1960 CanLII 708 (NLSC). Further, the record before me suggests that damage to a buried natural gas line is less remote than the risk in ***Bowaters***. There is evidence that there had been other line strikes on the Project before the Rupture.

[100] In ***Seaway Hotels Ltd v Consumers Gas Co***, 17 DLR (2d) 292 (Ont HCJ), 1959 CanLII 155 (ONSC), aff'd 1959 CanLII 159 (ONCA), a gas company severed a buried power line and caused a neighbouring plaintiff damage due to loss of electricity. The Court found the gas company liable directly in negligence for failing to take precautions to warn its contractor or otherwise to eliminate or lessen the risk of harm. Arguably in *obiter*, it held that "digging a ditch and laying a pipeline is not an inherently dangerous activity" and did not hold the gas company vicariously liable for the contractor's negligence. In my view, however, working in the vicinity of buried power lines is different than working in the vicinity of buried natural gas lines given the risk of explosion if natural gas is released and exposed to flame. Further, in a more recent case, the Ontario Divisional Court noted that excavating might be found to be inherently dangerous work: ***Parker v Casalese***, 2010 ONSC 5636 at para 13, aff'd 2011 ONCA 764.

[101] There are several cases involving hydrocarbon-carrying pipelines which DCR/Rowe did not rely on. They illustrate the inherent danger associated with natural gas, its carriage, and the need to protect it from escaping pipelines:

(a) in ***Ballentine v Ontario Pipe Line Co***, (1908) 16 OLR 654 (Ont Trial Court), 1908 CarswellOnt 391, the defendant gas company hired an independent contractor to connect gas lines to the gas company's customers. The contractor's employees, while constructing a necessary trench, allowed gas to escape which ignited and exploded. The gas company was not relieved of liability by allowing or directing a contractor to perform their work for them. It is implied from the cases relied upon, some of which were also relied upon by the Supreme Court of Canada in ***City of St John***, that the digging of the trench near the existing gas line was considered dangerous;

(b) in ***Weisler v District of North Vancouver***, 17 DLR (2d) 319, 1959 CanLII 328 (BCSC), a power shovel operator broke a gas line, gas escaped and an explosion destroyed a building. It was admitted that the gas under high pressure was a dangerous substance, citing ***London Guarantee & Accident Co v Northwestern Utilities Ltd***, [1935] 4 DLR 737, [1936] AC 108 [***Northwestern Utilities***](which involved the escape of gas from a gas main due to a faulty weld);

(c) in ***McKenzie v Hyde***, 1967 CanLII 516 (MBKB), aff'd 1967 CanLII 618 (MBCA), a contractor (Hyde) hired by a property owner (Forrester) disrupted a gas line when breaking up old concrete in a driveway, the gas leaked, and caused an explosion that damaged a neighbouring property. The lower court noted that "any escape of natural gas presents an emergency". It then went on to say:

> Hyde and his employee Baraniuk were performing an act that to the knowledge of Forrester was dangerous or extra hazardous. Digging a ditch is not an inherently dangerous activity, but the work here, having regard to the presence of the gas line, was inherently dangerous and of a nature likely to involve injurious consequences to others unless executed with care.

(d) in ***School Division of Assiniboine South No 3 v Hoffer et al***, 1970 CanLII 882 (MBKB), a snowmobile hit a gas riser near a school which allowed gas to escape and caused an explosion. The Court noted that "[e]scaping gas is by its nature a dangerous substance which must be kept under control";

(e) in ***Fenn v City of Peterborough*** (1976), 14 OR (2d) 137, 1976 CanLII 778 (ONSC), var'd 1979 CanLII 77 (ONCA), aff'd [1981] 2 SCR 613, a defendant utilities commission was replacing water service lines in a residential neighbourhood. The excavation work exposed a gas main and caused gas to escape, which resulted in an explosion that destroyed a neighbouring home and killed its occupants. The Court stated that it "is **common knowledge that gas is dangerous** and when mixed

with air in certain proportions and ignited it will burn or explode. **It is to be expected, therefore, that gas distribution and transmission systems and gas-operated equipment will be treated with the greatest of care. There is a high risk and this produces a correspondingly high duty**." (emphasis added);

(f) in ***Ostash v Sonnenberg***, 67 DLR (2d) 311, 1968 CanLII 627 (ABCA), members of a family became ill with carbon monoxide poisoning following an allegedly negligent conversion of a furnace from coal burning to gas burning by a contractor and his inexperienced helpers. The Court of Appeal cited ***Northwestern Utilities*** for the proposition "[t]hat gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question". The Court stated that the "[t]he risk in the case at bar was most grave if the duty should not be fulfilled. The case of dangerous things is 'a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety...'"; and

(g) in ***Henuset Bros Ltd v Pan Canadian Petroleum Ltd***, 1977 CanLII 1679 (ABKB), a low-pressure oil pipeline was severed by a large rotary ditching machine excavating a pipeline trench for a natural gas gathering system. The Court noted that "the degree of peril was such as to impose on all concerned a very high degree of care" and the risk of harm was extreme. A similar result was found in respect of an oil pipeline in ***Blackmore v Murphy Oil Company Ltd et al***, 1983 CanLII 2287 (SKKB).

[102] The plaintiffs also rely on ***R v APM Construction Services Inc***, 2020 ABPC 15, which is the sentencing decision from APM's guilty plea to an offence under the *Occupational Health and Safety Act*, RSA 2000, c O-2 (*OHSA*) related to APM's conduct following the Rupture. The Court noted that pressurized methane gas is an inherently dangerous substance, toxic to humans quite apart from its explosive properties, and that fire and explosion are the predictable results of its release into an oxygenated environment. I agree with DCR/Rowe that ***R v APM*** does not decide the question of whether the work being done by Arends that led to the Rupture was inherently dangerous, however, like several of the cases noted above it is indicative of the inherent dangerousness of natural gas as a substance, and that working in the vicinity of a gas leak, and responding to a gas leak, can be inherently dangerous activity.

[103] I agree with the plaintiffs that the Occupational Health and Safety Code's detailed provisions governing locating and excavating near buried gas lines, while not determinative, is at least some indication that working with heavy excavation equipment in the known vicinity of natural gas lines is an inherently dangerous activity. The purpose of *OHSA* and the Safety Code is to maximize the safety of workplaces: ***R v Kal Tire***, 2020 ABCA 200 at para 10. Section 447(1.1) of the *Occupational Health and Safety Code*, Alta Reg 87/2009 (*Safety Code*), which was an *OHSA* regulation in effect at the time of the Rupture, required that the ground could not be disturbed until buried facilities had been identified and their locations marked. Section 448(1) reflects the specific inherent danger associated with using heavy equipment near buried lines, because it prohibits work with mechanical excavation equipment within a "hand expose zone" of an active buried facility until it has been exposed to sight.

[104] In this case, the admissible evidence does not allow the court to apply the tests noted above as to whether the work being done at the time of the Rupture was inherently dangerous. There is insufficient, unclear or conflicting evidence of exactly what Arends was doing to excavate or to construct the ramp, where he was doing it, or all of the circumstances prevailing at the time. There is no evidence of the "usual manner" of heavy equipment excavation near pipelines, or of constructing a ramp from ground level into a trench, to establish that it is not a dangerous activity if "carried out with care and in the usual manner." For example, there is insufficient evidence to establish that excavating and working near operating pressurized pipelines in the normal manner does not continue to be inherently dangerous even where any normal precautions are taken and the base safety requirements of the *OHSA* and the *Safety Code* are followed (for example with locate marks in place and/or where buried facilities have been hand-exposed). The existence of previous line strikes on the Project suggest that working around buried natural gas facilities may very well be inherently dangerous.

[105] Further, DCR/Rowe has not adduced evidence as to whether contractors working in the vicinity of a buried gas line would normally take special precautions, over and above the *OHSA* requirements, to avoid a line-strike. This evidence is required to assess whether the party in DCR/Rowe's position would likely have taken special precautions if it had done the work itself rather than the work being completed by Ground Zero. Without more, based on the numerous cases above expressing the heightened duty of care while working near gas pipelines due to the inherent dangerousness of natural gas, it seems likely that a contractor would normally take special precautions to avoid a line-strike.

[106] Accordingly, in light of the authorities noted above (and in particular ***McKenzie***), which in my view on balance suggest that excavating in the vicinity of a buried gas pipeline is inherently dangerous, and in light of the known potential catastrophic consequences of a pipeline leak, I find that, even if all the evidence DCR/Rowe has presented were to be accepted, DCR/Rowe has not established that there is no merit to a claim based on vicarious liability because the work being done was not inherently dangerous. Whether the work being done at the time of the Rupture was inherently dangerous is a genuine issue requiring trial.

[107] DCR/Rowe's argument focused almost exclusively on whether the work immediately prior to the Rupture was inherently dangerous, but largely ignores the potential for vicarious liability in respect of Ground Zero's response to the Rupture even though it acknowledges in its Brief that one of the claims being made relates to a failure to warn that the Gas Line had been struck. There is insufficient evidence before the court about Arends' or Ground Zero's actual response to the Rupture, or what an earthworks contractor's normal manner of response would be to a line strike, to assess whether a vicarious liability claim may flow against DCR/Rowe in respect of Ground Zero's response to the Rupture. Whether DCR/Rowe can be vicariously liable for Ground Zero's response to the Rupture is also a genuine issue requiring a trial.

ii. Was the Work Done by Arends Collateral Negligence or Not Part of the LOA Scope of Work?

[108] DCR/Rowe also argue that, in any event, DCR cannot be held vicariously liable for Ground Zero's conduct because, even if DCR remained obligated under a contract with APM, the work Arends was doing at the time of the Rupture was outside the scope of any such contract. They

argue that the scope of any contract did not include building a ramp or operating in breach of the *Safety Code* requirements.

[109] The "casual or collateral negligence" concept in the context of vicarious liability for subcontractors puts some limits on when a contractor may be held vicariously liable for the work of its subcontractor. A contractor/employer may not be vicariously liable if the negligent work done by the subcontractor was not work the subcontractor was hired to perform and is outside the scope of the duty imposed on the contractor/employer: ***City of St John*** at 383; ***Kerrybrooke KB*** at paras 130–131; ***Eisert*** at para 19. Vicarious liability for the negligence of an independent contractor is justified where it is "not merely casual or collateral but entails a breach of duty that was conclusively imposed on the employer of the contractor": ***Sherman v 21 Degrees Heating and Air Conditioning Inc***, 2006 CanLII 8476 (ONSC) at para 17, citing ***Fridman*** at 310; ***Connelly & Company Management Ltd v Rohling***, 2009 ABQB 614 at para 41; ***Evans*** at para 16; ***Vandenbrink Farm Equipment Inc v Double-D Transport Inc***, 1999 CanLII 14947 (ONSC) at para 48.

[110] DCR's potential vicarious liability turns, at least in part, on the Contract Issues and the terms of the possible contract between DCR and APM. That alone likely gives rise to a genuine issue for trial as to whether Ground Zero's work was collateral or outside the scope of the LOA. However, I have nonetheless conducted a review of the evidence before me to see if DCR/Rowe have established no merit based on Arends' work at the time of the Rupture being outside the terms of any DCR/APM contract.

[111] On January 28, 2015, DCR submitted a bid to APM which provided a lump sum for earthworks and a lump sum for underground utilities. The bid included "excavation and backfill of all structural foundations", excluded a number of other items in the lump sum price, and provided "all hourly work" would be charged at an hourly rate.

[112] On April 18, 2015, APM provided the LOA to DCR in reference to "an Earthworks, UnderGround Utilities" subcontract, which was signed and returned by DCR on April 27, 2015. The LOA provided:

> We are pleased to inform you to proceed with the Earthworks Subcontract for the above noted contract. The Scope of Work is defined in this document and the tender documents submitted by your firm and by all Drawings, Specifications and Addenda that were issued for tender. Refer to the attached Document List and Scope of Work for additional information and further qualifications (if applicable).
>
> The contract amount will be $288,000 ... + (GST)
>
> A Purchase Order will be prepared and forwarded for execution. In the interim, the Tender Document, Drawings, Specifications, Addenda, Project Schedule and the Standard Purchase Order Terms & Conditions (see page 4) will govern the responsibilities assigned to this Subcontract.
>
> The Purchase Order for this Subcontract will not be issued (or be valid) prior to APM receiving [a list of several items from DCR, including a "Detailed breakdown

of contract amounts, an itemized list of all Sub-Contractors, and an itemized list of all labour and equipment rates (to Project Manager)].

[...]

All Work is to be completed according to the Drawings, Specifications, Addendums and the Project Schedule.

This Letter of Acceptance forms the basis of your contract with APM and supersedes any submitted quotes. [...]

[113] Under Scope of Work, the LOA provided:

General

The Scope of Work is defined by the Bid Documents including all Drawings, Specifications, Addenda, Supplemental Conditions, etc. that were issued for tender.

The following "Additional Items" provide supplementary information and clarification of the Scope of Work under this contract, and in some cases may add to, but shall not limit, the Subcontractor's responsibilities as defined in the Bid Documents.

Additional Items

- Supply and install all earthworks as per all drawings, specifications, and all addendums. The work shall include but not be limited to:

  [...]

  - Excavation and backfill of all structural foundations, pads, footings
  - Sub grade preparation of entire building area prior to placing gravels

  [...]

- Coordinate and schedule all work with the APM Site Supervisor

  [...]

- All work to be installed as per specs, drawings and specifications. Any deviations from project detailed must be approved by the consultants in writing.

[114] In oral argument, the parties confirmed that the "Drawings, Specifications and Addenda" that were issued for tender are not in the record before me. Further, many of the documents in the attached "Document List" are not before me (including the Site Plan, Site Details, Foundation

Section and Details, the overall plans for deep services, surface improvements and plan grading, eight different Addenda, and the Site Specifications).

[115] The Standard Purchase Order Terms & Conditions attached to the LOA provide, among other things:

> 1. Compliance with Contracts and Rules. All labour, materials and services shall be in strict accordance with the general contract and contract documents which include, but are not limited to, plans, specifications, general conditions, special conditions, addenda to any and all of the foregoing, and APM's contract, if any, with the Project Owner. Without any way limiting any of the other provisions of this purchase order, Seller, to the extent applicable to the labour, materials, and services to be supplied, agrees to comply with and be bound by and liable for all obligations of every kind and description undertaken by APM under its contract with the Owner.

[116] APM's contract with ASHC is not in the record in this application. A portion of that contract was included in an affidavit sworn by Jim Molyneaux that was filed in respect of the Insurance Applications, but it did not attach the various incorporated documents necessary to understand the construction and related services required by the "Contract Documents" as referenced in definitions of the "Work" or the "Project".

[117] DCR/Rowe argue, at para 70 of their Brief, that there is no evidence that the further issuance of a valid purchase order, as contemplated by the LOA, was ever issued by APM to DCR, although there appears to be some conflict or confusion in the evidence based on the Rowe Affidavit (Para 10), the Middlemiss Answers #52, and the D. Arbeau Cross (pp 27-28). If the contemplated purchase order was issued, the court must interpret its terms in the context of the LOA and, if it was not issued, the court must interpret the provisions of the LOA noted above that deal with the "interim" period between acceptance of the LOA and the issuance of the purchase order.

[118] The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 79; ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 49. Contracts must be interpreted in light of the contract as a whole: ***IFP*** at para 79; ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64.

[119] In interpreting contracts, courts must consider the relevant surrounding circumstances, including the objective evidence of the background facts at the time of execution of the contract, namely the knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: ***IFP*** at paras 82–83; ***Sattva*** at para 58. Relevant background facts can include the genesis, aim or purpose of the contract, the nature of the relationship created by the contract, the nature or custom in the industry in which the contract was executed, antecedent agreements leading up to the contract, and even negotiations if they shed light on the factual matrix: ***IFP*** at paras 83–85 and the cases cited therein.

[120] In an application where a defendant seeks to summarily dismiss a claim because certain work falls outside the scope of a construction contract, one would expect the moving party to have placed the surrounding circumstances evidence before the court. While it is unclear to what extent there was available evidence of potentially relevant negotiations, it is obvious that important antecedent documents exchanged by the parties, and documents incorporated by reference into the LOA, have been omitted. Further, there is no evidence of industry practice or expert evidence addressing the type of work earthworks contractors typically perform, or whether it was known to the parties at the time of the LOA whether earthwork ramps would be required to be constructed to access the trenches in which the footings would be located and, if so, who would construct those ramps or how they would be constructed.

[121] Instead, DCR/Rowe rely on the Middlemiss Answers, in which Middlemiss states that the compacting of the trench or the ramp work was not within the scope of the LOA. Middlemiss was not involved in the negotiation of the LOA and was not a party when it was accepted. His bald conclusory statements about the scope of the LOA are either legal argument, his interpretation, views, or speculation about the objective intention of the original parties to the LOA. That is not admissible, reliable or probative evidence of anything. He is not qualified to give it. I disregard it entirely.

[122] Courts are to determine summary judgment applications based on the pleadings and materials actually before the court, not on suppositions about what might be pleaded or proved in the future: ***Weir-Jones*** at para 37; ***Lameman*** at para 19.

[123] Based on the limited record before me, I find that DCR/Rowe have not discharged their burden to show there is no merit to the vicarious liability claims because the work being performed at the time of the Rupture was collateral or outside the scope of the work included in the LOA (or any other contract between DCR and APM). For example, the LOA on its face appears intended to cover all earthworks required for the Project, including excavation work relating to the footings, to be coordinated with the APM site supervisor, for a lump sum price, with the potential for extras being charged potentially at an hourly rate. There is no evidence of a change order, or a claim for extras, or a separate invoice, for the work Arends was doing at the time of the Rupture. Ultimately, whether the work Arends was doing at the time of the Rupture was collateral work or work within the scope of any contract between DCR and APM is a genuine issue that cannot be fairly determined on the record before me. Like the Contract Issues, it will require a trial.

[124] DCR/Rowe also argues that the work Arends was doing could not be part of the scope of contract between DCR and APM because he performed the work after the pipeline locates were no longer present in violation of the *Safety Code*. DCR/Rowe's argument based on the pipeline locates not being in existence at the time Arends caused the Rupture relies on evidence which I have already held DCR/Rowe cannot use as admissions or evidence against the plaintiffs to support the Dismissal Application. In any event, DCR/Rowe has not provided any authority to support the proposition that anytime a contractor or subcontractor breaches the *Safety Code* in the course of conducting work on a project means that the work falls outside the scope of work in the contract or becomes collateral negligence for the purposes of determining vicarious liability. This is another genuine issue requiring a trial.

iii. Was the Work Done by Arends Not in DCR/Rowe's Control or Supervision / Knowledge?

[125] DCR also argues that it cannot be held vicariously liable when it did not have knowledge of, or control over, the work Arends was doing at the time of the Rupture. DCR relies on ***Canadian National Railway Company v Saskatchewan Wheat Pool and McCaffrey***, 1986 CanLII 2901 (SKKB) and ***Travois Holdings Ltd v Adanac Tile & Marble Co***, 1987 CanLII 3371 (ABKB).

[126] In ***Canadian National Railway***, the issue was whether the Wheat Pool was liable for the conduct of one McCaffrey in the demolition of a grain annex that caught fire and damaged the plaintiff railway company's cars. McCaffrey had started a fire near the annex to dispose of material pulled from the annex during demolition. The Wheat Pool was not held vicariously liable because the dismantling of the annex was left entirely to McCaffrey and the plaintiffs could not establish that the Wheat Pool was aware that McCaffrey would create a hazardous situation by lighting a fire. In my view, this case is distinguishable because all parties, including DCR/Rowe, were aware that the Project required, and Ground Zero would be conducting, excavation work near the Gas Line as part of the Project. And, as noted above, the question of whether Arends' excavation was outside the expected scope of work is a genuine issue requiring a trial.

[127] In ***Travois***, a fire started in a nursing home while repairs from a previous fire were being conducted. Claims and third party claims were made against the general contractor and several subcontractors and sub-subcontractors. The Court's decision, and in particular the passages relied on by DCR/Rowe, relate to the Court's assessment of *direct* claims of negligence, not vicarious liability for independent contractor conduct. DCR/Rowe conflates the direct tort claim analysis with vicarious liability. It is not helpful to DCR/Rowe.

[128] DCR/Rowe's arguments based on ***Canadian National Railway*** and ***Travois*** do not meet the burden to show that there is no merit to the vicarious liability claims, or that there are no genuine issues requiring a trial.

b. Is there No Merit to a Vicarious Liability Claim if Ground Zero is Not a Subcontractor?

[129] Given my finding that DCR/Rowe have failed to discharge their burden that there is no merit to the vicarious liability claims based on the "inherently dangerous" cases, and given the parties agree that the Contract Issues are not appropriate for summary determination, I need not go any further on the vicarious liability claims.

[130] However, in case I am wrong and there is no merit to the vicarious liability claims based on the "inherently dangerous" cases, to obtain summary dismissal DCR/Rowe would have to establish that there is no merit to any other potential vicarious liability claims. This possibility was not addressed in argument.

[131] Rowe's evidence is that he made "arrangements" for Ground Zero to perform work, but there is no written agreement or documentation defining their relationship. DCR/Rowe argue that Ground Zero was DCR's assignee or that Ground Zero was novated into the LOA or any contract between APM and DCR. No one suggested, and there is no evidence, that Arends was DCR's employee. However, there is some evidence (some of which is disputed) that:

(a) DCR "hired personnel"[2] from Ground Zero, and that Ground Zero employees were described to be DCR's "representative,"[3] "super"[4], or "foreman"[5];

(b) Ground Zero was "assisting"[6], "helping"[7] or doing work "for" DCR[8] or "with [DCR]"[9];

(c) a Rowe text indicates that Rowe stated to Middlemiss that Rowe had advised APM that Middlemiss "worked for us as a manager and will be taking care of the job"[10];

(d) in late May 2015, both Ground Zero and DCR/Rowe were doing different aspects of the Work;[11]

(e) in June 2015, Ground Zero's employee Pacaud represented himself as the foreman of DCR[12] as well as the foreman of Ground Zero[13] in respect of work on the Project;

(f) Rowe continued to be copied on emails respecting the project into late June, 2015[14], including emails in relation to a gas line on June 15 and 18, 2015[15];

(g) Ground Zero invoiced DCR, who in turn invoiced APM,[16] and DCR "authorized"[17] APM to pay Ground Zero directly;

(h) on June 23, 2015, DCR/Rowe was copied on an email from the Town of Canmore about Ground Zero's cheques provided to the Town of Canmore;[18]

(i) immediately after the Explosion, APM requested incident reports from both DCR and Ground Zero, and referenced Ground Zero employees as part of a DCR/Ground Zero "crew"[19]; and

[2] D. Arbeau Affidavit at para 9.
[3] D. Arbeau Affidavit at Exhibit E; Rowe Cross at Exhibit 15.
[4] Rowe Cross at Exhibit 14.
[5] Rowe Cross at Exhibit D for Identification.
[6] D. Arbeau Affidavit at para 9; Middlemiss Affidavit at para 2.
[7] Rowe Cross at Exhibit 15; D. Arbeau Affidavit at Exhibit E; D. Arbeau Cross at p 27.
[8] Rowe Cross at Exhibit 44.
[9] Rowe Cross at Exhibit 15; D.Arbeau Affidavit at Exhibit E; D. Arbeau Cross at Exhibit 1.
[10] PL Compendium Tab 8 [GZGSS00243].
[11] D. Arbeau Affidavit at Exhibit E.
[12] Rowe Cross at Exhibit D for Identification.
[13] Middlemiss Answers #39 and Exhibit 22.
[14] PL Compendium Tab 10 [APM002711].
[15] PL Compendium Tab 10 [DCR00027276_0001].
[16] Middlemiss Affidavit at Exhibit A.
[17] Rowe Cross at Exhibit 46.
[18] PL Compendium Tab 10 [DCR00014633_0001].
[19] Rowe Cross at Exhibit 39.

(j) in September 2015, when APM expressed concerns about the LOA and whether Ground Zero would "honour the agreement as signed by [Rowe]", Ground Zero asked DCR/Rowe: "can you let me know what you want to do?".[20]

[132] In these circumstances, even if Ground Zero is found not to be a subcontractor, the factual record, and some of the pleadings, raise an issue that Ground Zero may have been DCR's agent, assignee, a novated party, or perhaps something else.

[133] Vicarious liability can be available for less formal relationships, like agency: ***Bonello v Gores Landing Marina (1986) Limited***, 2017 ONCA 632; ***Apex*** at paras 13, 20–21; ***Capital Estate Planning Corporation v Lynch***, 2011 ABCA 224 at para 77; ***Prefontaine v Veale***, 2003 ABCA 367 at para 16; ***Thiessen v Clarica Life Insurance Co***, 2002 BCCA 501 at paras 29–31; ***Fullowka*** at para 144, citing ***Leroux v Molgat***, 1985 CanLII 229 (BCSC); ***Austeville Properties Ltd v Josan***, 2019 BCCA 416 at para 51. Based on these cases, whether vicarious liability would apply may depend on the precise findings in respect of the Contract Issues, the scope of the LOA, what exactly DCR authorized Ground Zero to do, whether Arends' work causing the Rupture was within the scope of the LOA, whether Arends' conduct was foreseeable, and whether DCR obtained any benefit from Ground Zero's conduct.

[134] If Ground Zero was not a subcontractor or agent, but an assignee, a novated party, or something else, then there are no unambiguous line of precedents that have been proposed by the parties which address vicarious liability in those situations. Accordingly, the court must engage in the two-stage, policy-based analysis set out by the Supreme Court of Canada in ***Fullowka***. In those circumstances, the plaintiffs would have to show the relationship between Ground Zero/Arends and DCR/Rowe was sufficiently close and that Arends' conduct was sufficiently connected to the conduct DCR authorized Ground Zero to do. The object of the analysis is policy-based: imposing liability for risks DCR/Rowe created or contributed to, encouraging the reduction of risk, and providing fair and effective compensation: ***Fullowka*** at para 142; ***Bennett*** at para 20.

[135] In my view, if Ground Zero is something other than a subcontractor, there are factual findings and policy considerations required that cannot be fairly resolved on this record. There are genuine issues requiring a trial. DCR/Rowe have not met the burden to show no merit to the other potential vicarious liability claims.

c. Do Some of the Potential Vicarious Liability Claims Lack Merit Due to Insufficient Pleading?

[136] DCR/Rowe argue that many of the Statements of Claim in the Actions do not adequately plead vicarious liability against DCR/Rowe in respect of Ground Zero's conduct. In particular, DCR/Rowe note that only a few of them specifically plead that the work conducted was inherently dangerous, and only a few mention vicarious liability at all. Although DCR/Rowe argued the vicarious liability point fully in its Brief and oral argument, they seem to suggest that the court should find that there is no merit to some of the plaintiffs' claims due to pleading deficiencies.

[20] Rowe Cross at Exhibit 30.

[137] The plaintiffs argue that there is no requirement to specifically plead vicarious liability or that the work is inherently dangerous and, further, if any of the claims are deficient they should be entitled to amend their claims.

[138] Summary judgment is to be considered based on the record and pleadings actually before the court, not on suppositions of what might be pleaded or proved in the future: ***Lameman*** at para 19; ***Weir-Jones*** at para 37. However, in my view, ultimately it is a question of judicial discretion that does not require the court to ignore the realities of the situation. I reject DCR/Rowe's suggestion that some of the claims should be subject to summary dismissal in respect of showing no merit on arguable vicarious liability claims, for a number of reasons.

[139] First, for reasons set out later, I have found that DCR/Rowe have not met their burden to show the direct negligence claims have no merit. In the circumstances, and for the reasons set out later in the exercise of my overall discretion, I would not summarily dismiss arguable vicarious liability claims based only on an argued deficiency in pleading, given that other claims would be proceeding.

[140] Second, I have reviewed all of the Statements of Claim. Pleadings are to be interpreted generously, not restrictively: ***Armstrong v Gula***, 2023 ABKB 270 at para 20; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para 74; ***Tottrup v Lund***, 2000 ABCA 121 at para 9. This interpretive approach applies in the context of summary resolution proceedings: ***Amyotte v Kawartha Haliburton Children's Aid Society***, 2021 ONSC 7378; ***Popescu v Wittman Canada Inc***, 2017 ONSC 3252 at paras 30–32; ***Link v Venture Steel Inc***, 2010 ONCA 144 at para 36.

[141] While some of the Statements of Claim are less clear than others as to whether they plead vicarious liability against DCR/Rowe, many of the claims have pleaded sufficient facts to expressly raise the issue, whether they specifically plead that the work was inherently dangerous or not. Further, other claims expressly claim DCR is liable for the work of its agents (including Ground Zero). In my view, only the Hanna-Seed Action, Lazdowski Action, Pasemko Action and Cherak Actions might arguably not plead enough facts, on their own, to engage a potential vicarious liability claim.

[142] Third, even though some of the claims do not expressly or clearly plead vicarious liability the issues in the Actions are not driven only by the plaintiffs' claims. In every one of the Actions, DCR/Rowe put into issue their own alleged lack of vicarious liability for Ground Zero's conduct. DCR/Rowe plead that "these Defendants are not liable for the acts of ... Arends, Ground Zero". Further, DCR/Rowe plead that all "DCR employees, agents, contractors and any other person and entity that DCR may be vicariously liable for were property trained and qualified to perform all tasks required of them with respect to the Work". Pursuant to rule 13.12, these pleadings are deemed to be denied by all plaintiffs. Therefore, vicarious liability is squarely an issue in the Actions.

[143] Fourth, even if some of the claims are arguably deficient, DCR/Rowe cannot be said to be surprised that vicarious liability is an issue. In addition to putting it in issue themselves, the Farrington Order contemplates that all of the Actions would proceed together as much as

practicable with common questioning. It has been fully argued before me. This is quite a different situation than a single, two-party lawsuit.

[144] Fifth, some of the claims were likely filed before there was complete discovery. It is common for claims to be amended as new facts emerge or new claims arising out of existing facts are explored. Rule 3.65(1) provides that, subject to rule 3.65(5), the court may give permission to amend a pleading before or after the close of pleadings. There is a strong presumption in favour of allowing amendments to pleadings after the close of pleadings: ***Kosteckyj v Paramount Resources Ltd***, 2022 ABCA 230 at paras 12, 41; ***Pace v Economical Mutual Insurance***, 2021 ABCA 1 at para 3; ***AARC Society v Canadian Broadcasting Corporation***, 2019 ABCA 125 at para 85. The applicant need not show any particular reason for needing the amendment: ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited***, 2014 ABCA 74 at para 24. Courts should exercise their discretion to allow the amendment unless the non-moving party demonstrates an exception or compelling reason not to: ***Kosteckyj*** at paras 12, 41; ***Pace*** at para 3, 53; ***AARC Society*** at paras 6, 53.

[145] Sixth, the plaintiffs have now expressly requested the opportunity, if necessary, to amend the Statements of Claim in the event any of them are deficient, before deciding the Dismissal Application. Given my findings about the vicarious liability claims, it would be unfair in the circumstances to take a technical or narrow approach to pleadings by dismissing some claims but not others arising out of the very same circumstances in joined actions.

[146] Seventh, even if DCR is correct that some of the claims do not properly plead vicarious liability, then for those claims there is not yet vicarious liability claim to dismiss.

[147] In all the circumstances, I find that to the extent some of the Statements of Claim are unclear or deficient in pleading vicarious liability, the appropriate process is to simply provide a process by which they can file amendment applications if they wish to amend their pleading.

d. Conclusion re Vicarious Liability

[148] Based on the foregoing, I find that DCR/Rowe has not discharged the burden to show there is no merit to vicarious liability claims. There are genuine issues requiring a trial. It would not be fair or appropriate to determine these claims on the record before me.

2. Is there No Merit to a Direct Negligence Claims against DCR/Rowe?

[149] DCR/Rowe's argument about the potential direct negligence claims against them is very thin, less than one page, and cites no case authority. DCR/Rowe seem to assume that by establishing that they were not at the site on the day of the Rupture or involved in the instruction to Arends, or the decision to instruct Arends, to do the work that led to the Rupture, or because the plaintiffs have not served any expert evidence to address direct tort claims, there is no merit to any direct negligence claim against them. It is not that simple.

[150] To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's

breach: ***1688782 Ontario Inc v Maple Leaf Foods Inc***, 2020 SCC 35 at para 18 [***Maple Leaf Foods***]; ***Mustapha v Culligan of Canada Ltd***, 2008 SCC 27 at para 3. Only elements (1), (2) and (4) appear potentially at issue in this case.

a. Did DCR/Rowe Owe the Plaintiffs a Duty of Care?

[151] The foundation of the modern law of negligence is the neighbour principle established in ***Donoghue v Stevenson***, [1932] AC 562 (HL), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act": ***Nelson (City) v Marchi***, 2021 SCC 41 at para 15; ***Rankin (Rankin's Garage & Sales) v JJ***, 2018 SCC 19 at para 16.

[152] In many cases, the relationship between the plaintiff and defendant is of a type which has already been judicially recognized as giving rise to a duty of care. In such cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis: ***Rankin*** at para 18; ***Mustapha*** at para 5. The existing categories are defined narrowly: ***Rankin*** at para 28.

[153] If it is necessary to determine whether a novel duty of care exists, courts apply the two stage "*Anns/Cooper*" test: ***Rankin*** at para 18. The first stage of the test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at para 39; ***Rankin*** at para 18. The onus is on the plaintiff to establish a *prima facie* duty of care by providing a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship: ***Rankin*** at para 19. Once foreseeability and proximity are made out a *prima facie* duty of care is established: ***Rankin*** at para 18. Once the plaintiff has demonstrated that a *prima facie* duty of care exists, then the burden shifts to the defendant to establish that there are residual policy reasons why the duty should not be recognized: ***Rankin*** at para 20; ***Imperial Tobacco*** at para 39.

[154] In this case, in my view, the duty of care analysis will depend on the determination of the Contract Issues. If DCR remained contractually involved, and Ground Zero was DCR's subcontractor, then there is authority which suggests that DCR may owe the Project owner, and even neighbouring property owners, a duty not to be negligent in:

(a) choosing or hiring a competent, experienced and careful contractor who has the proper equipment to do the work: ***Chappell's Ltd v County of Cape Breton***, [1963] SCR 340 at 346, 1963 CanLII 105 (SCC); ***Lewis*** at para 49; ***City of St John*** at 383–384; ***Winnipeg Condominium Corporation No 36 v Bird Construction Co***, [1995] 1 SCR 85 at para 55, 1995 CanLII 146 (SCC); ***Sin v Mascioli***, 1999 CanLII 2384 (ONCA); ***Fraser v U-Need-A-Cab Ltd***, 1 DLR (4th) 268 (ONSC), 1983 CanLII 1659; ***Craven et al v Strand Holidays (Canada) Ltd et al***, 1982 CanLII 1859 (ONCA); ***Evans*** at para 24;

(b) preparing, informing, warning, supervising or instructing the contractor about the work to be done and its risks, to ensure the contract is carried out with reasonable

care: ***Lewis*** at para 49; ***Travois*** at paras 159–160; ***McKenzie*** at 372; ***Evans*** at para 24; ***City of St John*** at 383–384; ***Seaway Hotels***.

[155] On the other hand, if DCR is ultimately held to have been removed from the LOA by novation of Ground Zero, or Ground Zero and DCR have some other relationship, it is likely that an *Anns/Cooper* analysis would be required. In the first stage, in determining whether reasonable foreseeability is established, the question is whether the plaintiff has offered facts to persuade the court that the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged: ***Rankin*** at para 24. The proximity analysis will involve considering established or analogous categories of proximate relationship: ***Maple Leaf Foods*** at paras 64–65. If proximity cannot be established on an established or analogous category of proximate relationship, then it must conduct a full proximity analysis: ***Maple Leaf Foods*** at para 66. The latter involves looking at factors that are diverse and depend on the circumstances of the case, including "all relevant factors present in the relationship" such as expectations, representations, reliance and the property or other interests involved: ***Maple Leaf Foods*** at para 66; ***Cooper v Hobart***, 2001 SCC 79 at paras 34–35. Assessing proximity requires asking whether, in light of the relationship at issue, the parties are in such a "close and direct" relationship that it would be just and fair having regard to that relationship to impose a duty of care: ***Cooper*** at para 34.

[156] In my view, the determination of the Contract Issues will be important in conducting the duty of care analysis, whether under existing lines of cases or an *Anns/Cooper* analysis. The contractual status of DCR and Ground Zero, their relationship to each other, and whether Ground Zero assumed all contractual obligations as suggested by DCR, are important questions that the parties agree cannot be resolved on the record before me. Parties involved in a construction project (owners, general contractors, subcontractors, sub-subcontractors, etc.) often attempt to contractually organize responsibility and allocate associated project and performance risks. While those contracts will not be determinative of whether there is a duty of care in tort owed to the owner of the project or third parties that are not part of the contractual relationship, in my view those contractual relationships are nonetheless a relevant factor in assessing at least whether a duty of care exists to the owner or neighbours, including foreseeability and proximity; and whether there are residual policy concerns to negate the duty.

[157] Unresolved contractual and policy issues can make summary judgment of negligence claims inappropriate: ***Saskatchewan Power Corporation v All Canada Crane Rental Corp***, 2019 SKQB 61 at para 66; ***Templanza v Wolfman***, 2016 ABCA 1 at para 20; ***Condominium Corporation No 0321365 v Cuthbert***, 2016 ABCA 46 at para 29 [***Cuthbert***]; ***Weir-Jones*** at para 45; ***Dasilva v McLean***, 2011 ABQB 618 at para 24; ***Milne v Alberta (Workers' Compensation Board)***, 2008 ABQB 710 at para 54; ***Ernst v EnCana Corporation***, 2014 ABQB 672 at paras 94, 96.

[158] Regardless of the determination of the Contract Issues, the admissible record before the court illustrates the following. DCR acted through Rowe. DCR signed the LOA and committed to do earthworks for the Project, and it is unresolved whether it remained contractually obligated by the time of the Rupture. DCR/Rowe were aware of the existence of the Gas Line, and it can be inferred as an earthworks contractor it was aware of the danger of natural gas leaks and the importance to ensure active gas lines are not breached. DCR/Rowe can also be taken to be aware of the strict requirements of the *OHSA* and the *Safety Code* respecting locating and exposing the

Gas Line. DCR/Rowe was aware that ASHC was the owner of the Project. There is some evidence that Rowe attended the site at least once, maybe more, and it can be inferred he would have been aware of the existence neighbouring properties, including residential properties. DCR/Rowe undertook to obtain permits and to order the locates for the Gas Line, and for a time was directly involved in that process. It was Rowe's idea to get Ground Zero involved to help on the Project. DCR/Rowe remained involved in the Project, although their involvement had diminished significantly by the time of the Rupture. They were not present on-site or directly involved in the work that led to the Rupture. By that time, APM appears to have been dealing directly with Ground Zero in respect of the on-site work.

[159] In my view, based on the law outlined earlier, and the admissible record, DCR/Rowe have not discharged the burden to show there is no merit to the plaintiffs' negligence claim against them on the basis that DCR/Rowe did not owe them a duty of care. There is at least a genuine issue requiring trial as to whether they owed a duty of care to the both the Neighbour Plaintiffs and ASHC (as the owner of Project) in choosing Ground Zero and ensuring Ground Zero could and did safely carry out the earthworks on the Project.

b. Did DCR/Rowe Discharge Any Standard of Care?

[160] In ***Ryan v Victoria (City)***, [1999] 1 SCR 201, 1999 CanLII 706 (SCC) (confirmed in ***Nelson (City)*** at para 91) the Supreme Court of Canada has described the standard of care analysis as follows, at para 28:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[161] As with the duty of care, in my view the determination of the Contract Issues is relevant in assessing whether DCR/Rowe discharged any required standard of care. What a reasonable and prudent person does when getting another person involved in the performance of excavation work in the vicinity of gas lines may very well depend on whether the contractor remains contractually responsible. For example, the standard of care for a construction contractor that is no longer contractually involved at all in the performance of work due to novation will likely be different than one who remains responsible and legally involved in the Project. Because the Contract Issues cannot be resolved summarily, in my view there is a genuine issue requiring trial as to what DCR/Rowe would be required to do to discharge any duty of care they owed.

[162] The available record also fails to establish there is no merit to a negligence claim based on a discharge of the standard of care. There is no evidence of DCR/Rowe taking any steps to conduct due diligence of Ground Zero or to vet the employees Ground Zero intended to use on the Project. DCR/Rowe did not do any training of Ground Zero or its employees, and they have acknowledged

they were not supervising Ground Zero's work. DCR/Rowe's presence on the site diminished over time as Ground Zero became involved.

[163] There is also a dispute in the evidence as to what exactly DCR/Rowe provided to Ground Zero, including whether DCR/Rowe warned Ground Zero about the presence of the Gas Line or provided Ground Zero and its employees sufficient information about the Gas Line (although this latter question may not be significant because the record illustrates that Ground Zero employees were likely aware of the Gas Line based on Pacaud signing the locate request).

[164] DCR/Rowe did not adduce any evidence of industry practice to establish what a reasonable and prudent person in DCR/Rowe's position would do to get another party involved to perform earthworks in this situation (and that may have been difficult to do in any event until the Contract Issues are resolved).

[165] In all the circumstances, DCR/Rowe have not established that there is no merit to the negligence claims against them because they discharged any standard of care. There are genuine issues requiring a trial as to what the appropriate standard of care would be if they owed the plaintiffs a duty of care, and whether DCR/Rowe's apparent hands-off approach to Ground Zero's conduct of the work was sufficient.

c. Did DCR/Rowe's Conduct Cause the Plaintiffs' Loss?

[166] As per ***Nelson (City)***, at paras 96–97:

> It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
>
> Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[167] With respect to factual causation, based on the record the plaintiffs' damage was caused by the Explosion, which in turn was a result of Arends rupturing the Gas Line. There is some indication that the Gas Line leaked for some time after the Rupture, and some of the plaintiffs have claimed that the response to the Rupture was also negligent. DCR/Rowe did not adduce any

evidence about what exactly happened after the Rupture, so I cannot fairly determine whether something happened after the Rupture that might disconnect DCR/Rowe from the potential causal chain. What is before me is that Ground Zero/Arends would never have been involved in the Project but-for DCR/Rowe's decision to seek their assistance. Whether DCR/Rowe's decision to involve Ground Zero factually caused the Rupture is also something I cannot determine on the admissible record as there is no evidence about what exactly occurred on the site between the people involved that day, or whether the result would have been any different if DCR/Rowe had not involved Ground Zero, or if DCR/Rowe had taken different steps to inform, prepare, warn, supervise or instruct Ground Zero. DCR/Rowe have not discharged the burden to show there is no merit to the negligence claims based on a lack of factual causation.

[168] With respect to legal causation, it is obvious that a ruptured and leaking gas line can lead to an explosion which can lead to damage. However, that may not be enough for the plaintiffs to establish legal causation against DCR/Rowe. They may also need to establish that it was reasonably foreseeable that Ground Zero/Arends would perform work in the way they did, and that in doing so it would foreseeably cause the Rupture. It is very difficult to assess these legal causation issues without resolution of the Contract Issues, whether a duty of care exists, and whether any standard of care was discharged, as some or all of these may impact the reasonable foreseeability analysis. Further, there are similar shortcomings in the record as noted above respecting factual causation. Without reliable evidence of what exactly was going on at the site at the time of the Rupture, what exactly Arends was asked to do and was doing, and how Arends was doing what he was asked to do, and with no expert or industry evidence to establish the usual practice for doing what Arends was doing, it is impossible to assess whether the result was reasonably foreseeable.

[169] DCR/Rowe have not discharged their duty to show no merit based on a lack of causation of damages. There are genuine issues requiring trial in respect of both factual causation and legal causation.

d. Conclusion Re Direct Negligence Claims

[170] Based on the foregoing, I find that DCR/Rowe have not discharged their burden to show there is no merit to plaintiffs' direct negligence claims. There are genuine issues requiring a trial. It would not be fair or appropriate to determine these claims or potential claims on the record before me.

3. Is There No Merit to Nuisance, Trespass or Misrepresentation Claims?

[171] Given my findings in respect of the vicarious liability and direct negligence claims, the lack of argument respecting nuisance, trespass or misrepresentation, and the fact they arise out of and are intertwined with the same facts respecting the vicarious liability and direct negligence claims, I do not need to decide this issue. In the circumstances, even if it is assumed that these claims have no merit, it makes no sense for the court to consider parsing out these residual claims if the rest of the claims are proceeding to trial: ***Spady*** at para 139; ***Hryniak*** at para 60; ***DIRTT Environmental Solutions Ltd v Falkbuilt Ltd***, 2021 ABQB 252 at paras 15–36.

F. If DCR/Rowe Have Met the Burden, have the Plaintiffs Demonstrated a Genuine Issue Requiring a Trial?

[172] I do not need to consider this question because I have found that DCR/Rowe have not met their burden. However, in case I have erred in describing or applying DCR/Rowe's burden, I have also considered whether the plaintiffs have demonstrated a genuine issue requiring a trial.

[173] DCR/Rowe criticizes the plaintiffs for not filing any affidavit or other evidence. Clearly, a respondent to a summary judgment application has a duty to put their best foot forward, and cannot suggest more favourable evidence may be unearthed in the future: ***Weir-Jones*** at para 37; ***Lameman*** at para 19; ***H2S Solutions Ltd v Tourmaline Oil Corp***, 2019 ABCA 373 at para 19.

[174] However, putting a best foot forward does not always require responding evidence. This is particularly the case when the responding party was not involved in all of the underlying facts. According to ***Weir-Jones*** at para 35 (emphasis added):

> The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its burden. The ultimate burden remains on the moving party to establish that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis. **The resisting party can meet its evidentiary burden by challenging the moving party's entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.),** or by raising a positive defence (such as a limitations defence). A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial. As noted, *infra* para. 37, **the resistance to summary judgment must be grounded in the record**, not mere speculation. **Sometimes the resisting party can succeed by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition, or in other words that there are genuine issues requiring a trial**.

[175] If I am wrong and DCR/Rowe did meet its initial burden, for the same reasons as outlined in my detailed analysis above, if necessary, I find that the plaintiffs discharged their burden to show that there are genuine issues requiring a trial. And, in any event, DCR/Rowe have not established their ultimate burden to establish that there is no genuine issue requiring a trial.

G. Is it Possible to Fairly Resolve the Claims against DCR/Rowe and if so, is the Court Prepared to Exercise its Discretion to Do So?

[176] For expediency, and given my earlier analysis, I have considered together the first and last of the considerations outlined at para 47 of ***Weir-Jones***.

[177] For the reasons above, I have found that it is not possible to fairly resolve the claims against DCR/Rowe on a summary basis, based on the issues I have identified in the facts, the record, and the law. The acknowledgement of all parties that the Contract Issues are not appropriate for summary determination had some bearing on my decision but was not determinative on its own.

[178] There are additional reasons why I do not believe that summary dismissal is possible, fair, or appropriate.

[179] First, I do not have confidence in the record that has been put before me. In particular, Rowe's memory of events is not strong, which may undermine the reliability of his evidence. The testing of his evidence is more appropriately done in person at a trial.

[180] Second, as I have noted, there are significant gaps in the evidence, including, in particular the surrounding circumstances and full terms of the LOA, what exactly was going on at the site the day of the Rupture and Explosion, and industry practice evidence. Further, the evidence of others involved on the site that day is incomplete or, in some cases, non-existent. Based on the existence (as opposed to the admissibility) of the transcripts that were sought to be adduced, but rejected, it seems that there is a strong likelihood that the record at trial will be significantly better than what is before the court now.

[181] Third, I must consider not only fairness as between DCR/Rowe and the plaintiffs, but in respect of the Actions as a whole: ***Hryniak*** at para 60. Partial summary determination, either in respect of partial claims for or against a particular plaintiff or defendant, or in respect of only dealing with claims against one party where there are numerous other parties involved, risk inefficient and duplicative proceedings or the potential for inconsistent findings: ***Hryniak*** at para 60. It must be demonstrated that partial summary judgment would achieve a just result: ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 140 at para 50; ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 54. Summary judgment is not meant to encourage inefficient litigation by instalment, especially in complex multi-party construction cases: ***Pure Environmental Waste Management Ltd v Lonquist Field Service (Canada), ULC***, 2022 ABQB 30 at para 100; ***O'Connor v Bains et al***, 2021 MBQB 255 at para 22; ***Hamilton (City) v Thier + Curran Architects Inc***, 2015 ONCA 64 at paras 17–22; ***Cuthbert*** at paras 1, 6, 29.

[182] Considerations of the potential difficulties of partial summary judgment on an action, as a whole, was comprehensively reviewed by Justice Sidnell in ***DIRTT Environmental*** at para 23, summarizing factors raised by the Ontario Court of Appeal in ***Butera v Chown, Cairns LLP***, 2017 ONCA 783:

> (a) there is a danger of duplicative or inconsistent findings: para 28;
>
> (b) a partial summary judgment application may result in the main action being delayed and may even be used as a delay tactic: para 30;
>
> (c) an application for partial summary judgment may be very expensive: para 31;
>
> (d) judges are required to spend time hearing partial summary judgment applications and may be required to write comprehensive reasons on an issue that does not dispose of the action: para 32;

(e) the record available at the hearing of a partial summary judgment application will likely not be as extensive as the record at trial, therefore increasing the danger of inconsistent findings: para 33;

(f) a partial summary judgment application should be considered to be a rare procedure that is reserved for issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner: para 34;

(g) a summary judgment application may result in the disposition of the entire action (unless the judgment is dismissed or only successful in part and partial summary judgment is granted); on the other hand, a partial summary judgment application does not finally resolve the action and a trial proceeds on the remaining issues: para 35;

(h) it must be asked if:

(1) there is any efficiency by granting partial summary judgment given that the action is proceeding to trial on other matters; and

(2) the claims to be determined on the partial summary judgment application are intertwined with those proceeding to trial: para 36; and

(i) it must be asked if the partial summary judgment is appropriate in the context of the litigation as a whole and will it serve the objectives of proportionality, efficiency and cost effectiveness: para 38.

[183] See also ***Novosell v Bolster***, 2022 ABKB 804 and ***Mason v Perras Mongenais***, 2018 ONCA 978. Some of these factors have been addressed earlier in these Reasons, and given my findings, I do not need to go through them in detail or apply the framework used by Justice Sidnell in ***DIRTT Environmental*** at para 35.

[184] In my view, from the perspective of the Actions as a whole, there is little-to-nothing to be gained by granting summary dismissal of the claims against DCR/Rowe, other than freeing those parties of the burden of one aspect of this litigation. DCR/Rowe would remain in the Actions as third party defendants to APM's third party claim. Much of the very same evidence before the court now will continue to be involved in the trial. There will have been little overall savings to the litigation process, and likely any savings that may have been realized have been significantly reduced by the considerable resources dedicated to the Dismissal Application.

[185] On the other hand, there is a significant risk that a trial judge may come to different conclusions on what will very likely be a better record. Further, the court (either me as case management judge or the trial judge) may have to deal with the complexity of the removal of DCR/Rowe from aspects of the Actions in ways that may not be apparent at this stage, particularly given the unresolved Contract Issues, including potentially issue estoppel or *res judicata*, all of which raise the prospect of inefficiency, unfairness or hindsight regret: ***Stankovic*** at para 54; ***Lynk***

v Co-Operators General Insurance Company, 2019 ABQB 417 at paras 25–26; ***Novosell*** at paras 16–24; ***Bibeau et al v Chartier et al***, 2022 MBCA 2 at para 63.

[186] As a whole, the negative impact on the Actions is simply not outweighed by the potential benefit of extricating DCR/Rowe from some aspects of the litigation, even if that were otherwise appropriate.

[187] Accordingly, even if I am wrong on my assessment of whether DCR/Rowe met their initial or ultimate burden, or on my assessment of whether the plaintiffs met their responsive evidentiary burden, as a separate matter altogether I would nonetheless not exercise my discretion in favour of summary dismissal in this case.

H. What is an Appropriate Order in this Case?

[188] Summary dismissal is not appropriate.

[189] As noted in ***Weir-Jones***, a judge who dismisses an application for summary adjudication may still be in a position to advance the litigation. To avoid confusion or issues moving forward with respect to the scope of the claims being made, I order that any plaintiffs in the Actions seeking to amend their claims shall propose any amended claim to the defendants by August 31, 2023. I also direct the parties to contact my judicial assistant to schedule our next case management meeting in September 2023 to address any proposed amendments and other steps.

VI. Conclusion

[190] DCR/Rowe's Dismissal Application is dismissed. I make the procedural order set out above.

[191] If the parties cannot agree on an appropriate costs order arising out of this application by August 31, 2023, they may make written submissions of no more than 5 pages (excluding authorities).

Heard on the 21st day of June, 2023.
Dated at the City of Calgary, Alberta this 18th day of July, 2023.

M.A. Marion
J.C.K.B.A.

Appearances:

Paul J. Stein, K.C. and Marc T.J. Matras, Gowling WLG
for Defendants, DCR Inc. and David Rowe

Thomas B. MacLachlan and Rachel Hopf, MMH Lawyers
for Plaintiffs, William Francis Cherak et al.

James Flanagan, McLennan Ross LLP
For APM Construction Services Inc., D. Arbeau and J. Arbeau

Jessica Flanders and Natasha Sutherland, Alberta Justice
For Plaintiffs, Alberta Social Housing Corp. and HMK in right of Alberta

Erika Carrasco and Doreen Saunderson, Field LLP
For Plaintiffs, Helen Ann Kudzin et al. (Docket 1701-08473)

Anthony Slemko, K.C., and Amanda Kostek, Chomicki Baril Mah LLP
For Plaintiffs, William Wollner et al (Docket 1701 07303), Plaintiffs, Paul Lepper et al. (Docket 1701-07584), Plaintiffs, Ron Pasemko and Leslie King (Docket 1701 08541), Plaintiffs, Lynne Hatley and Jay Honeyman (Docket 1701-08542)

Megan Klein and Nicholas McIlhargey, Verjee Law
For Plaintiffs, Ed Lazdowski et al. (Docket 1701-05277), and Plaintiffs, Catherine Hanna-Seed et al. (Docket 1701-05276)

Constantine Pefanis, Pefanis Horvath
For Plaintiffs, Joel Lepper et al. (Docket 1701-08200), and Plaintiffs, Paul Lepper et al. (Docket 1701-07584)

Sarah Miller, Jensen Shawa Solomon Duguid Hawkes LLP
For Plaintiffs, David Palmer et al. (Docket 1701-08196)

APPENDIX A

ACTION	1701 08473
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Helen Ann Kudzin, Rischa Reynolds, Charles Reynolds, Toni Leblanc, Tim Heath, Andrew Ewan, Samantha Ewan, Judith Ewan, David Robert Palmer, Jenny Marie Palmer, Venita Sobering, John Montgomery, Eleanor McRory (Deceased) By Her Personal Representative John McRory, Lorna Kuhn, Dieter Kuhn, Alaric Fish, Roberta Fish, Scott Lee Egger, Janice Fong, Andrew Kirk, Nancy Kirk, Christian Hery, Veronique Hery, George Biggy, Theresa Biggy, Lindsey Madden, Brendan Madden, Brenda Lea Cook, Robert V. Knowlden, Valerie C. Knowlden, Clifford Alexander White, Johanne Margaret Marie White, John Lloyd Gingles, Kathleen Louise Gingles, Katherine Scott, Theresa Zakli, Mike Zakli, David Graham, Victor George Batycki, Wendy Batycki (Deceased) by her Personal Representative, Jivan Maher, Rambha Maher, Wilmar Homes Ltd., Debra Loraine Reeve, Marie Antoinette Owen (Deceased), David William Owen, Carolyn E. Kennedy, Larry Lehr, Lester Lehr, Eileen Lehr, John Doe I-IV, and Jane Doe I-IV
DEFENDANTS	APM Construction Services Inc., DCR Construction Inc., DCR Inc., David Rowe, Ground Zero Excavation, Ground Zero Grading Inc., ATCO Gas and Pipelines Ltd., ATCO Gas a division of ATCO Gas and Pipelines Ltd., Cam-Tel Communications Ltd. O/A Cam-Tel Line Locating Ltd, Alberta One-Call Corporation, Alberta One-Call Location Corporation, Alberta Social Housing Corporation, The Alberta Social Housing Corporation a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network of Public Housing, the Town of Canmore, ABC Corp. Ltd., DEF Corp. Ltd., Dave Arbeau, Jerry Arbeau, Ben Arends, Andrew Pacaud, Kavon Sharifi, John Doe I and John Doe II

- and -

ACTION	1701 03619
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	ATCO Gas and Pipelines Ltd.
DEFENDANTS	APM Construction Services Inc., Ground Zero Grading Inc., DCR Inc., DCR Construction Inc., Benjamin Arends, Dave Arbeau, Jerry Arbeau, Andrew Pacaud, Kavon Sharifi, David Rowe, Jason Middlemiss, Keith G. Bugden John Doe 1, John Doe 2 and John Doe 3

- and -

ACTION	1701 07303
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	William Wollner, Margaret Hall, Dianne Fiddler, Ralph George Belcourt, Nettie Tworowski, Brian Webster, Herbert Stephenson, Carmelo Ciaramiaro, Paul Lepper and Brian Youngberg
DEFENDANTS	APM Construction Services Inc., DCR Inc, DCR Construction Inc., David Rowe, Ground Zero Grading Inc., ATCO Gas, a division of ATCO Gas and Pipelines Ltd., Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, Town of Canmore, and Alberta Social Housing Corporation, David Arbeau, Jerry Arbeau, Benjamin Arends, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss and Keith Bugden

- and -

ACTION	1701·05276
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Catherine Hanna-Seed
DEFENDANTS	APM Construction Services Inc., Ground Zero Excavation, Ground Zero Grading Inc., The Alberta Social Housing Corporation, The Alberta Social Housing Corporation a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network of Public Housing Agencies, ATCO Gas and Pipelines Ltd., The Town of Canmore, DCR Construction Inc., DCR Inc., Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, David Rowe, Dave Arbeau, Jerry Arbeau, Ben Arends, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss, Keith G. Bugden, ABC Corporation, DEF Corporation and XYZ Corporation

- and -

ACTION	1701·05277
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Ed Lazdowski and Donna Lazdowski
DEFENDANTS	APM Construction Services Inc., Ground Zero Excavation, Ground Zero Grading Inc., The Alberta Social Housing Corporation, The Alberta Social Housing Corporation a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network of Public Housing Agencies, ATCO Gas and Pipelines Ltd., The Town of Canmore, DCR Construction Inc., DCR Inc., Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, David Rowe, Dave Arbeau, Jerry Arbeau, Ben Arends, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss, Keith G. Bugden, ABC Corporation, DEF Corporation and XYZ Corporation

- and -

ACTION	1701 07584
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Paul Lepper, Lori Lepper and His Majesty the King in Right of Alberta
DEFENDANTS	APM Construction Services Inc., DCR Inc., DCR Construction Inc., David Rowe, Ground Zero Grading Inc., ATCO GAS, a division of ATCO Gas Pipelines Ltd., Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, Town of Canmore, and Alberta Social Housing Corporation and David Arbeau, Jerry Arbeau, Benjamin Arends, Andrew Pacaud, Kavon Sharifi, Jason Middelmiss, and Keith Bugden

- and -

ACTION	1701 08196
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	David Palmer, Jenny Palmer, Antonia Leblanc, Timothy Heath, Douglas Booth, Gillian Booth, Heather Booth, Nancy Kirk, Andrew Kirk, Dianne Fiddler, Randy Fiddler, Theresa Biggy, George Biggy, Kyndra Biggy, Helen Kudzin, Charles Reynolds, Rischa Reynolds, and His Majesty the King in Right of Alberta
DEFENDANTS	APM Construction Services Inc., Dave Arbeau, Jerry Arbeau, Ground Zero Excavation, Ground Zero Grading Inc., John Doe, Jason Middlemiss, Ben Arends, Andrew Pacaud, Kavon Sharifi, ATCO Gas and Pipelines Ltd., ATCO Gas, a division of ATCO Gas and Pipelines Ltd., Alberta Social Housing Corporation, The Alberta Social Housing Corporation, a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network OF Public Housing, DCR Inc., DCR Construction INC., David Rowe, Keith G. Bugden, Cam-Tel Communications Ltd., operating as Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, Alberta One-Call Location Corporation, and The Town of Canmore

- and -

ACTION	1701 08200
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Joel Lepper, Erika Lepper, a Minor by her Father and Litigation Representative, Paul Lepper, Annie Lepper, a Minor by her Father and

	Litigation Representative, Paul Lepper, and His Majesty the King in Right of Alberta
DEFENDANTS	APM Construction Services Inc., DCR Inc., DCR Construction Inc., David Rowe, Ground Zero Grading Inc., ATCO Gas, a division of ATCO Gas and Pipelines Ltd., Cam-Tel Communications Ltd. operating under the trade name "Cam-Tel Line Locating", Alberta One-Call Corporation, Alberta Social Housing Corporation, and the Town of Canmore, and Dave Arbeau, Jerry Arbeau, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss, Keith Bugden and Ben Arends
- and -	
ACTION	1701 08528
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Alberta Social Housing Corporation and His Majesty the King in Right of Alberta
DEFENDANTS	APM Construction Services Inc., Dave Arbeau, Jerry Arbeau, DCR Inc., DCR Construction Inc., David Rowe, Ground Zero Grading Inc., Ben Arends, Andrew Pacaud, Kavon Sharifi, ATCO Gas and Pipelines Ltd., and John Does 1-4
- and -	
ACTION	1701 08541
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	Ron Pasemko and Leslie King
DEFENDANTS	APM Construction Services Inc., Ground Zero Excavation, Ground Zero Grading Inc., The Alberta Social Housing Corporation, The Alberta Social Housing Corporation a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network Of Public Housing Agencies, ATCO Gas and Pipelines Ltd., The Town of Canmore, DCR Construction Inc., DCR Inc., Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, David Rowe, Keith Bugden, Dave Arbeau, Jerry Arbeau, Ben Arends, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss, ABC Corporation, DEF Corporation and XYZ Corporation
- and -	
ACTION	1701 08542
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary

PLAINTIFF	Lynne Hatley and Jay Honeyman
DEFENDANTS	APM Construction Services Inc., Ground Zero Excavation, Ground Zero Grading Inc., The Alberta Social Housing Corporation, The Alberta Social Housing Corporation a division of Alberta Seniors, His Majesty the King in Right of Alberta, Bow Valley Regional Housing, Alberta Network Of Public Housing Agencies, ATCO Gas and Pipelines Ltd., The Town of Canmore, DCR Construction Inc., DCR Inc., Cam-Tel Line Locating Ltd., Alberta One-Call Corporation, David Rowe, Keith Bugden, Dave Arbeau, Jerry Arbeau, Ben Arends, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss, ABC Corporation, DEF Corporation and XYZ Corporation

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ACTION	1801 16715
COURT	Court of King's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	William Francis Cherak and Maxine Cherak, Douglas Rex Booth and Gillian Carole Booth, Brian Balazs, and Cameron J Dick and Sarah Dick
DEFENDANTS	APM Construction Services Inc., Ground Zero Grading Inc., ATCO Gas and Pipelines Ltd., Alberta Social Housing Corporation, Alberta One Call Corporation, DCR Inc., DCR Construction Inc., David Rowe, ABC Ltd., and John Doe, Ben Arends, Andrew Pacaud, Kavon Sharifi, Dave Arbeau, Jerry Arbeau, Jason Middlemiss, Keith G. Bugden