Court of King's Bench of Alberta

Citation: Royal & Sun Alliance Insurance Company of Canada v Co-Operators General Insurance Company, 2023 ABKB 426

Date: 20230718
Docket: 2101 06838
Registry: Calgary

Between:

Royal & Sun Alliance Insurance Company of Canada and APM Construction Services Inc.

Applicants

- and -

Co-operators General Insurance Company

Respondent

And Between:

Docket: 1701 08473

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 Inc., DCR Construction 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, Town Of Canmore, ABC Corp. Ltd., Def Corp. Ltd., Dave Arbeau, Jerry Arbeau, Benjamin Arends, Andrew Pacaud, Kavon Sharifi, Jason Middlemiss, Keith G. Budgen, John Doe I and John Doe II

Defendants[1]

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

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 a large explosion (**Explosion**) occurred causing property damage at the site and nearby properties.

[2] The Explosion resulted in thirteen separate actions filed in 2017 (**Canmore 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 Canmore 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 Canmore Actions. In January 2023, I directed the hearing of a summary dismissal application (**Dismissal Application**) at a full-day special application. At the same time I directed a separate full-day application to hear an Originating Application (**Duty to Defend Application**), which had been filed by Royal & Sun Alliance Insurance Company of Canada (**RSA**) and APM Construction Services Inc (**APM**) seeking a declaration that Co-operators General Insurance Company (**Co-operators**) owes APM a duty to defend and owes RSA a duty to contribute to APM's defence, together with a cross-application (**Cross-Application**) by Co-operators to adjourn the Duty to Defend Application and to have it joined with the Canmore Actions (**Insurance Applications**). The parties have expressed a desire to have both Applications heard and decided quickly as there is a mediation scheduled for August 2023.

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[1] The full styles of causes for the Canmore Actions that are involved in the Insurance Applications are attached as Appendix A to these Reasons. Third-Party Defendants have been omitted in styles of causes.

[4] These are my reasons in respect of the Insurance Applications. My reasons in respect of the Dismissal Application have been prepared and published separately: ***Kudzin v APM Construction Services Inc***, 2023 ABKB 425 (**Dismissal Reasons**).

[5] The Insurance Applications raise the questions of when an originating application seeking a declaration of a duty to defend can or should be heard summarily, whether the Duty to Defend Application should be determined summarily and, if it not determined summarily, whether it should be directed to be heard concurrently or consecutively with the Canmore Actions.

[6] For the reasons set out below, I find that the Duty to Defend Application should not be determined summarily, but should be adjourned to a trial process and heard concurrently or consecutively with or to the Canmore Actions with an appropriate more detailed procedural order or agreement to be made in due course.

II. Background and Positions of the Parties

[7] RSA and APM base their position on the undisputed fact that, on April 28, 2015, David Rowe (**Rowe**), the principal of DCR Inc (**DCR**), signed a letter of acceptance (**LOA**) in respect of the earthworks and underground utilities for the Project. The signed LOA was provided to APM, together with a document entitled "Confirmation of Insurance" (**COI**) which indicated it was signed on behalf of Co-operators by an authorized representative, Brenda Burwash (**Burwash**).

[8] RSA and APM's position is that Burwash had actual, implied or ostensible authority to bind Co-operators and did so. On its face, the COI references APM as an "Additional Insured" in respect of DCR's commercial general liability insurance policy it held from Co-operators, Policy No. 003609494 (**Policy**). RSA and APM's position is that APM is insured under the Policy as an "Additional Insured" for claims against APM based on the operations of DCR. RSA and APM do not assert that APM is insured under the Policy for its own independent negligence.

[9] APM also had a commercial general liability insurance policy with RSA for the relevant period. APM initially tendered to RSA its defence in the Canmore Actions. RSA acknowledged its duty to defend APM under the RSA policy, on a reservation of rights basis.

[10] In September 2017, APM requested indemnification from DCR pursuant to the terms of the LOA.

[11] In 2018, APM filed Statements of Defence, Amended Statements of Defence, and third party claims, in the Canmore Actions. Pleadings were largely completed in the Canmore Actions in 2018.

[12] In December 2019, APM demanded production of all of DCR's commercial general liability policies in effect as of June 26, 2015. The Declarations for the Policy were provided on December 4, 2019.

[13] On January 14, 2020, APM requested that Co-operators confirm that it will provide APM a defence based on the COI and the Policy.

[14] On December 1, 2020, RSA's coverage counsel requested copies of the Policy and confirmation whether Co-operators had issued a coverage position to APM.

[15] On January 25, 2021, Co-operators provided its position in respect of APM's coverage under the Policy. In summary, Co-operators' position is that (1) Co-operators never received a request to add APM as an Additional Insured; (2) APM was never in fact added as an Additional Insured; (3) the COI was issued for "information only" and conferred no rights on APM or obligations on Co-operators; (4) DCR assigned its obligations in respect of the Project to another contractor, Ground Zero Grading Inc (**Ground Zero**), and (5) by the time of the Explosion there was no longer any contract between APM and DCR, and the COI "was superfluous and had no effect".

[16] On June 4, 2021, RSA and APM filed the Duty to Defend Application seeking a declaration that Co-operators has a duty to defend APM in the Canmore Actions and related relief seeking reimbursement for past and future costs of APMs defences. The Duty to Defend Application is supported by a May 31, 2021 affidavit of one of APM's former employees, David Arbeau (**D. Arbeau**) and a December 15, 2022 affidavit of an RSA employee, Francisco Dominguez (**Dominguez**). Both affiants were questioned on their affidavits and the questioning transcripts are before me.

[17] On May 20, 2022, Co-operators filed the Cross-Application in which it seeks an adjournment of the Duty to Defend Application, an order directing that it be tried concurrently or consecutively with the Canmore Actions pursuant to rule 3.72, and consequent relief about the use of evidence from the Canmore Actions in the Duty to Defend Application. The Respondents to the Cross-Application include all the parties in the Canmore Actions. The Cross-Application is supported by affidavits from a Co-operator adjuster, Jim Molyneaux (**Molyneux**), and Rowe. Both affiants were questioned on their affidavits and the questioning transcripts are before me.

[18] Since RSA and APM proceeded by way of Originating Application, Co-operators did not file a statement of defence or other formal pleading.

[19] The only parties that participated in the Insurance Applications were RSA, APM and Co-operators. None of the plaintiffs or other defendants in the Canmore Actions objected or took any position.

III. The Record

[20] Co-operators prepared a 901-page compendium of evidence for the Insurance Applications (**Compendium**). The Compendium includes the affidavit of Molyneaux (**Molyneaux Affidavit**), which appends numerous Exhibits, including a number of records produced by APM, DCR and Ground Zero in the Canmore Actions, as well as excerpts from the transcripts from questioning for discovery pursuant to part 5 (**Part 5 questioning**) of the Alberta *Rules of Court*, Alta Reg 124/2010 (*Rules*) of Jason Middlemiss (**Middlemiss**)(Exhibits 19 and 20), Jerry Arbeau (**J. Arbeau**)(Exhibits 21 and 22), and D. Arbeau (Exhibits 24 and 25).

[21] During argument, I asked whether there was an additional insured endorsement (Form No. D-1(Z)) in respect of the Policy, because it was referenced in the Declarations for the Policy but was not in the record before me. Co-operators' counsel was able to locate Form No. D-1(Z)

Additional Insured Endorsement – Miscellaneous (**Additional Insured Endorsement**) and, after giving RSA and APM's counsel an opportunity to consider it, the parties agreed the Additional Insured Endorsement was part of the record before me and would be appended to a Co-operators' affidavit to be filed subsequent to the application pursuant to rule 3.14(2).

IV. Issues

[22] The issues on this application are:

(a) Which parts of the Compendium are admissible and for what purposes?

(b) Can or should the Duty to Defend Application be determined summarily?

(c) If the Duty to Defend Application can and should be determined summarily, should the court grant the declarations sought?

(d) If the Duty to Defend Application is not determined summarily, should it be heard concurrently or consecutively with the Canmore Actions?

(e) What is an appropriate order?

V. Analysis

A. Which parts of the Compendium are Admissible and for What Purposes?

[23] The Insurance Applications involve both an originating application, as well as an application within the Canmore Actions. The evidence that may be relied on in the two processes is slightly different.

[24] Rule 3.14(1) governs the evidence that the court may consider in an Originating Application process. It provides:

> 3.14(1) When making a decision about an originating application, other than an originating application for judicial review, the Court may consider the following evidence only:
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> (a) affidavit evidence, including an affidavit by an expert;
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> (b) a transcript referred to in rule 3.13;
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> (c) if Part 5 applies by agreement of the parties or order of the Court to the originating application, the transcript evidence or answers to written questions, or both, under that Part that may be used under rule 5.31;
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> (d) an admissible record disclosed in an affidavit;
>
> (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 each of the other parties 5 days' or more notice of that party's intention 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.

[25] Rule 6.11 governs the evidence the court may consider in an application:

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.

[26] I address the components of the Compendium below.

1. Records Produced in the Canmore Actions

[27] As noted above, the Molyneaux Affidavit exhibits several records produced by parties to the Canmore Actions that Molyneaux was not involved with and of which he has no first-hand knowledge (Exhibits 11-18 and 26-28). Exhibits 11-18 were included as "Documentary Evidence in Support of Ground Zero Assuming the Earthworks Subcontract". Exhibit 26 is a portion of a contract between APM and the project owner, Alberta Social Housing Corporation (**ASHC**). Exhibits 27 and 28 were included as evidence of "Other Instances of Additional Insureds".

[28] The Exhibits that were disclosed in affidavits of records in the Canmore Actions may be used in those actions, in relation to the rule 3.72 application, but only for the purposes of proving the records are authentic and were sent and received as indicated: ***Kudzin*** at paragraphs 59 to 70.

[29] However, Co-operators' attempted use of these Exhibits in response to the Duty to Defend Application raises the question raised by Justice Slatter in ***CCS Corporation v Pembina Pipeline Corporation***, 2014 ABCA 390 [***CCS CA***] at para 94(b)(emphasis added):

> 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**.
>
> Whether information and belief based on these sources is inadmissible, or whether the nature of the source merely affects the weight of the evidence, remains an open question.

[30] Nobody objected to these Exhibits being in the Compendium. In this case, I find that I do not need to decide whether they are admissible, or for what purpose, because these Exhibits, whether admitted or not, would not change my conclusions in the Insurance Applications. Further, the first tranche relates to the "**Contract Issues**" discussed in the Dismissal Reasons, namely the determination of the terms of the contractual relationships and obligations in respect of earthworks work for the Project, amongst APM, ASHC, DCR and Ground Zero, which no one has suggested is ripe for summary determination.

[31] In my view, Exhibit 26 is relevant. Exhibits 27 and 28 are not relevant.

[32] Accordingly, I have proceeded with these applications on the basis that these Exhibits would make no difference to the outcome of the Duty to Defend Application, whether admitted as some truth of the proof of their contents or only for the presumed admissions set out in rule 5.15 as discussed in the Dismissal Reasons: ***Kudzin*** at paragraphs 59 to 70.

2. Part 5 Questioning Transcripts

[33] There is no order of the court permitting Part 5 Questioning to be used in the Duty to Defend Application under rule 3.14(c). There is also no evidence of an agreement of the parties, although nobody objected to the Part 5 questioning in the Compendium. Co-operators was not the party that conducted any of the Part 5 questioning, and was not a party to the Canmore Actions, so Co-operators cannot use the Part 5 questioning transcripts under 3.14(1)(c) or 6.11(1)(c).

[34] The only possible way Co-operators could use the Part 5 questioning transcripts of Middlemiss, J. Arbeau and D. Arbeau is pursuant to rules 3.14(a) and 6.11(a), because they have

been appended to the Molyneaux Affidavit. In my view, in doing so, Co-operators raises the open question raised by Justice Slatter at para 94(a) of ***CCS CA***, namely whether someone can rely on Part 5 transcripts of other parties to support an information and belief "notwithstanding that the party tendering the affidavit could not read in that questioning except against the party being questioned".

[35] I have reviewed the excerpts from the Middlemiss, J. Arbeau and D. Arbeau questioning and have considered the Insurance Applications assuming they are admitted and assuming they are not admitted. In the result, whether these excerpts are admitted or not, would not change my decision on the Duty to Defend Application or the Cross-Application, and use and admissibility of these Part 5 questioning transcripts becomes academic: ***CCS CA*** at para 87.

B. Can or Should the Duty to Defend Application be Determined Summarily?

[36] Rule 3.2 provides that a statement of claim must be used to start an action unless, among other things, there is no "substantial factual dispute": rule 3.2(a). Accordingly, the Duty to Defend Application could only be commenced by way of the Originating Application if there is no substantial factual dispute.

[37] Even where there is not a substantial factual dispute, courts have significant discretion under the *Rules* as to whether and how originating application proceedings proceed, including:

(a) rule 3.2(6), which provides that where an action should have been started or should continue in another form, the court may make any procedural order to correct and continue the proceeding and deal with ay related matter;

(b) rule 3.12, which provides that at "any time in an action started by originating application the court may, on application, direct that all or any rules applying to an action started by statement of claim apply to the action started by originating application";

(c) rule 3.14(1)(g), which specifically provides that the court may permit oral evidence to be adduced in an originating application; and

(d) rule 1.4(1), which provides the court significant discretion to, subject to any specific provision in the rules, make any order with respect to practice or procedure, in order to implement and advance the purpose and intention of the rules under rule 1.2 (including providing a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way). Rule 1.4(2) also provides a broad range of discretionary powers.

[38] Courts may decide that claims commenced with originating applications are better suited to trial or some other process with *viva voce* evidence: ***Royal Bank of Canada v Racher***, 2017 ABQB 181 at para 17.

[39] Further, Alberta courts have effectively harmonized aspects of the originating application process with the summary judgment process, by confirming that the test for whether a matter is appropriate for summary judgment, as set out in ***Hryniak v Mauldin***, 2014 SCC 7 and ***Weir-Jones***

Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49, applies to originating applications with some modifications: ***Kathryn Farms Ltd v 1572548 Alberta Ltd***, 2021 ABQB 245 at para 30, aff'd 2022 ABCA 21 at para 20; ***Statt v SGI Insurance Services Ltd***, 2021 ABCA 268 at para 59; ***Lloyd v de Walle***, 2022 ABCA 321 at paras 8–12; ***Rifco Inc (Re)***, 2020 ABQB 366 at para 38; ***Energy Construction and Directional Drilling (Re)***, 2022 ABQB 268 at para 10; ***Hotchkiss v Budding Gardens Inc***, 2020 ABQB 794 at para 10. This gives rise to additional discretionary considerations.

[40] In my view, in determining whether, in the context of an originating application process, it is "possible to fairly resolve the dispute on a summary basis", or whether the court is left "with sufficient confidence in the state of the record", as contemplated in ***Weir-Jones***, the court must be mindful of the context of the application including that, absent agreement of the parties or a court order under rules 3.12 or 3.14(1)(c), originating applications do not involve formal pleadings, records discovery or questioning under Part 5 of the *Rules*: ***Rifco Inc*** at para 38. The less robust process may impact whether the matter can be determined fairly on the record or the court's confidence in the record.

[41] Applications seeking a declaration that an insurer has a duty to defend are often commenced through an originating application or other summary process, because, in many cases, they can and should be decided summarily without issue. This is in part because of the limited nature of the review that is mandated in considering a duty to defend application, which has been confirmed numerous times by the Supreme Court of Canada, and has been recently summarized by the Alberta Court of Appeal in ***Optrics Inc v Lloyd's Underwriters***, 2022 ABCA 26 at paras 39–43:

> [39] Whether or not the 2016-2017 Underwriters are bound by the terms of the 2016-2017 Policy to defend against BNI's breach of contract claim is a question to be determined on the basis of the pleadings, the 2016-2017 Policy wording, and limited extrinsic evidence in accordance with the principles governing the determination of an insurer's duty to defend.
>
> [40] These principles are well established.
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> [41] The duty to defend under a policy of indemnity is broader than the duty to indemnify. In *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33 at paras 19-20, the Supreme Court of Canada explained:
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> > An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, 1990 CanLII 144 (SCC), [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and

> the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).
>
> In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35; *Nichols*, at p. 810). [emphasis added]

[42] To determine the true nature and substance of the claim, courts may review documents referred to in the pleadings. This limited extrinsic evidence is not considered for the purpose of examining the contentious points in issue in the underlying litigation, but rather to illuminate the substance of the claims made: *Monenco Ltd v Commonwealth Insurance Co*, 2001 SCC 49 at paras 37-39.

[43] The widest latitude is given to the allegations in the pleadings in determining whether they raise a claim that falls within coverage: *Nichols v American Home Assurance Co*, [1990] 1 SCR 801 at 812, 68 DLR (4th) 321.

[42] In applying this framework, in many cases there are no factual disputes about the existence or validity of the policy, or other factors that may militate against providing a declaration of the duty to defend. Accordingly, often courts assess the duty to defend in the context of the pleadings in the underlying action and summarily and expeditiously determine the duty to defend question: see e.g. ***Malic v Zurich Insurance Company Ltd***, 2021 ABQB 308; ***Tien Lung Taekwon-Do Club v Lloyd's Underwriters***, 2015 ABCA 46; ***Northbridge Indemnity Insurance Corporation v Intact Insurance Company***, 2014 ABQB 345; ***Canyon Roofing (1995) Ltd v Royal & Sunalliance Insurance Co of Canada***, 2006 ABQB 719; ***Palliser Regional (School) Division #26 v Aviva Scottish & York Insurance Co Limited***, 2004 ABQB 781.

[43] However, in other cases, additional other factors come into play which make a declaration of a duty to defend more complicated. For example, historically, there were arguably conflicting lines of authority in Canada as to when it is appropriate for a court to grant a declaration that an insurance company has a duty to defend when the essential validity or existence of the policy had been placed into question (for example, where the insurer asserted misrepresentation, fraud or material-non-disclosure in the obtaining of the policy, or a breach of a condition, or that policy will never come into existence): see e.g. Gary A Zabos, "An Update on Current Issues in the Duty to Defend" in *Insurance Law Update* (Saskatoon: Saskatchewan Legal Education Society, 1999), 1999 CanLIIDocs 473 at 17–20. In this matter, Co-operators relies on a selection of these cases: ***Agassiz Enterprises (1980) Ltd v General Accident Assurance Co of Canada***, 1988 CanLII 5715

(MBCA) at para 26; ***Continental Insurance Co v MTC Electronic Technologies Co Ltd***, 1995 CanLII 1532 (BCSC) at paras 4, 15–16; ***Litton Systems Canada Ltd v Olympia Engineering Ltd***, 1990 CanLII 6661 (ONSC), 1990 CarswellOnt 840 at para 16.

[44] More recently, at least in Alberta and some other provinces, it has been settled and recognized that there are not inflexible rules and that whether to grant a duty to defend application summarily and before trial of the underlying action it is a matter of discretion, based on the circumstances of the case: ***Optrics*** at para 67; ***Kostic v CIBC Trust Corporation***, 2018 ABCA 355 at para 62, leave to appeal to SCC refused, 38501 (2 May 2019); ***IT Haven Inc v Certain Underwriters at Lloyd's, London***, 2022 ONCA 71 at paras 46–54; ***Optimum Frontier Insurance Company v Drane***, 2004 NBCA 52 [***Drane***]; ***Longo v Maciorowski***, 2000 CanLII 16897 (ONCA), 50 OR (3d) 595 (CA) at paras 32–35, leave to appeal to SCC refused, 28301 (10 May 2001).

[45] In my view, based on the *Rules* cited earlier and my review of some of the cases, some of the non-exhaustive factors for the court to consider in exercising its discretion whether to declare a duty to defend in an originating application before the merits of the underlying litigation are decided, include:

(a) where possible and appropriate, applications to determine whether an insurance company has a duty to defend should be dealt with expeditiously: ***Optrics*** at para 44; ***IT Haven*** at para 39; ***McLean (Litigation Guardian of) v Jorgenson***, 2005 CanLII 45188 (ONCA), [2005] OJ No 5207 at para 5; ***Kostic*** at para 25;

(b) whether there is a "substantial factual dispute," as contemplated by rule 3.2(2)(a), respecting the issues to be determined in the duty to defend application. For example, where there is a substantial factual dispute and contested positions regarding the existence or essential validity of the policy, whether the applicant is an insured under the policy, whether the applicant obtained the policy by misrepresentation, fraud or material-non disclosure, whether the applicant breached a statutory condition or condition of the policy, whether relief from forfeiture may apply, or whether the insurer may be estopped from denying the duty to defend, these may be factors against summary determination: ***Optrics*** at para 65; ***SCS Western Corp v Dominion of Canada General Insurance Co***, 1998 ABQB 152 at para 63; ***IT Haven*** at paras 46–56; ***Longo*** at para 15; ***Litton Systems*** at para 20; ***Featherstone v Zurich Insurance Co***, 1991 CanLII 7111 (ONSC), 1991 CarswellOnt 59 at paras 25–27; ***Laughlin v Sharon High Voltage Inc***, 1993 CanLII 8648 (ONSC), 1993 CarswellOnt 673 at para 51; ***Griffen v Hopey Estate***, 1998 CanLII 14691 (ONSC), 1998 CarswellOnt 2969 at para 10; ***Slough Estates Canada Ltd v Federal Pioneer Ltd***, 1994 CanLII 7313 (ONSC), 1994 CarswellOnt 153 at paras 48, 78; ***Comeau v Roy et al***, 1999 CanLII 20762 (NBCA) at paras 13–17; ***Drane*** at para 24; ***Agassiz Enterprises*** at paras 7, 31; ***Carter v Kerr***, 1990 CanLII 253 (BCCA); ***Dominion of Canada General Insurance Co v MacCulloch***, 1991 CanLII 8261, 78 DLR (4th) 593 (NSCA) at 597–598; ***Wade v Wade***, 2000 CanLII 20389 (NLSC) at para 12;

(c) even where there is no substantial factual dispute, whether the applicant cannot meet the initial or ultimate burden required under ***Weir-Jones*** to prove that there is

no defence to its claim for the declaration of a duty to defend and no genuine issue requiring a trial: ***Optrics*** at paras 5, 68; ***SCS Western*** at para 63; ***Litton Systems*** at para 20;

(d) whether it is possible to fairly resolve the question of the duty to defend summarily, or if the court is not left with sufficient confidence in the state of the record: ***Weir-Jones*** at para 47. As noted earlier, it is important for the court to consider whether regular pre-trial procedures like pleadings, records discovery, or Part 5 questioning may be required in the circumstances of a particular case: ***Agassiz Enterprises*** at para 36; ***Continental*** at paras 15–16; ***Slough*** at paras 48, 78;

(e) the strength of the parties' respective positions that there is a duty to defend: ***Optrics*** at para 65; ***Longo*** at para 36; If there is even a "mere" or "any" possibility (or even where it is unclear) that the claim falls within the insurance policy, it will be a factor in support of a summary declaration of the duty to defend: ***Progressive Homes Ltd v Lombard General Insurance Co of Canada***, 2010 SCC 33 at para 51; ***Nichols v American Home Assurance Co***, [1990] 1 SCR 801 at 810, 1990 CanLII 144 (SCC); ***Optrics*** at para 45. Where it is "clear" and "unambiguous" that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, this will be a factor against declaring a duty to defend and may warrant a summary declaration that there is no duty to defend: ***Nichols*** at 810; ***Monenco Ltd v Commonwealth Insurance Co***, 2001 SCC 49 at para 29; ***Optrics*** at para 45; ***Kostic*** at para 28;

(f) whether deciding the duty to defend application might require the court to make findings that would compromise, affect or determine live issues in the underlying litigation: ***Optrics*** at para 44; ***Kostic*** at paras 25, 37; ***IT Haven*** at paras 38, 56; ***Slough*** at para 48. The duty to defend application should not be turned into a "trial within a trial": ***Monenco*** at para 37; ***Kostic*** at paras 29–31, 62; ***Agassiz Enterprises*** at paras 35, 36;

(g) whether a declaration of a duty to defend may cause conflicts between the insured and the insurer in the underlying action: ***Nichols*** at 811–812; ***Drane*** at para 24; ***Dominion of Canada General Insurance Company v PCS Investments Ltd (Property Claims Service)***, 1996 ABCA 10 at paras 11–12 [***PCS Investments***];

(h) whether there is urgency to provide a defence, including whether the applicant is already defending or being defended in the underlying action. Financial or other urgency for the potential insured will be a factor in favour of a summary declaration: ***Optrics*** at para 65; ***Longo*** at para 33; ***Drane*** at para 24; ***IT Haven*** at para 56. On the other hand, if the party seeking the declaration is otherwise insured and is already being defended by another insurer, or if the applicant's reasonable expectations are that a different insurer would initially defend it, it may be a factor against the declaration: ***Canadian Indemnity Co v Royal Insurance Co of Canada***, 1993 CanLII 6999 at para 31; ***SCS Western*** at para 64. It might be also pertinent if the party seeking defence costs does not have the ability to reimburse the defence

costs if it is ultimately found to be required to do so: ***IT Haven*** at para 56; ***Longo*** at para 34;

(i) whether the party seeking the declaration moved expeditiously to seek the declaration to the duty to defend. Lengthy delay, or a lack of cooperation by the insured, may militate against the declaration: ***Agassiz Enterprises*** at para 26; ***Wade*** at para 12;

(j) whether there is prejudice, irreparable harm or inconvenience to the parties involved in the underlying action, to the party seeking the declaration if the application is not granted, or to the insurance company if it is granted: ***Continental*** at paras 16–17; ***Canadian Indemnity*** at para 31;

(k) the status of the underlying action: ***IT Haven*** at para 56;

(l) whether the declaration will result in any practical benefit, or will likely lead to further litigation, expense or delay: ***Canadian Indemnity*** at para 31. For example, if a summary declaration may result in further disputes or litigation over the insurer's proportionate share of the defence costs because only some of the claims in the underlying action are covered under the policy, or because there are more than one insurer contributing and equitable contribution principles are engaged, the insurer's duty to defend may be limited and it may be impossible or difficult to allocate costs before the trial of the underlying action: ***Nichols*** at 811–812; ***Royal & SunAlliance Insurance Company of Canada v Meridian Construction Inc***, 2012 NSCA 84 at para 25; ***Aetna Insurance Company v Canadian Surety Company***, 1994 ABCA 145 at paras 185–186; ***Continental Insurance Co v Dia Met Minerals Ltd.***, 1996 CanLII 3363 at para 18; ***Canadian Indemnity*** at para 31; ***Atlific Hotels and Resorts Ltd v Aviva Insurance Company of Canada***, 2009 CanLII 24634 (ONSC) at paras 9–10; ***Northbridge Indemnity*** at para 28.

[46] I have considered whether to grant the Duty to Defend Application based on relevant factors, including those set out above. I specifically address some of these factors below.

1. Is There a Substantial Factual Dispute?

[47] Although it does not argue that the Policy is void, Co-operators raises issues that go to the very existence of APM's rights as an insured. This is analogous to cases where the validity of the policy is challenged. However, that does not, in and of itself, mean that there is a substantial factual dispute, or that summary determination is not appropriate.

[48] In my view, the fundamental facts about the COI are not in dispute. APM was the general contractor for the Project. DCR tendered a bid for the earthworks and utilities subcontract. APM issued the LOA to DCR, one of the requirements of which was for DCR to provide proof of insurance listing APM as an additional insured. Burwash, an employee of an insurance broker, Bjornson Insurance Group Inc (**Bjornson**), signed the COI. Bjornson is an agent of Co-operators and, as of at least July 2022 when Molyneaux was questioned, Bjornson advertised on the Co-operators website and used Co-operators' email addresses. The COI was on Co-operators' letterhead, identified Burwash as "authorized representative", and identified APM as Additional

Insured in respect of the Policy. DCR received a copy of the COI and provided it to APM when DCR provided APM the signed LOA. Bjornson was the agent/service office for the Policy. Co-operators was never advised about the COI and APM was not formally documented as Additional Insured in respect of the Policy. Bjornson maintained a copy of the Policy and its endorsements and Co-operators requested and received them from Bjornson after the Explosion.

[49] However, there is a dispute between the parties as to whether APM ever became an Additional Insured, or whether it remained an Additional Insured at the time of the Explosion. These raise issues of law, or mixed fact and law, including in the Contract Issues. I address those issues in the next section.

2. Strength of the Duty to Defend Positions: Whether there is No Merit to Co-Operators' Position and Whether There is a Genuine Issue Requiring a Trial

[50] The strength of the parties' positions on whether Co-operators owes a duty to defend depends on these issues raised by the parties:

(a) is Co-operators bound by the COI signed by Burwash?

(b) if Co-operators is bound by the signed COI, what is its legal effect?

(c) if Co-operators was bound by the signed COI, did it cease to be bound by the COI before the Explosion?

(d) if Co-operators was bound by the COI at the time of the Explosion, based on the framework for assessing a duty to defend (including the pleadings in the Canmore Actions) did it give rise to a Co-operators' duty to defend APM?

[51] I briefly address the strength of the positions of the parties below.

a. Is Co-operators Bound by the Signed COI?

[52] This question depends on whether Burwash or Bjornson was Co-operators' agent with actual, implied or ostensible authority to bind Co-operators to the terms of the COI.

[53] A principal may be bound by an agent's conduct where the agent has actual express, actual implied or ostensible authority: ***Toronto-Dominion Bank (TD Canada Trust) v Currie***, 2017 ABCA 45 at paras 6–7 [***Currie***]; ***Williams (Guardian ad litem of) v BC Conference of the Mennonite Brethren Churches***, 2010 BCSC 791 at para 41.

[54] Actual authority (whether express or implied) is the authority which the principal has given the agent wholly or in part by means of words created by a consensual agreement to which they are alone parties: ***Monachino v Liberty Mutual Fire Insurance Company***, 2000 CanLII 5686, 47 OR (3d) 481 (CA) at paras 33–35; ***Keddie v Canada Life Assurance Co***, 1999 BCCA 541 at para 23; ***Williams*** at paras 42–44.

[55] Ostensible authority gives an agent authority to bind a principal to agreements made with third parties in circumstances where the agent has no actual authority to do so: ***Doiron v Manufacturers Life Insurance Company***, 2003 ABCA 336 at para 13; ***Currie*** at para 6. The party seeking to establish ostensible authority has the onus: ***Currie*** at para 7. The requirements of ostensible authority include: (1) an express or implied representation by the principal that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced; (2) that such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (3) the recipient of the representation relied on it and was induced by it to enter the contract; and (4) the principal had the capacity to enter into a contract of the kind sought to be enforced: ***Doiron*** at para 13; 15; ***Coutinho & Ferrostaal GmbH v Tracomex (Canada) Ltd***, 2015 BCSC 787 at paras 108–109.

[56] With respect to actual authority, Molyneaux acknowledged in questioning that, at the time of Molyneaux's questioning, Bjornson was an independent agent advertising on Co-operators' website. Co-operators has not provided evidence denying Bjornson's authority to issue certificates of insurance in 2015. Although there is no direct evidence about Bjornson's actual authority at the time the COI was created and provided to APM, I find that it can be inferred, based on all the evidence (including that Bjornson was listed as the agent on the Policy Declarations), that APM has met the initial evidentiary burden that Bjornson had actual authority to sign and provide the COI. It is then incumbent on Co-operators to put its best foot forward to provide evidence that Bjornson and Burwash did not have actual authority: ***Weir-Jones*** at para 37. In my view, Co-operators has not done that, and has not suggested that it requires a pre-trial discovery process on that question.

[57] With respect to ostensible authority, I find that APM has met the initial evidentiary burden through evidence and inference, that Burwash made either an express or implied representation that she had authority to bind Co-operators in issuing the COI and that both Bjornson and Co-operators likely held her out as having that authority. This is supported by the inference that Co-operators likely allowed Bjornson and Burwash to use Co-operators' email addresses, by the fact Bjornson was likely Co-operators' independent agent at the time, and by the fact that the Declarations on the Policy listed Bjornson as the agent for the Policy.

[58] The evidence supports that APM made it known that the confirmation of insurance adding APM as an additional insured was a condition of contracting with or paying DCR. It was APM's practice to require a confirmation of insurance before issuing the purchase order contemplated in the LOA and it would not make payment without it. Therefore, in effect, the COI was required before APM would allow DCR to work on and be paid for work on the Project. APM's practice was confirmed again later when APM required Ground Zero to provide confirmation of its insurance once Ground Zero's role working on the Project site became clear. In my view, in the circumstances, APM has met the evidentiary burden to show it relied on the COI in proceeding to engage DCR and allow DCR to work on the Project. The fact that APM had its own commercial liability insurance, and did not reduce its own coverage, is not enough to establish a genuine issue for trial on the question of reliance. On the record before me, Co-operators has not provided evidence to show there is a genuine issue requiring trial in respect of ostensible authority. Given Bjornson is Co-operators' agent, Co-operators likely could have adduced evidence from Bjornson on the application but did not do so.

[59] In all the circumstances, on the record before me, APM has met its burden to show that there is no merit to Co-operators' position that Co-operators was not initially bound by the COI, and there is no genuine issue requiring a trial about whether Burwash and Bjornson had authority to bind Co-operators to the terms of the COI. Co-operators has not established there is a genuine issue for trial on this issue.

b. What is the Legal Effect of the COI?

[60] RSA and APM's position is that the legal effect of the COI is to add APM as an Additional Insured to the Policy on the same terms as the Policy, namely only in respect of APM's potential liability for DCR's conduct, not to create a new policy that covered APM's independent conduct.

[61] Co-operators raises two main arguments on the legal effect of the COI in opposition to the existence of a duty to defend. First, it relies on this statement made in the COI:

> The Insurance afforded is subject to the terms, conditions and exclusions of the applicable policy. This Confirmation is issued as a matter of information only and confers no rights of the holder and imposes no liability on the insurer.

[62] Second, Co-operators notes that APM was never actually added as an Additional Insured on the Declarations of the Policy and that, based on the express terms of the Policy (including the Additional Insured Endorsement), a potential additional insured like APM did not become an "Insured" under the Policy until it was "designated in the Declarations or on file as an additional Insured".

[63] Co-operators relies on ***Ontario (Transportation) v Canadian Surety Company***, 2008 CanLII 60337, 93 OR (3d) 708 (ONSC), aff'd 2009 ONCA 919. In that case, the Ontario Ministry of Transportation (**MTO**) (as project owner) sought recovery of defence, investigation, and indemnity costs against the insurer of its contractors after MTO had been held independently negligent in causing an injury to the plaintiff. The issue in the case was whether a certificate of insurance gave rise to coverage for MTO's own negligence. The Court of Appeal confirmed, at para 7, that there was coverage provided by the certificate of insurance, but that it did not cover independent negligence of MTO, and that it was "limited, at least, to claims based on MTO's vicarious liability for the acts or omissions" of the contractor and its representatives. In contrast, RSA and APM do not argue that the COI provides APM with coverage for APM's own independent negligence, but rather for its liability arising out of DCR's conduct.

[64] Co-operators also relies on ***Sky Solar (Canada) Ltd v Economical Mutual Insurance Company***, 2019 ONSC 4165, aff'd 2020 ONCA 558, which in my view applied ***Ontario (Transportation)*** in concluding that the certificate of insurance did not create any additional duties or responsibilities on its own. However, ***Sky Solar*** proceeded on the basis that adding an additional insured provided some coverage and that the additional insured had to comply with the conditions of the underlying policy.

[65] In my view, given that RSA and APM do not claim that the COI provided additional insurance to APM for APM's own negligence, ***Ontario (Transportation)*** and ***Sky Solar*** do not assist Co-operators in the way it asserts. If anything, these cases are some support for RSA and APM's position on the legal effect of the COI. However, ***Ontario (Transportation)*** and ***Sky Solar***

are not binding on the interpretation of the legal effect of the COI in the context of the Policy. The COI and the Policy must be interpreted in accordance with ordinary principles of contractual interpretation.

[66] 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 paras 49, 55. 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.

[67] In interpreting contracts, courts must consider the relevant surrounding circumstances, namely the objective evidence of the background facts at the time of execution of the contract which includes 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 para 82; ***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 cases cited therein.

[68] In the context of standard form contracts, like insurance contracts, surrounding circumstances generally play a lesser role in the interpretative process and, where they are relevant, they tend not to be specific to the particular parties: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at para 32. For standard form contracts there is usually no relevant surrounding circumstances relating to the negotiation of the contract, but the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates, continue to have a role in the interpretation process: ***Ledcor*** at para 30. The interpretation of standard form contracts can give rise to an issue of law where the interpretation has precedential value: ***Ledcor*** at paras 4, 24.

[69] In this case, the LOA indicated that the proof of insurance was required "in accordance with the Contract Documents", but the "Contract Documents", including the tender documents provided by APM to DCR, are not before the court. This may be important context, particularly if it was communicated to Burwash as agent for Co-operators. But there is also no evidence before the court about the dealings between DCR and Burwash or Bjornson as agent for Co-operators, which might form part of the relevant surrounding circumstances. Further, there is no industry evidence about the commercial purpose of adding additional insureds to a sub-contractor's commercial general liability policy in the context of a construction project, or additional insureds endorsements generally, and the questioning on D. Arbeau's affidavit on this point referencing APM's practice of being added as an additional insured based on the the "risk" of the sub-trades was vague.

[70] The evidence in this case, and the cases the parties have cited that have dealt with the use of certificates of insurance to add additional insureds, illustrates that certificates of insurance (or confirmations of insurance) are frequently used and often employ common or similar language. See also: ***Riocan Holdings Inc v Intact Insurance Co***, 2017 ABCA 73 at paras 7–10, 29–45; ***Carneiro v Durham (Regional Municipality)***, 2015 ONCA 909 at para 24; ***Weldwood of Canada***

Ltd v Gisborne Construction (Alberta) Ltd, 1995 CanLII 9108, 30 Alta LR (3d) 99 (ABKB) at paras 17-20; ***Meridian Construction Inc v Maintenance Services Ltd***, 2008 PESCT 9, 2008 CarswellPEI 14. The cases also indicate that certificates of insurance adding additional insureds can create complex legal questions about the interaction of the certificates with the underlying policy, the rights and obligations afforded (if any), and what happens when an endorsement adding the additional insured to the policy does not occur: ***Ontario (Transportation)***; ***Sky Solar***; ***Williams*** at paras 60–63; ***Burnaby (City) v Intact Insurance Company***, 2020 BCSC 221 at paras 33–36.

[71] The determination of these issues may have important precedential value in the construction insurance industry.

[72] Further, I note that ***Ontario (Transportation)***, ***Sky Solar*** and ***Williams*** were all decided after lengthy trials.

[73] In all the circumstances, I find that there is a genuine issue requiring a trial as to the legal effect of the COI, the rights it conferred on APM (if any), and the effect of the fact that APM was never designated in the Declarations as an additional insured. I have concerns about the state of the record in determining these issues. While this does not, in my view, foreclose a declaration of a duty to defend, it is a factor that supports deferring the determination to a trial process.

c. Did Co-operators Cease to be Bound by the COI before the Explosion in any Event?

[74] As noted above, Co-operators also takes the position that, even if the COI conferred insurance coverage on APM for DCR's negligence, that the COI ceased having any effect by the time of the Explosion.

[75] Co-operators did not cite any legal authority for its position in its lengthy Briefs. During oral argument, I specifically requested supplemental submissions to support Co-operators' argument that somehow, if it is determined that the COI created binding rights and obligations between APM and Co-operators, a later assignment, novation, or agreement between APM and others (but not Co-operators or its agents), as raised in the Contract Issues, could somehow affect the rights and obligations between APM and Co-operators under the COI and/or Policy.

[76] With respect, Co-operators was unable to provide me with legal authority to support its position. On the record before me, that argument, on its own, without more, and all else being equal, would not have raised a genuine issue for trial. However, its determination may be tied to the legal effect of the COI in the first place, which I have held does give rise to a genuine issue for trial, and so I do not make any specific findings about Co-operators' argument. If Co-operators can establish that there is an applicable legal principle to support its position, then the question of the effect or existence of the COI at the time of the Explosion could also not be determined without determination of the Contract Issues (which all parties agree raise genuine issues requiring a trial).

d. If APM was Bound by the COI at the time of the Explosion, Did it Give Rise to a Duty to Defend APM?

[77] If it is assumed, for the sake of discussion, that the COI provided coverage to APM for liability arising out of DCR's conduct or operations, as asserted by RSA and APM, then based on

a review of the pleadings in the Canmore Actions I would find that they would meet the test that there is a "possibility" that some of the claims made against APM fall within the Policy as per the duty to defend framework summarized in ***Optrics*** at paras 39–43.

e. Conclusion re Strength of Positions, Merit and Genuine Issues

[78] On balance, while RSA and APM's position on the duty to defend question has some merit, the genuine issue regarding the legal effect of the COI, and the lack of a good record to decide that issue, is a factor supporting a deferral of the Duty to Defend Application to be determined pursuant to a trial process.

3. Do Other Factors Support Deciding the Duty to Defend Application?

[79] In my view, other factors do not support granting the declarations requested in the Duty to Defend Application summarily or at this stage. In particular:

(a) there is a risk that a finding on the Duty to Defend Application would have unintended consequences on, or could compromise or affect, live issues in the Canmore Actions;

(b) the claims in the Canmore Actions include direct claims of independent negligence against APM. Therefore, only some of the claims against APM would be covered by the Policy even assuming RSA and APM's interpretation of the COI is adopted. This may give rise to conflict issues between Co-operators and APM, and will raise difficult issues respecting how to equitably apportion past and future APM defence costs;

(c) there is no urgency to this matter because APM is being defended by RSA. RSA and APM have not adduced any evidence of prejudice or irreparable harm in the event the declaration is not granted now. At its core, this application is really about who is funding APM's defence initially, not about whether a potential insured is being defended or has resources to defend itself. It is likely consistent with APM's reasonable expectations that its own commercial general liability insurer is defending it in the first instance; and

(d) APM delayed exploring, claiming and filing its court process seeking confirmation of the duty to defend. Meanwhile, significant steps were taken in the Canmore Actions.

4. Conclusion re Summary Determination of the Duty to Defend Application

[80] In all the circumstances, I find that it is not appropriate in this case to summarily grant the Duty to Defend Application and I decline to exercise my discretion to do so. In my view, the question of whether Co-operators owes a duty to defend is better suited for a trial process.

C. If the Duty to Defend Application Can and Should be Determined Summarily, Should the Court Grant the Declarations Sought?

[81] Given my findings above, I do not address this question.

D. If the Duty to Defend Application is Not Determined Summarily, Should it be Heard Concurrently or Consecutively with the Canmore Actions?

[82] Co-operators argues that the Duty to Defend Application should be joined to the Canmore Actions and determined concurrently or consecutively. It argues that the validity of the COI affects the Duty to Defend Application, that there are common questions of law and fact between the Duty to Defend Application and the Canmore Actions that give rise to the possibility of inconsistent findings, and that there is no prejudice by having the Duty to Defend Application joined with the Canmore Actions.

[83] RSA and APM's position is that the Duty to Defend Application should not be joined to the Canmore Actions. They point out that the Duty to Defend Application does not seek indemnity under the Policy. RSA and APM argue that there are not overlapping or common issues, that joining the Duty to Defend Application with the Canmore Actions would lead to inefficiency and delay, would lengthen the trial, and would be unfair because it deprives APM and RSA's rights to immediate defence and contribution from Co-operators.

[84] Rule 3.72 provides:

> Consolidation or separation of claims and actions
>
> 3.72(1) The Court may order one or more of the following:
>
> (a) that 2 or more claims or actions be consolidated;
>
> (b) that 2 or more claims or actions be tried at the same time or one after the other;
>
> (c) that one or more claims or actions be stayed until another claim or action is determined;
>
> (d) that a claim be asserted as a counterclaim in another action.
>
> (2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions
>
> (a) have a common question of law or fact, or
>
> (b) arise out of the same transaction or occurrence or series of transactions or occurrences.

[85] Section 8 of the *Judicature Act*, RSA 2000, c J-2 also provides the court jurisdiction to grant remedies "so that as far as possible all matters in controversy between the parties can be

completely determined and all multiplicity of legal proceedings concerning those matters be avoided".

[86] Rule 3.72 and the *Judicature Act* give rise to a discretion: ***Alliance Pipeline Limited v Universal Ensco, Inc***, 2007 ABCA 285 at para 3; ***1177620 Alberta Ltd v Axcess Mortgage Fund Ltd***, 2016 ABCA 404 at para 14. The factors the court considers have most recently been confirmed by the Court of Appeal in ***1177620 Alberta***, referencing ***Alliance Pipeline*** and ***Munro v Munro***, 2011 ABCA 279. From ***1177620 Alberta*** at para 17:

> [17] In *Alliance Pipelines*, at para 6, Paperny JA for this Court described the proper approach to a consolidation application as follows:
>
> > The purpose of consolidation is to enhance the administration of justice. A court should consider the possibility of inconsistent verdicts, the prospect of prejudice to the parties and the impact of consolidation and non-consolidation, both at the pre-trial and trial stages, on scarce resources, including administrative, judicial and financial. In other words, a court must be able to conclude that having regard to all the circumstances, on balance, it is in the interests of justice that the actions be consolidated. Some of the relevant factors that should be considered are discussed in *Mikisew*. These, however, are not necessarily the only relevant factors, nor are they in themselves determinative. Each case must be assessed on its own merits and should include consideration, not just of the common claims, but the extent of the distinct claims between the parties. The focus in each case must be on the impact of consolidation on the parties and on the administration of justice.

[87] The non-exhaustive *Mikisew* factors (from ***Mikisew Cree First Nation v Canada***, 1998 ABQB 675 at para 2) referenced with approval by the Court of Appeal were recently confirmed by Justice Hollins in ***Parks v McAvoy***, 2022 ABQB 305 at para 6:

> (a) whether there are common claims, disputes, and relationships between the parties,
>
> (b) whether consolidation will save time and resources in pre-trial procedures,
>
> (c) whether trial time will be reduced,
>
> (d) whether one party will be seriously prejudiced by having two trials together,
>
> (e) whether one action is at a more advanced stage than the other, and
>
> (f) whether consolidation will delay the trial of one action which will cause serious prejudice to one party.

[88] In my view, considering all of the above factors, I find that it is appropriate for the Duty to Defend Application to be joined with the Canmore Actions and either heard concurrently or consecutively with the Canmore Actions, for a number of reasons including:

(a) while I was not convinced, based only on the record before me, that the Contract Issues raised a genuine issue for trial as to whether the COI remained in effect at the time of the Explosion, it is nonetheless a position that Co-operators intends to raise in defence of the Duty to Defend Application in any future process. The practical reality is that this means that there will be a significant overlap in the evidence and witnesses in the two proceedings. It is fair and efficient to allow Co-operators to participate in the Canmore Actions rather than duplicating the evidence in separate process;

(b) the determination of the Canmore Actions will have a direct and significant impact on the quantification of any contribution that Co-operators may be obligated to pay for APM's defence. It will be impractical for the court to determine reasonable contribution until the various claims in the Canmore Actions against APM and DCR are determined. Further, it is likely that, even assuming RSA and APM's interpretation of the COI and the Policy, the claims against APM for its direct negligence will not be covered by the Policy and Co-operators will only have to contribute to a portion of the defence costs. All of these questions are better determined in this case after or as part of the underlying actions;

(c) there is no evidence of any prejudice to RSA or APM. As noted earlier, APM is being defended and it does not stand to lose anything by having the matters joined as its defence and indemnity rights cannot be addressed until the claims in the Canmore Actions are addressed. RSA only stands to suffer delay of the potential contribution to defence costs and there is no evidence Co-operators is or will be unable to contribute later if it is later held it must contribute; and

(d) there is no evidence of any prejudice to the other parties to the Canmore Actions. It is unclear whether there will be significant delay or lengthening of the trial if the Duty to Defend Application is joined with the Canmore Actions in some fashion. It may depend on the crystallization of the issues and parties. Importantly, however, none of the plaintiffs in the Canmore Actions objected to or participated in Co-operators' rule 3.72 application. Any concerns about the impact on the Canmore Actions are better addressed later when the logistics and procedures for the trial of the Canmore Actions and the Duty to Defend Application are addressed.

[89] Accordingly, I order that the Duty to Defend Application shall be adjourned to be heard concurrently or consecutively with the Canmore Actions, subject to refinement or variation by a more detailed order to be determined in a later process involving all interested parties. I address other procedural directions in respect of the Duty to Defend Application below.

E. What is an Appropriate Order?

[90] I have found that the Duty to Defend Application should not be heard summarily and should be heard concurrently or consecutively with the Canmore Actions. Some further procedural orders are appropriate. In particular, the Duty to Defend Application shall be amended to continue it with a pleadings and discovery process, following the guidance of the Alberta Court of Appeal in ***Singh v Kaler***, 2017 ABCA 275 at paras 66–68. Accordingly:

(a) the Originating Application shall be amended to be called "Statement of RSA / APM Claim", and RSA and APM shall be entitled to amend the body of the Originating Application to reflect its pleaded facts and specific relief sought. The applicants shall not have to pay a further filing fee as it is the continuation of the existing proceeding;

(b) Co-operators shall have the right to file a "Statement of Co-operators' Defence" setting out its defences to the claims being made by RSA and APM;

(c) RSA and APM shall have a right to file a "Reply of RSA and APM to the Co-operators' Defence";

(d) these documents referred to shall be treated as pleadings and shall otherwise follow the requirements of pleadings under the *Rules*;

(e) the parties shall be obligated to swear and serve "affidavits of records", pursuant to rule 5.6 by analogy, with the above documents considered the pleadings determining the issues as contemplated by rule 5.2;

(f) the timing of the service of the affidavits of records shall be agreed or, if the parties cannot agree, they shall seek further direction from me; and

(g) the parties shall be entitled to conduct Part 5 questioning by analogy, in respect of the claims and defences set out in the "pleadings".

[91] The parties to the Duty to Defend Application, and the parties to the Canmore Actions, are directed to attempt to reach agreement on the timing of these steps and any other procedural steps necessary to allow the pre-trial processes respecting the Duty to Defend Application to move forward expeditiously to minimize delay to the progress of the Canmore Actions.

[92] RSA and APM have made it clear that the Duty to Defend Application does not address the question of whether Co-operators is liable to indemnify APM. In my view, if APM seeks to claim indemnity under the Policy, the practicalities of that should be considered by the parties now, including whether it can or should be included as part of the Duty to Defend Application, whether it should follow another process, or whether the parties anticipate any additional parties will be involved. I direct the parties to consider their positions on those questions and to explore whether agreement can be reached on a process moving forward to address any duty to indemnify claims. This issue shall be added to the agenda for our next case management conference.

[93] I grant the parties leave to immediately write to the Acting Associate Chief Justice in Calgary to seek to have the Duty to Defend Application formally added as one of the matters under my case management together with the Canmore Actions, on my recommendation.

VI. Conclusion

[94] The Duty to Defend Application is not granted. It is adjourned and directed to be heard concurrently or consecutively with the Canmore Actions, as set out above, subject to further refinement of that process to be dealt with by agreement of all parties to the Duty to Defend Application and the Canmore Actions or pursuant to a further order of this court granted on notice to all interested parties. I also grant the procedural order noted above.

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

Heard on the 23rd 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 C. Dawson, Dolden Wallace Folick LLP
for Royal & Sun Alliance Insurance Company of Canada and APM Construction Services Inc.

Paul J. Stein, KC and Marc T.J. Matras, Gowling WLG
for Co-operators General Insurance Company

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 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

- and -

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