SUPREME COURT OF CANADA

CITATION: Emond *v.* Trillium Mutual Insurance Co., 2026 SCC 3

APPEAL HEARD: March 18, 2025
JUDGMENT RENDERED: January 30, 2026
DOCKET: 41077

BETWEEN:

Stephen Emond and
Claudette Emond
Appellants

and

Trillium Mutual Insurance Company
Respondent

- and -

Insurance Bureau of Canada,
Ontario Trial Lawyers Association,
Canadian Association of Mutual Insurance Companies,
Ontario Mutual Insurance Association and
Farm Mutual Reinsurance Plan Inc.
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: Rowe J. (Wagner C.J. and Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

(paras. 1 to 112)

REASONS DISSENTING IN PART: Karakatsanis J.
(paras. 113 to 155)

REASONS DISSENTING IN PART: Côté J.
(paras. 156 to 267)

Stephen Emond and
Claudette Emond *Appellants*

v.

Trillium Mutual Insurance Company *Respondent*

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Ontario Trial Lawyers Association,
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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance — Property insurance — Standard form insurance contract — Interpretation — Guaranteed rebuilding cost endorsement — Legal compliance cost exclusion clause — House insured through standard form residential home insurance contract deemed total loss after flood — Insurance contract containing guaranteed rebuilding cost endorsement but also containing clause excluding increased costs of compliance with zoning and construction-related laws — Local conservation authority's requirements imposing additional costs to rebuild house — Whether guaranteed rebuilding cost endorsement entitles homeowners to full rebuilding costs of house including costs of compliance with conservation authority's requirements despite compliance cost exclusion clause — If not, whether nullification of coverage doctrine prevents application of compliance cost exclusion clause.

The insureds' house was severely damaged in a flood and was deemed a total loss. The house is located within the area of jurisdiction of a conservation authority, which is empowered to regulate development activities. The insureds wish to rebuild their house, but to do so must carry out additional work to comply with the conservation authority's requirements. Their home insurer acknowledged coverage for the loss under the insurance contract, but a dispute arose regarding rebuilding costs, particularly as to whether costs of compliance with the conservation authority's requirements are excluded.

The terms of the insurance contract between the insureds and their insurer are set out in the insurer's residential insurance policy booklet, a standard form. The

insureds purchased the comprehensive form policy ("base policy"), which states, in section 1, that the house is insured against direct physical loss or damage subject to a number of exclusions. One of these exclusions states that the insurer does not cover "increased costs of repair or replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services; except as provided under Additional Coverages of Section 1" ("compliance cost exclusion"). One of the Additional Coverages exceptions states that the insurer will pay an additional amount up to $10,000 for the increased cost to comply with zoning and construction-related laws.

The insurance contract also includes a guaranteed rebuilding cost endorsement ("GRC endorsement") that amends the "Basis of Claim Payment" provision in the base policy, which provides the basis of loss settlement in the event of damage. The GRC endorsement provides that the insurer will pay for insured loss or damage if the insureds repair or replace the damaged or destroyed house on the same location with materials of similar quality using current building techniques. The GRC endorsement concludes with a statement that "in all other respects, the policy provisions and limits of liability remain unchanged". Section 4 of the policy, in which the GRC endorsement is found, reproduces many of the exclusions found in the base policy, but does not reproduce the compliance cost exclusion.

The insureds brought an application for a declaration that the GRC endorsement entitled them to recover the total costs of rebuilding their house, with no

limitation of coverage for the cost of complying with the legal requirements. The application judge issued the requested declaration. The Court of Appeal allowed the insurer's appeal, holding that the cost of replacement payable under the insurance contract does not include the compliance costs, other than the $10,000 extended under the applicable exception.

Held (Karakatsanis and Côté JJ. dissenting in part): The appeal should be dismissed.

Per Wagner C.J. and **Rowe**, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.: The insureds are not entitled to recover the increased compliance costs, other than $10,000 under the applicable exception. When the standard form insurance contract is read as a whole, the contested language can bear only one reasonable meaning: the compliance cost exclusion applies to the increased costs of complying with the conservation authority's requirements, despite the GRC endorsement. The replacement cost of the insureds' home should therefore be calculated in reference to that exclusion. Giving effect to this unambiguous language by applying the compliance cost exclusion does nothing to nullify the purpose of the GRC endorsement, which is to permit recovery of replacement costs even when they exceed the amount of insurance.

In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, the Court endorsed a generally advisable order in which to interpret insurance contracts: first, the insured has the onus of establishing that the

damage or loss claimed falls within the initial grant of coverage; second, the onus shifts to the insurer to establish that one of the exclusions to coverage applies; third, if the insurer is successful in demonstrating an exclusion, the onus then shifts back to the insured to prove that an exception to the exclusion applies. Endorsements do not change the generally advisable order. They are not self-contained and standalone contracts disconnected from the insurance policy of which they form a part. They vary or amend the underlying policy but are still built on its foundation. Aspects of the endorsement that affect coverage are considered as part of the coverage conferred by the insurance contract, aspects that create exclusions are considered later, followed by any exceptions to the exclusions created.

Where the language of the insurance contract is unambiguous, effect should be given to that clear language, reading the contract as a whole; other interpretive tools are only to be considered where the language is ambiguous. The words of the contract must be given their ordinary and grammatical meaning, as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law. The initial focus on the language should not be misunderstood as encouraging a reading of provisions in isolation. In determining whether the language of a provision is ambiguous, the court must still read the contract as a whole. Ambiguity arises where there are multiple reasonable but differing interpretations of the policy. For example, a provision that appears unclear in isolation may continue to admit of more than one reasonable meaning when read in light of the contract as a whole. Or a provision that appears clear

in isolation may be capable of holding more than one reasonable meaning when the contract is read as a whole. Insurance policies often contain overlapping coverages, exclusions, conditions, and endorsements and reading the contract as a whole is an exercise in searching for harmony rather than discord between its provisions.

In the face of ambiguity, the court cannot rely on the language alone and instead must move to a second stage and employ other rules of contract interpretation to resolve that ambiguity, including: the interpretation should be consistent with the reasonable expectations of the parties; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance contract was formed; and it should be consistent with the interpretations of similar insurance policies. If ambiguity still remains after the two first stages, the court must have resort to the *contra proferentem* rule at a third stage, which provides that the ambiguity must be resolved in a manner favourable to the insured.

Even when the language of the provision is unambiguous, however, it is settled law in Ontario that a provision should not be applied to the extent it would completely defeat the very objective of having purchased the relevant coverage and render it nugatory. This rule is referred to as the nullification of coverage doctrine and is considered only after the insurance contract has been properly interpreted. Nullification of coverage applies exclusively in the insurance context, where courts must be especially alert to the inequality of bargaining power that favours the insurer,

and in the extreme and specific scenario where coverage is nullified, such that the insurer is pocketing a higher premium without any material risk.

The insurance contract in the instant case is a standard form contract, the interpretation of which is a question of law reviewed on a correctness standard. There is no dispute that the total loss of their home as a result of the flood claimed by the insureds falls within the insurance contract's grant of coverage, so the burden rests with the insurer to show that the compliance cost exclusion precludes coverage for costs of compliance. Reading the contract as a whole, it is unambiguous that the compliance cost exclusion applies despite the GRC endorsement. Whether an exclusion applies to limit the insurer's liability for compliance costs cannot be understood in the abstract, but must be grounded in the language of the specific insurance contract at issue. Because the GRC endorsement simply amends the basis of claim payment provision in the base policy by extending the amount payable beyond the amount of insurance purchased by the insureds, the exclusions in the policy continue to apply to the amended provision as they did to the original provision. This is further confirmed by language in the GRC endorsement, which states that in all other respects, the policy provisions and limits of liability remain unchanged. The language of the GRC endorsement is clear that it only amends the basis of claim payment provision in the base policy and does not amend any other part of the policy.

It is also unambiguous that the conservation authority requirements at issue are captured by the compliance cost exclusion and that increased costs of compliance

with the conservation authority's requirements in excess of the applicable $10,000 exception are excluded from coverage. The increased costs are the difference between the cost of rebuilding the house as it previously stood, without regard to laws prescribing requirements as to how it must now be built, and the cost of rebuilding the house as modified to bring it into compliance with the applicable laws. This does not restrict the excluded compliance costs to those that arise after the date of construction and the prevailing law at the time of construction is irrelevant to the comparative exercise. The language in the compliance cost exclusion of "increased costs of repair or replacement due to operation of any law" does not inject a temporal dimension into the exclusion; rather the words "due to" clearly link the increase in costs to the operation of "any" law with no wording to suggest any limitation on when the law came into force. Where increased costs are meant to be calculated by reference to the time when the contract was issued, the contract says this explicitly.

Even if one were to conclude, despite the clear language, that the words "increased costs" were ambiguous, that ambiguity would necessarily be resolved against the insureds. Parties reading the broad language of this exclusion would not reasonably expect an insurer to have implicitly accepted liability for all pre-existing non-compliance with applicable law, which would require insurers to ascertain the state of compliance of the insured's property in each case or else bear indeterminate liability, and potentially to do so each time the contract is renewed. Courts have generally avoided interpretations of this nature, which would transform the insurer into a guarantor for the insured's regulatory non-compliance and have long given effect to

similar language in compliance cost exclusions without inquiring into when the relevant law came into force.

Furthermore, in the instant case, the high bar to show nullification is not met and the compliance cost exclusion applies despite the GRC endorsement. The primary benefit of the GRC endorsement for the insureds is that it allows them to recover a cost of rebuilding that exceeds the insurance amount indicated on the declaration page, as may be adjusted for inflation. While the costs the insureds will recover are less than they would have been without the exclusion, this does not nullify the benefit under the GRC endorsement allowing them to recover amounts exceeding the clear upper limit set under the base policy.

Per **Karakatsanis** J. (dissenting in part): The appeal should be allowed in part and the insurer ordered to pay the costs of complying with any laws existing at the time the insurance contract was last renewed, but not increased costs for laws that came into force after that date. There is agreement with the majority on the principles governing the interpretation of insurance contracts outlined in *Ledcor* and that the compliance cost exclusion applies to the insureds' guaranteed rebuilding cost coverage. However, there is disagreement on the application of the principles to interpret the effect of the compliance cost exclusion: applying the *Ledcor* framework, the compliance cost exclusion is ambiguous and must be interpreted in favour of the insureds.

At the first stage of *Ledcor*, a clause is ambiguous if there is more than one reasonable way to interpret it. In the instant case, the clause is ambiguous because the ordinary meaning of "increased costs" is compatible with the insureds' interpretation: they reasonably understood that the guaranteed rebuilding endorsement covered all compliance costs except increased costs to comply with laws that arose after they paid their premium and the insurer issued their policy. Both this interpretation and the insurer's interpretation — according to which the compliance cost exclusion excludes all compliance costs, no matter when they arose, except for those covered by the applicable exception — are reasonable on the face of the contract. Therefore, the rules of contractual interpretation must be applied to resolve the ambiguity.

At the second stage of *Ledcor*, if multiple reasonable interpretations arise after the first stage, the court's task is to apply the general rules of contract interpretation to resolve the ambiguity, including interpreting the provision to support the reasonable expectations of the parties and the commercial atmosphere in which the agreement was formed. The parties' reasonable expectations are informed by the purpose for which the general class of insurance contract exists, which for home insurance is to provide homeowners with coverage in the event of foreseeable damage to their home. A home insurance seeker would not reasonably expect an exclusion clause situated among exclusions for unknowable, uncontrollable future contingencies — such as war, nuclear incidents, radioactive contamination, pollution, latent defects, animals, and crime — to vitiate their coverage for existing legal requirements, such as the knowable regulatory requirements that existed at the time of contract formation.

Reasonable expectations therefore point in the insureds' favour, as adopting the insurer's interpretation and excluding all costs of complying with all laws that apply post-construction risks rendering coverage illusory, especially for older homes. Commercial reality also favours the insureds: premiums are based on the insurer's expert assessment of its risk at the time of policy issuance and renewal, which means homeowners are entitled to assume that the costs of rebuilding at that time are covered. If the insurer does not intend to cover those costs, it must exclude them in clearer language.

There is disagreement with the majority's alternative position that if the compliance cost exclusion were ambiguous, it should be resolved in favour of the insurer. Insurers are able to assess their potential liability before agreeing to insure a loss, which is presumably inherent in any decision to provide insurance, and nothing in the record suggests compliance assessments are more onerous than ordinary valuation practices. Unlike existing compliance costs, legal requirements that arise after contract formation are unknowable to either party and the insureds' interpretation tracks this commercial reality too: it distinguishes these unknowable losses from the predictable ones, and exempts the insurer from paying only the former. No reported Canadian case addresses the ambiguity at issue here and none of the cases cited by the majority assist in resolving the ambiguity in the meaning of the compliance cost exclusion. Therefore, the ambiguity should be resolved in the insureds' favour. If the ambiguity persisted after the second stage, the contractual interpretation would favour the insureds at the third stage of *Ledcor*, where courts construe the contract against its drafter, interpreting

coverage provisions broadly and exclusion clauses narrowly. In this particular contract, that would mean interpreting the compliance cost exclusion to only exclude increased costs arising from laws enacted after the issuance of the policy.

Per **Côté** J. (dissenting in part): The appeal should be allowed in part, the judgement of the Court of Appeal set aside, and the application judge's declaration restored with the alteration that the coverage does not include increased costs resulting from the operation of any rule, regulation, by-law, or ordinance not in effect at the time that the insurance policy was last renewed. While there is agreement with the majority regarding the order and principles of interpretation applicable to standard form insurance contracts, there is disagreement with the majority's finding that the compliance cost exclusion applies to limit the GRC endorsement.

Guaranteed replacement cost insurance is meant to provide insureds with peace of mind. They expect that in the event of loss or damage covered by the policy, they will receive not merely a portion of the funds needed to recover from their loss, but a replacement of what they lost. Insurers must meet these reasonable expectations; draft their policies and endorsements using clear, express, and easily intelligible terms; and work to confirm that their insureds understand not only their coverage but also its limitations and exclusions. Insurers bear the responsibility for drafting intelligible and accessible insurance contracts that are considerate of the unequal bargaining power in the standard form contract context. If the policy's language or structure is ambiguous, general rules of contractual interpretation can be used to resolve that ambiguity. Those

rules include ensuring that any interpretation is consistent with the reasonable expectations of the parties and does not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted. In addition, courts should give effect to the reasonable expectations of the parties and not read in windfalls in favour of any party.

Insurers must be attentive to ambiguity not only in the text of their insurance policies, but also in the relationship between their constituent parts — such as the underlying policy and any endorsements. While endorsements change or vary the underlying policy, they may be more or less comprehensive in respect of a particular subject matter: they may make only minor changes to the underlying policy or they may effectively displace an entire subject matter. This variation in the effect of an endorsement may create structural ambiguity concerning the relationship between the underlying policy and the endorsement. For that reason, insurers must also be cognizant of the principle that, if it is ambiguous whether an exclusion in the underlying policy applies to an endorsement, then the exclusion must be set out in the endorsement itself in order to apply.

Guaranteed replacement costs endorsements replace what was lost, without any deduction for depreciation. While the main purpose of guaranteed replacement cost endorsements is to provide enhanced protection to an insured so that their recovery is not limited by depreciation, that should not be interpreted to mean that it is their only purpose or that additional value for the insured is unacceptable. Absent exclusions that

limit an insured's recovery, they provide insurance that covers the necessary costs for rebuilding, replacing, or repairing the insured property — regardless of increased costs, such as those to comply with by-laws or building codes.

In the instant case, pursuant to the generally advisable order in which to interpret insurance contracts, there is no debate concerning whether the peril suffered by the insureds was covered by the GRC endorsement. The burden therefore rests on the insurer to demonstrate that the compliance cost exclusion ousts the GRC endorsement's coverage for increased compliance costs. Applying *Ledcor*, at the first step, there is ambiguity concerning whether the compliance cost exclusion applies to limit the GRC endorsement. Particularly, several structural and textual elements of the insurance policy, when taken together, create significant ambiguity.

Textually, the wording of the GRC endorsement is unclear and can be understood to suggest that: (1) the GRC endorsement may cover the field in relation to rebuilding costs, thereby displacing the compliance cost exclusion; and (2) the GRC endorsement's reference to current building techniques may include compliance with legal requirements that shape and regulate current building practices. First, the degree to which it comprehensively addresses the subject matter of reconstruction costs is unclear. The wording "in all other respects, the policy provisions and limits of liability remain unchanged" indicates that the GRC endorsement takes precedence and that it is only those parts of the policy not amended or displaced by the GRC endorsement that continue to apply. Furthermore, the average person seeking insurance coverage would

view the use of a phrase as clear as “Guaranteed Rebuilding Cost Coverage” as suggesting a promise that the insurer would pay for the rebuilding of the insured home. Its ordinary meaning suggests that the GRC endorsement covers the field with respect to the cost of rebuilding, guaranteeing it and displacing exclusions that would otherwise impinge upon that broad guarantee. This is not contradicted by the language in the GRC endorsement. Second, the use of the ambiguous phrase “current building techniques” also causes confusion regarding whether this includes the use of building methods that comply with current legal obligations. In consideration of the word “current”, “current building techniques” can also refer to legal requirements that impinge upon and guide almost every aspect of the building process. All current building techniques must be legally permitted in order to be used and in order to be current. Therefore, the current building techniques in the area under the conservation authority’s jurisdiction include methods for carrying out the construction of a home that ensure compliance with the conservation authority’s requirements.

Structurally, the application of the compliance cost exclusion contained in section 1 is also unclear because: (1) the GRC endorsement itself does not contain any exclusion for compliance costs; (2) section 4 lists a series of 14 exclusions that apply to all the endorsements, but the compliance cost exclusion is not included in this list; and (3) while the exclusions in section 4 largely overlap, with 10 of the 14 exclusions listed in section 4 being essentially reproductions or recitations of the exclusions contained in section 1, the insurer chose to not carry forward the compliance cost exclusion into section 4. The average person seeking insurance would note that there

is a separate list of exclusions under section 4, that this list is specific to endorsements, and that this list is different than the more general lists in section 1. On this basis, it is reasonable to understand that the section 4 list that is specific to endorsements would trump the lists in section 1, which apply more generally. There is disagreement with the majority's narrow reading of the coverage granted by the GRC endorsement as relating only to the absence of a policy limit. This interpretation is not in keeping with the understanding that insurance policies should be interpreted based on how the average person seeking insurance coverage would understand them and reflects legal complexity and nuance that are beyond the proper interpretive framework.

Read together, the above elements give rise to two reasonable interpretations, namely: (1) the GRC endorsement applies unencumbered by the compliance cost exclusion; or (2) the GRC endorsement is limited by the compliance cost exclusion. This ambiguity must be resolved in favour of the compliance cost exclusion not applying to limit the GRC endorsement. At the second step of *Ledcor*, the application of the general rules of contractual interpretation is solidified by principles favouring the insureds in circumstances of ambiguity. Reinforced by the GRC endorsement's removal of the policy's limits and paired with the clear absence of the compliance cost exclusion from the GRC endorsement and the section 4 exclusions, as well as the absence of any statement in the policy affirming that the section 1 exclusions applied with full force to limit the GRC endorsement, the insureds' expectation clearly favoured the understanding that the guaranteed rebuilding cost coverage would provide just that. Moreover, the insurer understood that rebuilding the

home would require changes to support its compliance with the myriad of legal requirements that have come into effect since the house was constructed. This finding does not expose the insurer to indeterminate liability as the GRC endorsement has clear parameters that limit its liability. This finding is not a windfall for the insureds; it is the fulfilment of the bargain for which they have been paying premiums.

However, the interpretation that accords with the reasonable expectations of the parties and the commercial context is that the insurer was required to insure against increased costs for compliance with any law in effect before the last renewal of the contract, not afterwards. The reasonable expectations of the parties cut both ways, and it would not be a reasonable interpretation to suggest that the insurer bargained to insure against any and all unknown increases in cost that may emerge between the date of the issuance or renewal of the policy and the date on which the loss eventually occurred.

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By Rowe J.

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Personal Insurance Co., 2011 ONCA 105, 104 O.R. (3d) 709; **referred to:** *Alvaro v. InsureBC (Lee & Porter) Insurance Services Inc*., 2021 BCCA 96, 457 D.L.R. (4th) 351; *Choukair v. Allstate Insurance Co. of Canada*, 2015 ONSC 4989, [2015] I.L.R. ¶I-5787; *Foodpro National Inc. v. General Accident Assurance Co. of Canada* (1988), 63 O.R. (2d) 288; *Pilot Insurance Co. v. Sutherland*, 2007 ONCA 492, 86 O.R. (3d) 789; *Pickford Black Ltd. v. Canadian General Insurance Co*., [1977] 1 S.C.R. 261; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129; *CIT Financial Ltd. v. Insurance Corporation of British Columbia*, 2017 BCSC 641; *Martin v. American International Assurance Life Co.*, 2003 SCC 16, [2003] 1 S.C.R. 158; *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *Piekut v. Canada (National Revenue)*, 2025 SCC 13; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *La Presse inc. v. Quebec*, 2023 SCC 22; *Taylor v. National Life Assurance Co. of Canada* (1990), 7 C.C.L.I. (2d) 146; *Ajax (Town) v. St. Paul Fire & Marine Insurance Co.* (2008), 93 O.R. (3d) 73; *EPCOR Electricity Distribution Ontario Inc. v. Municipal Electric Association Reciprocal Insurance Exchange*, 2022 ONCA 514; *Ontario v. St. Paul Fire and Marine Insurance Company*,

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By Karakatsanis J. (dissenting in part)

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SCC 7, [2017] 1 S.C.R. 121; *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129; *Roth v. Economical Mutual Insurance Co.*, 2016 ABCA 399, 46 Alta. L.R. (6th) 1; *Manhas v. Sovereign General Insurance Co.*, 1999 BCCA 162, 172 D.L.R. (4th) 475; *Seivewright v. B.C. Insurance Co.* (1989), 39 C.C.L.I. 145; *Allemand v. State Farm Ins. Cos*., 160 Wn. App. 365, 248 P.3d 111 (2011).

By Côté J. (dissenting in part)

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Insurance Co., 2011 ONCA 105, 104 O.R. (3d) 709; *Pilot Insurance Co. v. Sutherland*, 2007 ONCA 492, 86 O.R. (3d) 789; *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Co.*, 2020 ONCA 487, 151 O.R. (3d) 663; *CIT Financial Ltd. v. Insurance Corporation of British Columbia*, 2017 BCSC 641; *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601; *Carter v. Intact Insurance Co.*, 2016 ONCA 917, 133 O.R. (3d) 721; *Carlyle v. Elite Insurance Co.* (1986), 1 B.C.L.R. (2d) 338; *Folk v. Saskatchewan Mutual Insurance Co.* (1992), 14 C.C.L.I. (2d) 128; *Schultz v. Mennonite Mutual Fire Insurance Co. of Saskatchewan*, 2014 SKPC 174, 462 Sask. R. 90; *Choukair v. Allstate Insurance Co. of Canada*, 2015 ONSC 4989, [2015] I.L.R. ¶I-5787; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029.

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Zarnett and Thorburn JJ.A.), 2023 ONCA 729, 489 D.L.R. (4th) 581, 39 C.C.L.I. (6th) 209, 46 B.L.R. (6th) 13, [2024] I.L.R. ¶I-6426, [2023] O.J. No. 4979 (Lexis), 2023 CarswellOnt 17093 (WL), setting aside a decision of Ryan Bell J., 2022 ONSC 5519, 28 C.C.L.I. (6th) 97, [2023] I.L.R. ¶I-6374, [2022] O.J. No. 4347 (Lexis), 2022 CarswellOnt 14187 (WL). Appeal dismissed, Karakatsanis and Côté JJ. dissenting in part.

Joseph Y. Obagi, *Elizabeth A. Quigley* and *Wayne J. Fryer*, for the appellants.

Pasquale C. Peloso, *Jaime Wilson*, *James Plotkin* and *Darren Johnston*, for the respondent.

Jeff Galway, *Christopher DiMatteo* and *Lilian Esene*, for the intervener Insurance Bureau of Canada.

Brian Cameron and *Liane Brown*, for the intervener Ontario Trial Lawyers Association.

Atrisha Lewis, *Akiva Stern*, *Mathew Zaia* and *William G. Scott*, for the interveners Canadian Association of Mutual Insurance Companies, Ontario Mutual Insurance Association and Farm Mutual Reinsurance Plan Inc.

The judgment of Wagner C.J. and Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

ROWE J. —

I. Overview

[1] In this appeal, this Court is asked to provide guidance on the proper application of the interpretive framework for standard form insurance contracts. This case presents an opportunity to clarify when the language of an insurance contract is ambiguous and when the nullification of coverage doctrine would justify a departure from language that is unambiguous.

[2] In September 2018, Stephen and Claudette Emond entered into a home insurance contract with Trillium Mutual Insurance Company. In addition to providing "comprehensive" coverage for their house, the contract included an optional "Guaranteed Rebuilding Cost Coverage" endorsement ("GRC endorsement"). In April 2019, the house was severely damaged in a flood and was deemed a total loss.

[3] The Emonds argue that the GRC endorsement entitles them to the full rebuilding costs of their home, including costs of compliance with building requirements imposed by the local conservation authority. They submit that, properly interpreted, a general exclusion for these costs in their policy does not apply given the GRC endorsement. They say that if the exclusion were to apply, it would deprive the endorsement of effect, contrary to the nullification of coverage doctrine. It should thus not apply on that basis.

[4] I would dismiss the Emonds' appeal. The language of the policy is unambiguous in excluding recovery of the increased costs of compliance, other than the $10,000 extended under a limited exception. Giving effect to this unambiguous language does not deprive the insureds of the benefit of the GRC endorsement, which

is to make the cost of repairs or replacement for the house payable "even if it is more than the amount of insurance" (Residential Insurance Policy (reproduced in A.R., vol. I, at pp. 75-107), at p. 4-1). Without this endorsement, the policy provides that the insurer will not pay amounts "exceeding the applicable amount(s) of insurance for any loss or damage arising out of one occurrence" (p. 1-10).

[5] The GRC endorsement does not allow the Emonds to circumvent the compliance cost exclusion appearing elsewhere in the insurance policy. The Court of Appeal was therefore correct to conclude that the replacement cost of their home should be calculated in reference to that exclusion.

II. Background

A. *Origin of the Dispute*

[6] In April 2019, the Emonds' house, located on the Ottawa River, was destroyed by a flood. At the time of the flooding, the Emonds' house was insured by Trillium.

[7] The Emonds' house is located within the area of jurisdiction of the Mississippi Valley Conservation Authority ("conservation authority"). Under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, the conservation authority is empowered to regulate development activities in or adjacent to rivers, such as the Ottawa River, and has developed a policy document for this purpose. Thus, in order to

rebuild, the Emonds must carry out additional work to comply with the requirements of the conservation authority.

[8] The Emonds wish to rebuild their house. Trillium acknowledged coverage for the loss under the insurance contract, but a dispute arose regarding rebuilding costs. In particular, the parties disagree on whether costs of compliance with the conservation authority's requirements are excluded.

B. *The Insurance Contract*

[9] The terms of the insurance contract are set out in Trillium's residential insurance policy booklet, a standard form. The Emonds purchased the "comprehensive form" policy for their property. I will refer to the comprehensive form policy as the "base policy" throughout these reasons. The Emonds' insurance contract also included two endorsements that supplement or modify the base policy: the GRC endorsement and a "Water Protection" endorsement. The GRC endorsement amends the "Basis of Claim Payment" provision in the base policy, which provides the basis of loss settlement in the event of damage. The Water Protection endorsement amends the policy to "bring back coverage for some water-related losses" which were excluded in the base policy (R.F., at para. 50).

[10] The provisions relevant to this appeal are reproduced in an appendix. Given the complexity of Trillium's policy booklet, it is worth summarizing at the outset some

of the key elements of the insurance contract that governs the parties' relationship, before addressing the dispute.

[11] The base policy, in section 1, states that the house is insured against direct physical loss or damage subject to a number of exclusions. One of these exclusions relates to costs of compliance with zoning and construction-related laws, and states that Trillium does not cover increased costs of compliance with legal requirements:

> [Trillium does] not insure against loss or damage resulting from, contributed to or caused directly or indirectly:
>
> . . .
>
> 8. because of increased costs of repair or replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services; except as provided under Additional Coverages of Section 1; [p. 1-7]

This exclusion will be referred to in these reasons as the "compliance cost exclusion".

[12] The term "Additional Coverages of Section 1" used in the exclusion refers to a later provision in section 1 that sets out exceptions to some exclusions. One of these exceptions, the "Building By-law & Code Compliance Coverage" exception ("BBCC exception"), relates directly to the compliance cost exclusion (p. 1-9). The BBCC exception states that the insurer will pay "an additional amount up to $10,000 . . . for the increased cost of demolition, construction, or repair to comply with any law regulating the zoning, demolition, repair or construction of any insured buildings" and outlines conditions to secure that benefit (*ibid.*).

[13] Finally, the base policy contains a "Basis of Claim Payment" provision, which outlines what Trillium will pay in the event of property damage to which the base policy applies. The provision states that the insurer will not pay amounts "exceeding the applicable amount(s) of insurance for any loss or damage arising out of one occurrence" (p. 1-10). The policy includes a declaration page, which summarizes the various types of coverage purchased and identifies the amount of insurance. The declaration page shows that the insurance amount for the house is $585,092.

[14] Beyond setting a limit on the amount payable, the provision also sets out two options that the insureds can choose for calculating the amount payable. "Option A" is based on the replacement cost of the property, referring to the

> cost of repairs or replacement (whichever is less) without deduction for depreciation, in which case [the insurer] will pay in the proportion that the applicable amount of insurance bears to 80% of the replacement cost of the damaged building at the date of damage, but not exceeding the actual cost incurred. [p. 1-10]

[15] Contrary to Trillium's written submissions, the reference to 80 percent in Option A does not mean that the amount payable is limited to 80 percent of the insurance amount that appears on the declaration page, in this case 80 percent of $585,092. Rather, this language amounts to a co-insurance clause, which is used to address situations, unlike the present, where the relevant property is underinsured (see generally B. Billingsley, *General Principles of Canadian Insurance Law* (3rd ed. 2020), at p. 267; C. Brown, *Insurance Law in Canada* (2025 (loose-leaf)), at § 7:10; see also *Alvaro v. InsureBC (Lee & Porter) Insurance Services Inc.*, 2021 BCCA 96,

457 D.L.R. (4th) 351, at paras. 20-23). For example, consider a property that would cost $500,000 to replace but in respect of which the insured only purchased $300,000 of coverage. As a result of the co-insurance clause, if the owner suffers a partial loss requiring $200,000 in repairs, the insurer will not pay out the full $200,000 even though that is under the total insurance amount of $300,000. Instead, the insurer pays a proportion of the $200,000 that is equal to the amount that the coverage "bears to" 80 percent of the actual replacement cost of the property. In this example, $300,000 bears to 80 percent of $500,000 at a ratio of 75 percent, so the insurer will pay only 75 percent of the $200,000 repair cost, or $150,000. At the hearing, the parties, including Trillium, adopted this understanding of the reference to 80 percent in Option A (transcript, at pp. 20-22, 25-26 and 48-49).

[16] The other option for calculating the amount payable, "Option B", is the actual cash value of the damage at the time of the occurrence. If the insureds do not choose Option A or Option B, Option B is used to calculate the amount payable.

[17] Section 4 (titled "Miscellaneous Coverages Section") sets out a number of provisions that apply only if expressly indicated on the declaration page. One such provision is the GRC endorsement, which amends the Basis of Claim Payment provision in section 1 as it applies to the house. The declaration page shows that the GRC endorsement applies to the property at issue.

[18] The GRC endorsement provides that Trillium "will pay for insured loss or damage if [the insureds] repair or replace the damaged or destroyed [house] on the

same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage" (p. 4-1). The Basis of Claim Payment in section 1 for the base policy does not include the language of "current building techniques", stating only that the insurer will pay for the insured loss or damage if the insureds repair or replace the damaged home "on the same location with materials of similar quality within a reasonable amount of time after the damage" (p. 1-10).

[19] The GRC endorsement goes on to provide that if the insureds choose the Option A replacement cost for the house, Trillium will pay "[t]he cost of repairs or replacement (whichever is less) without deduction for depreciation even if it is more than the amount of insurance" noted on the declaration page (p. 4-1). Unlike the base policy, there is no co-insurance language included. There are, however, a number of eligibility criteria for reliance on the GRC endorsement, requiring the amount of insurance to be 100 percent of the estimated cost to rebuild, as well as annual adjustments and notice of changes at the property to keep this number current.

[20] The endorsement concludes with a statement that "[i]n all other respects, the policy provisions and limits of liability remain unchanged" and that coverage is void if the conditions in the endorsement are not met (p. 4-1).

[21] Later in the same section there is a provision entitled "General Loss or Damage Not Insured of Section 4" providing that Trillium does not "insure against loss or damage resulting from, contributed to or caused directly or indirectly by" 14 enumerated circumstances (p. 4-7). This provision reproduces many of the exclusions

found under “Perils Excluded” in the base policy in section 1, but does not reproduce the compliance cost exclusion.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2022 ONSC 5519, 28 C.C.L.I. (6th) 97 (Ryan Bell J.)*

[22] The application judge concluded that Trillium had to pay replacement costs that included the costs of complying with the conservation authority’s requirements. She noted that “[t]he language of the GRC endorsement is clear and unequivocal: it provides ‘guaranteed rebuilding cost’ coverage” (para. 30). Citing *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.), the application judge noted that any limitations on the coverage provided by an endorsement should be set out in the endorsement itself.

[23] The application judge disagreed with Trillium that the compliance costs at issue were costs due to the “operation of any law”, which are excluded under the compliance cost exclusion. Relying on *Choukair v. Allstate Insurance Co. of Canada*, 2015 ONSC 4989, [2015] I.L.R. ¶I-5787, the application judge concluded that the exclusion applied “only to increased costs associated with the operation of a law, as distinct from a rule, regulation, by-law, or ordinance” (para. 47). This meant that costs of compliance with the conservation authority’s *Regulation Policies* — which are not statutes — did not fall within the compliance cost exclusion.

[24] She went on to conclude that, in the alternative, Trillium's interpretation would contravene the nullification of coverage doctrine, because it would "virtually nullify" the GRC endorsement coverage contrary to the reasonable expectations of an ordinary person (paras. 49-54).

B. *Court of Appeal for Ontario, 2023 ONCA 729, 489 D.L.R. (4th) 581 (Thorburn J.A., Lauwers and Zarnett JJ.A. Concurring)*

[25] The Court of Appeal allowed Trillium's appeal and ordered that the cost of replacement payable under the insurance contract does not include the compliance costs, with the exception of the $10,000 extended under the BBCC.

[26] The court concluded that the base policy specifically excludes coverage for "increased costs" of repairs due to the operation of "any law". Unlike the application judge, the Court of Appeal held that the word "law" includes "both legislation and rules of subordinate authority such as by-laws and regulations" (para. 66). Therefore, the conservation authority's *Regulation Policies* are included in the definition of "any law" (para. 69).

[27] The court concluded that "the exclusion for costs associated with legal compliance is explicit in the Policy and is clearly applicable to the GRC" (para. 80). The fact that the compliance cost exclusion was not repeated in the GRC endorsement itself was not determinative "because the Policy provisions must be read as a whole" (para. 79). Further, the court concluded that the term "current building techniques",

which only appears in the GRC endorsement, refers to contemporary construction methods, which are often more cost-effective, and does not extend coverage for the compliance costs (paras. 82-86).

[28] With respect to nullification, the court concluded that the compliance cost exclusion does not deny the Emonds the benefits of the GRC endorsement. The court noted that while the operation of the exclusion may deny the insureds some funds, it would not "render nugatory" the coverage for the most obvious risks for which the GRC endorsement was issued, such as depreciation and inflation (para. 89, citing *Foodpro National Inc. v. General Accident Assurance Co. of Canada* (1988), 63 O.R. (2d) 288 (C.A.), at p. 288).

IV. Issues

[29] The Emonds seek to restore the application judge's order declaring that they are owed the increased compliance costs of rebuilding their home (A.F., at para. 114). They argue that the GRC endorsement overrides the compliance cost exclusion because it guarantees all rebuilding costs. The Emonds also say that to apply the compliance cost exclusion would be to nullify the benefit that they bargained for under the GRC endorsement (paras. 95-96). They say the application judge was right to conclude that the compliance cost exclusion could not be applied in the circumstances.

[30] Trillium disagrees. It argues that the language of the insurance policy is unambiguous and that, reading the provisions holistically, the Court of Appeal correctly

found that coverage under the policy limited the recoverable costs of complying with the conservation authority's requirements to $10,000 (R.F., at paras. 64 and 81). Trillium argues further that the compliance cost exclusion does not nullify the coverage provided by the GRC endorsement, because the Emonds nonetheless benefit from the endorsement's modification of the coverage limit (para. 146).

[31] In light of the positions of the parties, this Court must address the following issues:

1. Properly interpreted, does the compliance cost exclusion in the policy apply despite the GRC endorsement?

2. If yes, does the compliance cost exclusion exclude the costs of compliance with the conservation authority's requirements?

3. If yes, does the nullification of coverage doctrine nevertheless prevent the application of the exclusion to these costs?

V. Analysis

A. *Principles of Interpretation for Insurance Contracts*

[32] The parties to this appeal do not take issue with the settled principles governing the interpretation of insurance contracts, which were summarized by this

Court in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, and *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121 (transcript, at pp. 8-9, 35 and 66-67). However, they advance different positions on whether the relevant provisions are ambiguous and as to their proper interpretation. It is therefore helpful at the outset to summarize the interpretive approach to be applied here.

(1) The "Generally Advisable" Order for Interpreting Insurance Contracts

[33] In *Ledcor*, this Court endorsed a "generally advisable" order in which to interpret insurance contracts (para. 52). First, the insured has the onus of establishing that the damage or loss claimed falls within the initial grant of coverage. Second, the onus shifts to the insurer to establish that one of the exclusions to coverage applies. Third, if the insurer is successful in demonstrating an exclusion, the onus then shifts back to the insured to prove that an exception to the exclusion applies (see *ibid.*; *Progressive Homes*, at paras. 29 and 51).

[34] The generally advisable order reflects the structure of insurance policies. Insurance policies set out coverage, followed by specific exclusions. Exclusions preclude coverage "when the claim otherwise falls within the initial grant of coverage" (*Progressive Homes*, at para. 27). Policies may also contain exceptions to exclusions. The exceptions to exclusions "do not create coverage — they bring an otherwise excluded claim back within coverage" (para. 28).

[35] How do endorsements, such as the GRC endorsement at issue in this appeal, fit into the order for interpreting insurance contracts?

[36] Endorsements are not self-contained and standalone contracts disconnected from the insurance policy of which they form a part. An endorsement "changes or varies or amends the underlying policy" (*Pilot Insurance Co. v. Sutherland*, 2007 ONCA 492, 86 O.R. (3d) 789, at para. 21). Some endorsements may be "comprehensive on the subject of the particular coverage provided in the endorsement", but they are still "built on the foundation of the policy" (*ibid.*; see also *Pickford Black Ltd. v. Canadian General Insurance Co.*, [1977] 1 S.C.R. 261, at pp. 265-66). It follows that endorsements do not change the generally advisable order. Aspects of the endorsement that affect coverage are considered as part of the coverage conferred by the insurance contract, aspects that create exclusions are considered later, followed by any exceptions to the exclusions created.

(2) Unambiguous Language in Insurance Contracts

[37] Where the language of the insurance contract is unambiguous, effect should be given to that clear language, reading the contract as a whole (*Ledcor*, at para. 49, citing *Progressive Homes*, at para. 22, citing *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71). This is the first stage of the interpretive analysis. Other interpretive tools are only to be considered where the language is ambiguous.

[38] The words of the contract must be given their "ordinary and grammatical meaning" (*Ledcor*, at para. 27, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47; see also *Ledcor*, at para. 61). For example, in *Sabean*, decided shortly after *Ledcor*, this Court gave the words of the contract "their ordinary meaning, 'as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law'" (para. 13, citing *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029). The Court concluded in that case that the insurer could not rely on its "specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy" (*Sabean*, at para. 4). This approach serves consumer protection, which this Court has said is an important purpose of home insurance law (see, e.g., *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, at para. 11).

[39] The principle that unambiguous language in an insurance contract should be given effect reflects unique features of the insurance context. Courts "expect insurers to ensure that the policy terms are 'clear, express and easily intelligible'" (Billingsley (2020), at p. 148, citing *CIT Financial Ltd. v. Insurance Corporation of British Columbia*, 2017 BCSC 641, at para. 52; see also *Katsikonouris*, at p. 1043). The factual matrix surrounding a standard form insurance contract is less relevant than in other contractual settings where parties negotiate (see *Ledcor*, at para. 28). In this context, focusing first on the ordinary meaning of the language will often offer a reliable path

to discern the reasonable expectations of both the insured and the insurer (see *Martin v. American International Assurance Life Co.*, 2003 SCC 16, [2003] 1 S.C.R. 158, at para. 19). Giving effect to unambiguous language also serves the goal of consistency in the interpretation of standard form insurance contracts, which this Court has said is "particularly important" (*Ledcor*, at para. 40).

[40] The initial focus on the language should not, however, be misunderstood as encouraging a reading of provisions in isolation, without understanding how they operate within the logic of the policy. In determining whether the language of a provision is ambiguous, the court must still read the contract as a whole (see *Ledcor*, at para. 49; *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6, at p. 19; see also *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 897-98).

[41] Ambiguity arises where there are multiple "reasonable but differing interpretations of the policy" (*Sabean*, at para. 42, citing B. Billingsley, *General Principles of Canadian Insurance Law* (2nd ed. 2014), at p. 147). "The mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity" (*Sabean*, at para. 42) — not all interpretations advanced will be reasonable. For example, in *Ledcor*, this Court concluded that the language of the contract was ambiguous because it identified two reasonable interpretations: (1) the term "cost of making good faulty workmanship" in its "plain, ordinary and popular meaning" could be understood as the cost of redoing

faulty workmanship and "resulting damage" could be understood as including damage resulting from the faulty work, or (2) "cost of making good faulty workmanship" could be understood as including the cost of repairing the parts of the property or project that were damaged by the faulty work and "resulting damage" could refer to consequential damage to other parts of the property (see *Ledcor*, at paras. 59-61). The contract did not contain definitions that could assist in resolving the ambiguity. As a result, the Court concluded that this ambiguity remained after the language at issue was read in the context of the contract as a whole.

[42] Ambiguity as it has been described in other interpretive contexts is also instructive by analogy here. In the statutory interpretation context, some "secondary principles of interpretation" are said to apply only if a legislative provision is ambiguous (*Piekut v. Canada (National Revenue)*, 2025 SCC 13, at para. 48). A statutory provision is not ambiguous for this purpose simply because different courts or authors have reached different conclusions as to the proper interpretation (*ibid.*, citing *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 30). As the Court noted in *Bell ExpressVu*, the "words of the provision must be 'reasonably capable of more than one meaning'" (para. 29, citing *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid).

[43] In statutory interpretation, the Court has emphasized that "one must consider the 'entire context' of a provision before one can determine if it is reasonably capable of multiple interpretations" (*Bell ExpressVu*, at para. 29). This Court has also

said that "[w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context" (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10; see also *La Presse inc. v. Quebec*, 2023 SCC 22, at paras. 23-24).

[44] Similarly, in the interpretation of insurance contracts, a provision's text cannot be read in isolation; it must be interpreted in light of the contract as a whole. The provision's interaction with other contractual provisions may colour its meaning.

[45] Specifically, the generally advisable order in which to interpret insurance contracts, discussed above, should not be taken to require provisions to be read in isolation. The Emonds contend, for example, that relying on the text of the exception to an exclusion to understand the exclusion within the context of the contract as a whole contradicts the generally advisable order set out in *Ledcor* (A.F., at paras. 9 and 31). This argument reflects a misunderstanding of the role that the generally advisable order plays in the interpretation of insurance contracts. The generally advisable order assists interpreters of insurance contracts in understanding the structure of coverage, exclusion and exception and clarifies the burden of establishing each. It does not mean a court must, for example, interpret a provision that confers coverage without recourse to other provisions, including exclusions or exceptions to exclusions. To the contrary, [TRANSLATION] "the text of a provision that defines the insurer's undertaking may be helpful in clarifying the meaning of an exclusion clause, and vice versa" (D. Boivin,

Le droit des assurances dans les provinces de common law (2nd ed. 2020), at para. 8-10).

[46] In reading the language of an insurance contract, then, ambiguity will generally arise in two cases. First, ambiguity may arise when a provision appears *unclear* in isolation and continues to admit of more than one reasonable meaning when read in light of the contract as a whole (see Brown, at § 8:6, citing *Taylor v. National Life Assurance Co. of Canada* (1990), 7 C.C.L.I. (2d) 146 (B.C.C.A.); *Ledcor*, at paras. 59-64). Second, ambiguity may arise when a provision that appears *clear* in isolation is capable of holding more than one reasonable meaning when the contract is read as a whole. For example, ambiguity may arise "where two or more provisions in the same contract, each clear in itself, are irreconcilable" (Brown, at § 8:6; see, e.g., *Ajax (Town) v. St. Paul Fire & Marine Insurance Co.* (2008), 93 O.R. (3d) 73 (S.C.J.)).

[47] That said, two or more provisions in the same contract are not irreconcilable or ambiguous merely because they overlap. Insurance policies "often contain multiple, sometimes overlapping coverages, exclusions, conditions, and endorsements" (*EPCOR Electricity Distribution Ontario Inc. v. Municipal Electric Association Reciprocal Insurance Exchange*, 2022 ONCA 514, at para. 58). Reading the contract as a whole is an exercise in "searching for harmony rather than discord" between such provisions (*ibid.*).

(3) Resolving Ambiguity

[48] In the face of ambiguity, the court cannot rely on the language alone. Instead, it must move to a second stage and employ other rules of contractual interpretation to resolve that ambiguity (*Ledcor*, at para. 50).

[49] These rules include, but are not limited to: that the interpretation should be consistent with the reasonable expectations of the parties; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance contract was formed; and it should be consistent with the interpretations of similar insurance policies (*Ledcor*, at para. 50).

[50] If ambiguity still remains after the two first stages, the court must have resort to the *contra proferentem* rule at a third stage, which provides that the ambiguity must be resolved in a manner favourable to the insured (*Ledcor*, at para. 51). In the context of insurance policies, *contra proferentem* means that interpretations that result in broader coverage, narrower exclusions and broader exceptions to exclusions are favoured at this stage (para. 51). This rule recognizes the "unequal bargaining power at work in insurance contracts" (*Scalera*, at para. 70). The insurer is the drafter of the contractual language and bears responsibility for residual ambiguity.

B. *Nullification of Coverage*

[51] Courts in Ontario have long refused to apply exclusion clauses in insurance contracts where the effect of the clause would be to virtually nullify the coverage provided by the policy (see *Ontario v. St. Paul Fire and Marine Insurance Company*,

2023 ONCA 173, 480 D.L.R. (4th) 30, at para. 31; *Cabell v. Personal Insurance Co.*, 2011 ONCA 105, 104 O.R. (3d) 709, at paras. 14-17; see also *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447 (C.A.), at para. 28; *Weston Ornamental Iron Works Ltd. v. Continental Insurance Co.*, [1981] I.L.R. ¶1-1430 (Ont. C.A.); *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, at paras. 16-17; *Consolidated-Bathurst*, at pp. 901-3; *Indemnity Insurance Co. of North America v. Excel Cleaning Service*, [1954] S.C.R. 169, at pp. 179-80, per Estey J.). This rule is referred to as the nullification of coverage doctrine.

[52] The decision in *Cabell* is instructive. In that case, the insureds had purchased an endorsement to their home insurance contract that provided additional coverage for damage to the swimming pool. The endorsement explicitly stated that "[a]ll other terms conditions and exclusions of this policy remain unchanged" (para. 6). The base policy excluded coverage for "settling, expansion, contraction, moving, bulging, buckling or cracking of any insured property, except resulting damage to building glass" (para. 29 (emphasis deleted)). The court had difficulty "conceiv[ing] of any damage or loss to an in-ground swimming pool that would not come within that exclusion, especially the word 'cracking'" (*ibid.*). The court concluded that application of the exclusion would virtually nullify the swimming pool endorsement and declined to apply it to the damage suffered by the insureds' swimming pool (paras. 31-32).

[53] In the most recent case discussing nullification, the Court of Appeal for Ontario describes nullification as preventing "insurance contracts from being construed

so as to defeat the coverage the policy provides, thereby defeating the very objective of the insurance contract and rendering it nugatory" (*Ontario v. St. Paul Fire and Marine Insurance Company*, at para. 31). Importantly this rule is said to apply even if the language of the policy is unambiguous (see *Cabell*, at para. 17; see also *Sam's Auto Wrecking Co. Ltd. v. Lombard General Insurance Co. of Canada*, 2013 ONCA 186, 114 O.R. (3d) 730, at para. 37), and is considered only after the insurance contract has been properly interpreted (see *Cabell*, at para. 18).

[54] The parties disagree about how this rule, referred to as the nullification of coverage doctrine, should be understood in reference to the *Ledcor* framework summarized above.

[55] The Emonds say that the application judge was right to conclude that this is a freestanding rule that continues to apply even in face of unambiguous language to the contrary (A.F., at paras. 94-99). They argue that insurers cannot be allowed to sell insurance products that are rendered valueless by exclusions buried elsewhere in the policy (paras. 85-86).

[56] Trillium says that the doctrine applies only where there is ambiguity in the contractual language and that it should be considered at the third stage of the *Ledcor* framework. It argues that the existence of a grant of coverage alongside a term that eviscerates that coverage does not create ambiguity. Thus, where an insurer offers coverage and unambiguously eviscerates that coverage elsewhere in the contract, the doctrine does not apply (R.F., at para. 141). Trillium argues that to do otherwise

undermines the holding in *Ledcor* that unambiguous language should be given effect, and would amount to a backdoor unconscionability remedy in the insurance context (paras. 137 and 139).

[57] Trillium relies on decisions of the Court of Appeal for British Columbia, which has expressed some doubt about the approach taken in Ontario (see, e.g., *Turpin v. Manufacturers Life Insurance Co.*, 2013 BCCA 282, 46 B.C.L.R. (5th) 56, at para. 45; *Economical Mutual Insurance Company v. Optimum West Insurance Company Inc.*, 2019 BCCA 184, 90 C.C.L.I. (5th) 1, at para. 53; see also *Royal & Sun Alliance Insurance Co. of Canada v. Snow*, 2016 NSCA 7, 394 D.L.R. (4th) 130). The reason for doubt is said to be that "[t]he Supreme Court of Canada has repeatedly and consistently affirmed that the reasonable expectations of the parties only become relevant if the provisions of an insurance contract are ambiguous" (*Turpin*, at para. 42, citing *Progressive Homes*, at para. 22).

[58] I do not accept Trillium's understanding of the doctrine. To do so would mean fundamentally changing the rule as it has been developed for decades in Ontario courts. Ontario courts have been clear that it applies even where the language is unambiguous, but Trillium would have it relegated to the third stage of *Ledcor*, which can only be reached where language is ambiguous and not resolved through the rules of contractual interpretation. The result of Trillium's position would be that insurance companies could offer coverage that is eviscerated elsewhere in the policy, provided

that the evisceration of coverage is unambiguous. I see no reason to endorse this approach.

[59] It is true that in early case law, particularly earlier case law of this Court, the rule was referenced in the course of discussing the interpretive principles that are now reflected in the *Ledcor* framework (see *Excel Cleaning*, at pp. 179-80, per Estey J.; *Consolidated-Bathurst*, at pp. 901-3; *Amos*, at paras. 16-17). But subsequently in *Progressive Homes*, *Ledcor*, and *Sabean*, this Court clarified the proper structure to the interpretive analysis, emphasizing the primacy of unambiguous language in the insurance context (see G. R. Hall, *Canadian Contractual Interpretation Law* (4th ed. 2020), at p. 269). In order to preserve the functional effect of the nullification rule, which applies even when faced with unambiguous language, it must now be recognized that it operates apart from this interpretive exercise.

[60] The rationale for the nullification of coverage doctrine is linked not just to the search for the shared intention of the parties, which is the object of interpretation, but to fundamental fairness considerations specific to the insurance context. As Estey J. put it in *Consolidated-Bathurst*, courts should be reluctant to "enable the insurer to pocket the premium without risk" (pp. 901-2; see also Boivin, at para. 8-84). Commentators have suggested that untangling such fairness considerations from the interpretive exercise results in a more conceptually sound approach, because doing so allows the interpretation of insurance contracts to remain focused on what the parties

agreed to as is reflected in the contract's text (see, e.g., Billingsley (2020), at pp. 148-50).

[61] To the extent some appellate courts appear to have taken a different approach regarding how the nullification doctrine relates to the *Ledcor* framework, the differences appear to be formalistic rather than substantive. In *Turpin* and *Optimum West*, the Court of Appeal for British Columbia was clear that there was no nullification of coverage in the specific insurance contracts they were interpreting in those cases. As such, the existence of the doctrine had no bearing on the cases (*Turpin*, at paras. 45 and 47; *Optimum West*, at para. 53).

[62] Further, as I have said, an ambiguity can arise where two seemingly clear terms of a contract conflict in such a way that it raises multiple reasonable possibilities as to their meaning. Arguably, a provision conferring special coverage for an additional premium that is rendered valueless by an exclusion elsewhere in the policy could raise such an ambiguity. Indeed, in *Snow*, this is how the Nova Scotia Court of Appeal read the Ontario case law: "*Cabell* was essentially looking at an ambiguity in the policy when it was read as a whole. An exclusion purported to deny coverage while an endorsement, which was requested and paid for, provided coverage" (para. 71). Even if nullification is conceived of as giving rise to an ambiguity in the language of the contract, rather than existing outside the interpretive framework, the practical result is the same.

[63] Further, I do not accept Trillium's argument that the nullification of coverage doctrine somehow represents an expansion of the principles of unconscionability.

[64] As Trillium rightly acknowledges, the doctrine of unconscionability already provides that insurance contract terms, properly interpreted, can be displaced for fairness reasons external to the interpretive exercise (R.F., at para. 139, citing *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; see also *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118). Relief on the basis of unconscionability "requires *both* some kind of unfairness *and* a substantively unfair transaction" (A. Swan, J. Adamski and A.Y. Na, *Canadian Contract Law* (4th ed. 2018), at §9.171 (emphasis in original)). As the Court noted in *Uber*, at para. 77:

> Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party or cause an "unfair surprise". [Citations omitted.]

[65] The nullification of coverage doctrine does not represent an undesirable expansion of these principles. If anything, it is more restrained. Unlike unconscionability, which applies to all contracts, nullification of coverage applies exclusively in the insurance context. Here, courts must be especially alert to the inequality of bargaining power that favours the insurer (see *Scalera*, at para. 70).

Further, nullification of coverage applies in the extreme and specific scenario where coverage is nullified, such that the insurer is pocketing a higher premium without any material risk (see *Cabell*, at para. 17, citing *Zurich Insurance*, at para. 28).

[66] For these reasons, I prefer not to disturb the settled law in Ontario. A provision should not be applied to the extent it would completely defeat the very objective of having purchased the relevant coverage and render it nugatory. This is true even when the language of the provision is unambiguous at the first stage of the *Ledcor* analysis (para. 49).

C. *Application*

[67] The insurance contract in this case is a standard form contract. The interpretation of standard form contracts is a question of law reviewed on a correctness standard (see *Ledcor*, at para. 24). No deference is owed to the courts below on the interpretation of the contract, though I take careful note of their reasons.

[68] Having regard to the generally advisable order for interpreting insurance contracts, I note that there is no dispute that the loss claimed by the Emonds (i.e., the total loss of their home as a result of the flood) falls within the insurance contract's grant of coverage. The burden rests with Trillium, as the insurer, to show that the compliance cost exclusion precludes coverage for costs of compliance.

[69] In order to determine whether Trillium must pay the increased costs of compliance with the conservation authority's requirements, I first interpret the contract by asking two questions. Does the compliance cost exclusion apply despite the GRC endorsement? If yes, then the second question is whether the exclusion applies to the increased costs of compliance with the legal requirements that are specifically at issue here. After settling on the proper interpretation, I then consider whether the nullification of coverage doctrine applies.

(1) The Compliance Cost Exclusion Applies Despite the GRC Endorsement

[70] With respect to the first question, the Emonds submit that it is unambiguous that the compliance cost exclusion does not apply to the GRC endorsement. In support of this position, they say that the GRC endorsement is "comprehensive on the subject of the rebuilding costs" (A.F., at para. 73) and that the heading of the GRC endorsement ("Guaranteed Rebuilding Cost Coverage") implies that full rebuilding costs are guaranteed. According to the Emonds, this interpretation is supported by wording in the GRC endorsement that the costs are calculated based on "current building techniques" and the absence of the compliance cost exclusion in the exclusions list at the end of section 4.

[71] Trillium submits that it is unambiguous that the compliance cost exclusion applies despite the GRC endorsement. Trillium says that the Emonds overemphasize the relevance of the word "guarantee" in the heading. Further, it submits that the GRC endorsement does not provide for additional coverage. Rather, it is "an amendment to

the Basis of Claim Payment that potentially expands the Policy's coverage limits" (R.F., at para. 87).

[72] Whether an exclusion applies to limit the insurer's liability for compliance costs cannot be understood in the abstract, but must be grounded in the language of the specific insurance contract at issue. It is therefore important to closely examine the language of this GRC endorsement, and the language describing the base policy that it purports to amend, in order to decide whether the compliance cost exclusion continues to apply despite the endorsement.

[73] The GRC endorsement explicitly states that it amends the "Basis of Claim Payment" provision in the base policy: "If the 'Declaration Page' shows that the Guaranteed Rebuilding Cost Endorsement applies, the Basis of Claim Payment for the [house] is amended as follows" (p. 4-1). The text of the GRC endorsement is explicit that the endorsement amends the formula only in respect of the house.

[74] As discussed above, the "Basis of Claim Payment" provision outlines the formula for calculating the amount payable by the insurer in the event of loss or damage. The "Basis of Claim Payment" provision for the base policy outlines two loss settlement options in the event of loss or damage: cost of repair or replacement and actual cash value of the damage incurred. As explained by Laskin J.A. in *Carter v. Intact Insurance Co.*, 2016 ONCA 917, 133 O.R. (3d) 721, at para. 23, the objective of replacement cost coverage is distinct from the purpose of actual cash value coverage, because it recognizes depreciation as an insurable risk:

> Replacement cost insurance . . . goes beyond the notion of indemnity. It recognizes that depreciation, or the deterioration of a property over time, is an insurable risk. Replacement cost insurance, in effect, insures depreciation: the difference between replacement cost and actual cash value. So, under replacement cost insurance, if insureds do indeed repair or replace their damaged property, they are entitled to recover from their insurer the full cost of the repairs or the replacement. They can replace "old" with "new".

[75] For either loss settlement basis, the base policy provides that the insurer will not pay amounts "exceeding the applicable amount(s) of insurance for any loss or damage arising out of one occurrence" (p. 1-10). The insurance amount purchased for the Emonds' house was $585,092 (A.R., vol. I, at p. 74). In the event of an insured loss under the base policy, that number would only automatically increase by a limited amount "solely attributable" to inflation (p. 1-9). This means that according to the clear language of the base policy, the payout following an occurrence of damage to the house would be subject to a strict upper limit, namely the insurance amount adjusted as necessary for inflation.

[76] The primary benefit of the GRC endorsement is that it increases the amount payable beyond this amount of insurance. By its clear language, it provides that the cost of repairs or replacement is payable by the insurer "even if it is more than the amount of insurance" (p. 4-1). The insureds are therefore protected from increases in rebuilding costs that surpass this upper limit, whether because in setting that limit the true costs to rebuild were underestimated, because construction costs have increased for reasons not solely attributable to inflation, or otherwise (see, e.g., *TGA General*

Contracting & Restoration Inc. v. Cirillo (2009), 90 C.L.R. (3d) 68 (Ont. S.C.J.), at paras. 117-18).

[77] It is important to recognize that the GRC endorsement does not have the effect of moving from an actual cash value loss settlement basis to a replacement cost basis. Contrasting the GRC endorsement with actual cash value loss settlement would be to select the wrong comparator. Even without the GRC endorsement, the Emonds could have enjoyed replacement cost coverage, because this is provided for in the base policy (p. 1-10). And even with the GRC endorsement, the Emonds may be paid on an actual cash value basis, depending on the circumstances (p. 4-1). The GRC endorsement and the provision it replaces in the base policy both provide two possible means to calculate the amount payable: replacement cost or actual cash value.

[78] Because the GRC endorsement simply amends the Basis of Claim Payment provision in the base policy by extending the amount payable beyond the amount of insurance purchased by the insureds, the exclusions in the policy continue to apply to the amended provision as they did to the original provision. This is further confirmed by language in the GRC endorsement, which states: "In all other respects, the policy provisions and limits of liability remain unchanged" (p. 4-1). The language of the GRC endorsement is clear that it only amends the Basis of Claim Payment provision in the base policy and does not amend any other part of the policy. This is not, therefore, a case like *Wigle*, where certain limitations on the scope of the endorsement were not

made apparent in that endorsement. Here, the fact that the relevant limits of liability continue to apply was made explicit in the endorsement itself.

[79] The Emonds raise a number of arguments in support of their contrary view that the exclusion does not apply despite this language. Even taken at their highest, these arguments do not raise any ambiguity.

[80] The Emonds submit that "in all other respects" is the operative phrase in the portion of the GRC endorsement that states: "In all other respects, the policy provisions and limits of liability remain unchanged" (A.F., at para. 92). In their view, the text of the endorsement guarantees full rebuilding costs. This being the subject matter of the endorsement, then any provisions that limit this guarantee are not carried into the endorsement and do not limit its coverage, because they do not address "other respects". This argument relies on two terms in the GRC endorsement's text: the term "Guaranteed Rebuilding Cost" in the heading of the endorsement; and the addition of the phrase "current building techniques" in the endorsement's amendment of the Basis of Claim Payment provision (A.F., at paras. 62-72).

[81] First, the Emonds argue that the use of the word "guaranteed" in the heading of the endorsement is "intended to convey a promise that the insurer was guaranteeing to the insured that it would pay the full rebuilding cost of the home" (A.F., at para. 62). The Emonds argue that, when they purchased the policy, they believed that they purchased insurance from Trillium that guaranteed full rebuilding costs (para. 64).

They argue that this is how the language would be understood by an average person applying for insurance (paras. 63-65).

[82] I disagree. This argument would have us read the word "guaranteed" in isolation, rather than in light of the contract as a whole, as required. The heading of an endorsement cannot overwhelm otherwise unambiguous language. In this context, the term "guaranteed" clearly refers to the absence of a limit on the amount payable by the insurer, subject to the conditions in the insurance contract. Indeed, the Emonds concede that at least some exclusions from elsewhere in the policy continue to apply despite the GRC endorsement, such as exclusions related to war and terrorism (transcript, at pp. 11-12). This underlines that the word "guaranteed" does not mean that Trillium was "guaranteeing the rebuild" no matter what (A.F., at para. 64). Even on the Emonds' own interpretation, this is not true.

[83] Second, the Emonds argue that the GRC endorsement confers an additional benefit: that the rebuilding would be completed with "materials of similar quality using current building techniques" (A.F., at para. 69 (emphasis added); Residential Insurance Policy, at p. 4-1). The base policy's Basis of Claim Payment provision calculates cost based on rebuilding "with materials of similar quality", but does not refer to "current building techniques". The Emonds argue that "these words would be read by an average person to mean that any rebuilding of the home would meet current building standards" (para. 70).

[84] I disagree. The ordinary meaning of the word "technique" is simply a way of carrying out a particular task, especially one that requires skill (*Oxford English Dictionary* (online), *sub verbo* "technique"; *Cambridge Dictionary* (online), *sub verbo* "technique"). A technique is not equivalent to a legal requirement: not all current techniques are necessarily legally required and not all legal requirements will relate to techniques by which a particular rebuilding task is carried out. For example, a legal requirement to upgrade the septic system on the Emonds' property is not a commonly used construction method or technique within any ordinary reading of those words. Rather, it is a requirement to conduct additional work as a pre-requisite to rebuild (see A.R., vol. II, at p. 6), even though the septic system itself was not damaged in the flood (see application judge's reasons, at para. 37).

[85] Consistent with this understanding, "current building techniques" refers to "construction methods that are commonly used today rather than those used in the original construction of the home" (C.A. reasons, at para. 84). For example, roof shingles on older homes were installed by hand nailing, but air nailing may have replaced the method of hand nailing in modern home construction.

[86] Rather than increase the coverage limit, the phrase "current building techniques" may actually serve to limit the insurer's liability for loss settlement under the GRC endorsement. As Trillium's adjuster explains, current building techniques can be more cost-effective than the techniques used at the time of construction (A.R., vol. II, at p. 10). This language thus serves a clear function within the logic of the policy

booklet as a whole. Since, in contrast to the base policy, there is no cap on the recovery for replacement costs under the GRC endorsement, calculating the cost of rebuilding using less efficient historical techniques could greatly increase the insurer's liability. The language of "current building techniques" in the endorsement excludes this possibility. It is therefore unambiguous that the requirements set by the conservation authority are not "current building techniques" referenced in the endorsement.

[87] The Emonds raise a further argument: the exclusions listed under section 4 omit the compliance cost exclusion (A.F., at para. 87). They argue that an "average person purchasing additional coverage under Section 4 . . . would rely on the exclusion clauses in Section 4 and have no reason to believe that the [GRC] endorsement was limited in any other way" (para. 90).

[88] I disagree. The exclusions in section 4 limit the insurer's liability with respect to coverage-granting endorsements in section 4 of the policy. The coverage-granting endorsements in section 4 insure additional property or perils not covered under section 1. For example, endorsements such as "Coverage LG — Lawn and Garden Equipment Coverage" provide coverage for the loss of lawn and garden equipment and golf carts. By contrast, the effect of the GRC endorsement, according to its clear language, is not to insure additional property or perils. Its effect is merely to "amend" the manner in which loss settlement is calculated, under section 1, in the event of damage to the house, which is already insured. Nothing in the wording of the endorsement suggests the exclusions applicable to that loss, which are also found in

section 1, are to be replaced by the distinct list of exclusions in section 4, which apply to additional property or perils insured under that section. To the contrary, the GRC endorsement clearly states that, apart from the amendment of the loss settlement calculation as it relates to the house, "the policy provisions and limits of liability remain unchanged" (p. 4-1).

[89] For these reasons, reading the contract as a whole, it is unambiguous that the compliance cost exclusion applies despite the GRC endorsement.

(2) The Increased Costs of Compliance With the Conservation Authority's Requirements Are Captured by the Compliance Cost Exclusion

[90] The Emonds argue that, even if the compliance cost exclusion applies, the "increased costs of repair" comprise only those increased costs for compliance with any law that came into force "after the policy was issued/renewed" (A.F., at para. 110). Since the conservation authority's requirements applied at the time of policy issuance, they say that they fall outside of the scope of the exclusion. In the alternative, the Emonds argue that the exclusion clause is ambiguous, because their interpretation is as reasonable as the interpretation adopted by the Court of Appeal (para. 110; see also C.A. reasons, at paras. 55-57).

[91] The Emonds' interpretation of the compliance cost exclusion is not a reasonable reading of the policy language. The language in the exclusion, "increased costs of repair or replacement due to operation of any law" (p. 1-7), does not inject a

temporal dimension into the exclusion as the Emonds suggest. Rather the words "due to" clearly link the increase in costs to the operation of "any" law with no wording to suggest any limitation on when the law came into force, much less a specific cut off on the date the insurance contract was formed.

[92] Where increased costs are meant to be calculated by reference to the time when the contract was issued, the contract says this explicitly. For example, the Inflation Protection clause provides that the increase in costs due to inflation is to be calculated "since the inception date of this policy; or the latest renewal date, or from the date of the most recent change to the amounts of insurance shown on the 'Declaration Page', whichever is the least" (p. 1-9).

[93] The "increased costs" are, instead, the difference between the cost of rebuilding the house as it previously stood, without regard to laws prescribing requirements as to how it must now be built, and the cost of rebuilding the house as modified to bring it into compliance with the applicable laws (see C.A. reasons, at paras. 56-63; see also *Fabian v. BCAA Insurance Corporation*, 2022 BCSC 552, 21 C.C.L.I. (6th) 246, at paras. 15, 19 and 25). That difference represents the additional costs resulting from having to comply with those laws.

[94] To be clear, this does not restrict the excluded compliance costs to those that arise after the date of construction. The prevailing law at the time of construction is irrelevant to the comparative exercise. The comparison is between rebuilding without regard to compliance with *any* law, and rebuilding with regard to the contemporary

legal requirements. Consistent with the text of the exclusion, the comparative exercise is grounded in the present and, in contrast to the narrower interpretation, does not require understanding how building requirements have evolved over time.

[95] Particularly when read in light of the policy as a whole — notably, the BBCC exception — this interpretation of the term "increased costs" is unambiguous. As stated above, the generally advisable order does not mean that the interpretation of a clause must be carried out in ignorance of other provisions in the contract that may help shed light on the coverage, exclusion or exception that is being interpreted. Specifically, in this case, the generally advisable order does not mandate that the language of exclusion clauses must be read without regard to their exceptions. In deciding whether there is an ambiguity, we must always read the language in the context of the contract as a whole.

[96] The text of the BBCC exception does not align with the Emonds' interpretation of the compliance cost exclusion to which the exception relates. Recall that this exception limits the compliance cost exclusion by allowing the insureds to recover some costs of compliance with laws that are "in force at the time of" loss or damage (p. 1-9). Nothing in its language suggests that it is limited to laws that came into force after the policy was issued.

[97] In light of the foregoing, it is unambiguous that the conservation authority requirements at issue are captured by the exclusion. Increased costs of compliance with

the conservation authority's requirements in excess of the $10,000 BBCC exception are excluded from coverage.

[98] Even if one were to conclude, despite the clear language, that the words "increased costs" were ambiguous, that ambiguity would necessarily be resolved against the Emonds. Parties reading the broad language of this exclusion would not reasonably expect an insurer to have implicitly accepted liability for all pre-existing non-compliance with applicable law. That would require insurers to ascertain the state of compliance of the insured's property in each case or else bear indeterminate liability, and potentially to do so again annually, each time the contract is renewed.

[99] This would be particularly onerous because each property would likely be subject to multiple, overlapping regulatory regimes at various levels of government concerning how it must be reconstructed. Even within the same municipality, the applicable law may vary between neighbourhoods. For example, the geographic extent of a conservation authority's jurisdiction is generally based on the watershed, a natural feature spanning parts of various municipalities (see *Conservation Authorities Act*, s. 2(1)). Depending on where a property is located in the City of Ottawa, then, it may be subject to the same conservation authority requirements that apply to the Emonds or to requirements set by a different conservation authority. Further, requirements at any level evolve continuously over time. Regulations prescribing the building code in Ontario, for example, have been amended more than a dozen times in the last decade

(see generally O. Reg. 332/12, now repealed, and O. Reg. 163/24, both made under the *Building Code Act, 1992*, S.O. 1992, c. 23).

[100] Assessing compliance cost risk accurately would therefore require a fine-grained assessment of regulatory requirements for each sub-municipal geographic unit and for each small window of time between regulatory changes. The insurer would then need detailed information about each property to identify possible non-compliance, which could well be latent. The Emonds, who bear the burden of showing the Court of Appeal erred in its interpretation of "increased costs", have failed to point to any evidence or authority suggesting this state of affairs would be reasonably expected or reflective of commercial reality.

[101] Indeed, courts have generally avoided interpretations of this nature, which would transform the insurer into a guarantor for the insured's regulatory non-compliance (see, e.g., *Roth v. Economical Mutual Insurance Co.*, 2016 ABCA 399, 46 Alta. L.R. (6th) 1, at para. 23), and have long given effect to similar language in compliance cost exclusions without inquiring into when the relevant law came into force (see, e.g., *Manhas v. Sovereign General Insurance Co.*, 1999 BCCA 162, 172 D.L.R. (4th) 475, at para. 16; *Seivewright v. B.C. Insurance Co.* (1989), 39 C.C.L.I. 145 (B.C.S.C.), at p. 148; see also *Allemand v. State Farm Ins. Cos.*, 160 Wn. App. 365, 248 P.3d 111 (2011), at para. 18). Despite the long history of courts considering compliance cost exclusions, the Emonds have failed to point to a single authority supporting their novel, temporal interpretation.

[102] In the event of a claim, the Emonds' proposed interpretation would make assessing the effect of the exclusion on the amount payable unclear and onerous. For example, in this case, the conservation authority's regulatory regime was revoked and replaced with a completely new regime *after* the date of contract formation (see *More Homes Built Faster Act, 2022*, S.O. 2022, c. 21, Sch. 2, s. 16; *Prohibited Activities, Exemptions and Permits*, O. Reg. 41/24, made under the *Conservation Authorities Act*; Mississippi Valley Conservation Authority, *Regulation Policies*, updated April 2024 (online)). The Emonds' house will presumably be rebuilt under that new regime, which means, under their narrow interpretation of this exclusion, that a requirement-by-requirement assessment of whether *and when* each requirement changed would be needed to calculate the payable costs.

[103] Further, and as in *Roth*, aspects of the non-compliance in this case relate to property that was not damaged by the insured peril, namely the non-compliant septic system (see application judge's reasons, at para. 37). It is not clear whether the Emonds' interpretation of this exclusion would allow them to recover the costs of this upgrade. Their interpretation risks raising these and other complex valuation issues, without any explicit language to manage them.

[104] I see no reason to depart from the settled understanding of this clause in favour of the Emonds' interpretation, which would lead to unworkable results divorced from the language of the exclusion and the broader context of the policy.

(3) The Compliance Cost Exclusion Does Not Nullify the GRC Endorsement

[105] Having interpreted the relevant provisions, I now ask whether there are grounds to disapply the exclusion based in the nullification of coverage doctrine.

[106] The Emonds say that applying the compliance cost exclusion in this case would virtually nullify the coverage provided by the GRC endorsement (A.F., at para. 96, citing application judge's reasons, at paras. 52-54).

[107] Trillium says that even taking the Emonds' argument at its highest there is no nullification (R.F., at paras. 147-51). It says that the compliance cost exclusion may limit what can be recovered under the GRC endorsement, but there is still a benefit such that it is not rendered nugatory.

[108] I agree with Trillium. The compliance cost exclusion does not nullify the benefit provided by the GRC endorsement.

[109] As I have said above, the primary benefit of the GRC endorsement for the insureds is that it allows them to recover a cost of rebuilding that exceeds the insurance amount indicated on the declaration page, as may be adjusted for inflation under the base policy. Whether or not compliance costs are recoverable, those insured who have opted for the endorsement would continue to enjoy this benefit, as the recoverable cost of replacement, less compliance costs, may still exceed the insurance amount. The Emonds have merely shown that the costs they will recover are less than they would have been without the exclusion, but this does not nullify the benefit under the GRC

endorsement allowing them to recover amounts exceeding the clear upper limit set under the base policy.

[110] Therefore, the high bar to show nullification is not met and the compliance cost exclusion applies despite the GRC endorsement.

VI. Conclusion

[111] When this standard form insurance contract is read as a whole, the contested language can bear only one reasonable meaning. An exclusion applies to the increased costs of complying with the conservation authority's requirements, despite the GRC endorsement. The purpose of the endorsement was to permit recovery of replacement costs even when they exceed the amount of insurance, and applying the compliance cost exclusion does nothing to nullify or otherwise interfere with that purpose. The Emonds are not, therefore, entitled to recover the increased compliance costs, with the exception of the $10,000 extended under the BBCC.

[112] I would dismiss the appeal with costs.

The following are the reasons delivered by

KARAKATSANIS J. —

I. Overview

[113] I arrive at the same result as my colleague Côté J.: Trillium must pay legal compliance costs related to laws that came into force *before* the policy was issued or renewed, but not increased costs for laws that came into force *after* that date. I do so, however, for different reasons.

[114] Despite the unwieldy structure of this insurance policy, I accept that the compliance cost exclusion applies to the Emonds' Guaranteed Rebuilding Cost Coverage endorsement, largely for the reasons of Rowe J. The guaranteed rebuilding endorsement modifies their policy, but it expressly leaves limits of liability unchanged — including the compliance cost exclusion. But the exclusion is itself ambiguous, and I would resolve that ambiguity in favour of the Emonds. I would allow the appeal in part and order that the insurer pay the costs of complying with any laws existing at the time the insurance contract was last renewed.

[115] This Court's approach to interpreting insurance contracts is set out in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. It begins by asking how an average insurance seeker, not versed in the niceties of insurance law, would understand a policy's terms. The focus on an average insurance seeker is consumer-protective. It gives effect to a layperson's understanding of language in adhesive yet financially significant contracts. This Court should not easily discard possible interpretations as unreasonable by strictly and

legalistically construing contractual terms, because doing so risks undercutting that consumer-protective orientation.

[116] I write to explain why, applying the *Ledcor* framework, the compliance cost exclusion clause (or the CCE) is ambiguous and why it must be interpreted in favour of the Emonds. First, the clause is ambiguous because the ordinary meaning of "increased costs" is compatible with the Emonds' interpretation: they reasonably understood that the "guaranteed" rebuilding endorsement covered all compliance costs except "increased costs" to comply with laws that arose after they paid their premium and Trillium issued their policy. Second, reasonable expectations point in their favour. Adopting Trillium's interpretation and excluding all costs of complying with all laws that apply post-construction risks rendering coverage illusory, especially for older homes. Commercial reality also favours the Emonds: premiums are based on the insurer's expert assessment of its risk at the time of policy issuance and renewal. That means homeowners are entitled to assume that the costs of rebuilding at that time are covered. If the insurer does not intend to cover those costs, it must exclude them in clearer language.

II. Background

[117] My colleagues have set out the facts comprehensively. I would emphasize also that the Emonds — understanding the risk of a home on the banks of the river — were willing to pay premiums for the most comprehensive insurance available.

[118] The clauses at issue here appear in different sections of the Emonds' policy, separated by a dense array of unrelated provisions. My colleagues have set out the relevant provisions in some detail. I do not repeat them here.

III. Analysis

[119] The principles governing the interpretation of insurance contracts are not disputed. In broad strokes, the three-stage interpretive approach outlined in *Ledcor* requires courts to: (1) give effect to unambiguous language; (2) resolve ambiguities through the rules of contractual interpretation; and (3) if ambiguity persists, resolve it in favour of the insured.

A. *The Ledcor Framework Applied*

(1) *Ledcor* Stage One: The Meaning of "Increased Costs" Is Ambiguous

[120] First, when interpreting a standard form insurance contract, the overriding principle is to give effect to unambiguous terms (*Ledcor*, at para. 49; *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121, at para. 12). The court's task at this stage is to determine whether a provision is ambiguous. To perform this task, courts must give the terms their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law" (*Sabean*, at para. 13,

quoting *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21).

[121] The CCE provides that Trillium

> do[es] not insure against loss or damage resulting from, contributed to or caused directly or indirectly:
>
> . . .
>
> 8. because of increased costs of repair or replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services except as provided under Additional Coverages of Section 1;
>
> (Residential Insurance Policy (reproduced in A.R., vol. I, at pp. 75-107), at p. 1-7.)

[122] All parties agree that a separate clause provides coverage for such costs, but only to a limit of $10,000.

[123] The Emonds argue that the CCE only excludes increased compliance costs arising out of laws that came into force *after* their policy was issued or renewed. The policy excludes "increased costs of repair", but does not specify a relevant point of comparison. As the Emonds put it, "[i]ncreased from what? The policy does not say" (A.F., at para. 110). They suggest that a reasonable interpretation of this undefined term restricts it to increases in cost that arise after contract formation. They argue that Trillium fixes premiums based on its assessment of risk at the time of issuance or renewal. They say the CCE does not exclude costs arising out of compliance with the

Mississippi Valley Conservation Authority's requirements, because those requirements applied before Trillium issued their policy. Alternatively, they argue this interpretation is as reasonable as Trillium's, so the CCE is ambiguous.

[124] Trillium submits that the CCE unambiguously covers all increased costs, no matter when they arose. The word "any" shows the provision captures all laws, and the word "regulating" shows it captures all laws in force at the time of the loss.

[125] My colleague Rowe J. agrees and concludes there is no ambiguity. He concludes that the phrase "increased costs of repair or replacement due to operation of any law" carries no temporal connotation. Instead, the CCE links "increased costs" with *any* law, and has no express "wording to suggest any limitation on when the law came into force, much less a specific cut off on the date the insurance contract was formed" (para. 91). And without that express wording, my colleague concludes that the only reasonable interpretation of "increased costs" tracks the difference between (a) the cost of rebuilding the house as it previously stood, without regard to laws prescribing requirements as to how it must now be built, and (b) the cost of rebuilding the house as modified to bring it into compliance with the now-applicable law (para. 93). On this view, "increased costs" would exclude all costs for legal requirements imposed since the date of construction.

[126] Yet even this interpretation implicitly imports a temporal or comparative dimension. It restricts "increased costs" to compliance costs that arise after construction, while the Emonds' interpretation restricts "increased costs" to those that

arise after contract formation. Justice Rowe concludes that the insurer is still liable for costs to rebuild a home in compliance with regulatory requirements that existed at the time of construction, because coverage extends to rebuilding a home "as it previously stood" (paras. 93-94).

[127] Even if Trillium's interpretation is reasonable, the question is whether the Emonds' is *also* reasonable. I disagree with my colleague's conclusion that it is not.

[128] A clause is unambiguous if there is only one reasonable way to interpret it. And a clause is ambiguous if there is more than one reasonable way to interpret it (*Sabean,* at para. 42). That the contractual language favours one interpretation does not mean another one is automatically unreasonable. In *Ledcor* itself, this Court concluded that the language of the clause at issue "slightly favour[ed]" the interpretation advanced by one of the parties, but was "nonetheless ambiguous" (para. 61). The question is whether an "average person applying for insurance" (*Sabean,* at para. 13) might reasonably understand the disputed language in more than one way.

[129] And here, an average person applying for insurance might reasonably understand "increased costs" as the Emonds suggest: only the regulatory costs that have increased since the issuance of the policy are excluded — not all the costs associated with regulatory requirements since their house was built more than half a century ago.

[130] This view is well within the bounds of the ordinary meaning of an "increase". The concept of an "increase" is comparative — it means that something is

greater than something else. While "increased" may not *necessarily* imply a temporal comparison, it is reasonable in this context to presume that it does. Even Trillium's explanation of "increased costs" implies a temporal element: increased costs from legal requirements imposed since the time of construction. It is a broader temporal range than the Emonds suggest — a difference of degree, not kind. These considerations suggest the Emonds' interpretation is reasonable.

[131] Granted, the clause does not expressly contain temporally limiting language. But the absence of express language is not fatal to the Emonds' argument. There was also no express wording to generate an ambiguity in *Ledcor*, yet this Court still found one.

[132] In *Ledcor*, the disputed clause excluded coverage for the "cost of making good faulty workmanship, . . . unless physical damage . . . results, in which event this policy shall insure such resulting damage" (para. 10). A window-cleaning service damaged a building's windows while cleaning them. They had to be replaced. The owner of the building claimed the cost of replacement because the "faulty workmanship" had resulted in physical damage. The insurer refused to pay. It argued that "resulting damage" only covered *consequential* damage to *some other part* of the insured property.

[133] The Court concluded that at stage one, the clause was ambiguous and accepted the insurer's interpretation as reasonable, despite the absence of any express language pointing to "consequential" damage or "some other part" of the property.

Justice Wagner (as he then was) observed that the policy did not define the "cost of making good faulty workmanship" or "resulting damage" (*Ledcor*, at para. 61). The insurer's interpretation presumably flowed from a common sense understanding of the ordinary usage of "resulting damage". The Court held that the policy was ambiguous — even though the language "slightly favour[ed]" the insureds' interpretation, and even though no express language supported the insurer's interpretation (para. 61).

[134] So too here. Just as an ordinary person might interpret "resulting damage" to mean "damage to some other part of the property", even without express language to that effect, an ordinary person might also interpret "increased costs" to mean "costs that are higher than they were when the insurance was purchased", even without express language to *that* effect.

[135] The first stage of the *Ledcor* framework requires reading the contested terms in the context of the contract as a whole. As I set out in more detail below, other language in this contract favours the Emonds' interpretation: the other "perils excluded" are mostly actuarially unpredictable sources of loss.[1] These include war, nuclear incidents, radioactive contamination, pollution, latent defects, animals, and crime. They share a common feature: they are uncontrollable, unforeseeable events that Trillium could not have accounted for in assessing its potential liability and setting a premium. But regulatory requirements that exist at the time of contract formation are exactly the opposite: they are knowable. They are background elements of the liability

[1] Some, like wear and tear, are simply not the kind of fortuitous risk with which insurance is concerned (see D. Boivin, *Insurance Law* (2nd ed. 2015), at p. 28).

landscape that any competent insurer would consider. A requirement that arises *after* the policy is issued, on the other hand, is exactly the kind of uncontrollable, unforeseeable event that belongs with the other excluded perils. The Emonds' interpretation makes sense of the CCE's relationship to its neighbouring excluded perils. Trillium's makes it an outlier.

[136] Trillium suggests that another clause, the "Building By-Law & Code Compliance Coverage" clause (or the BBCC) resolves the meaning of "increased costs". The BBCC creates coverage that corresponds to costs excluded by the CCE. It promises to pay an "additional amount" (here, up to $10,000) "for the increased cost of demolition, construction, or repair to comply with any law regulating the zoning, demolition, repair or construction" of the insured property (pp. 1-9 and 4-1). It specifies that it covers "any increase in the cost . . . arising from the enforcement of the minimum requirements of any . . . law", but only if the law "is in force at the time of such loss or damage" (pp. 1-9 and 4-1).

[137] Trillium argues this last condition is crucial, and my colleague Rowe J. agrees. They say it shows the breadth of the CCE's application by showing that the BBCC applies to *any* law *in force at the time of the relevant loss or damage*. This plain language, Trillium argues, "reinforces that 'any law' regulating zoning, demolition, repair or construction refers to those *in force when the loss occurs*" (R.F., at para. 106 (emphasis in original)).

[138] This does not resolve the ambiguity in the CCE. The CCE's ambiguity flows from uncertainty about the meaning of "increased costs". It does not flow from uncertainty about the meaning of "any law". The only plausible meaning of "any law", in this context, is a law that is in force when the loss occurs. Only a contemporaneously applicable law could increase the Emonds' compliance costs. That the cost-increasing law must be in force at the time of the loss says nothing about when the law must have been *passed*. It does not, therefore, help resolve the ambiguity created by the Emonds' interpretation of "increased costs".

[139] For all these reasons, the CCE is — at least — ambiguous between the Emonds' interpretation and Trillium's. On the Emonds' interpretation, the CCE only excludes compliance costs that arise after their policy was issued or renewed. On Trillium's, the CCE excludes all compliance costs, no matter when they arose — except for those covered by the BBCC. Both are reasonable on the face of the contract, even if (as in *Ledcor*) one is stronger that the other. As *Ledcor* instructs, I therefore proceed to the rules of contractual interpretation to resolve the ambiguity.

(2) *Ledcor* Stage Two: Contractual Interpretation Favours the Emonds

[140] If multiple reasonable interpretations arise after the first stage — meaning the contract is ambiguous — the court's task at the second stage is to apply the general rules of contractual interpretation to resolve the ambiguity (*Sabean*, at para. 12; *Ledcor*, at para. 50). These rules include interpreting the provision to support the reasonable expectations of the parties, the commercial atmosphere in which the agreement was

formed, and the interpretation of similar policies. The court must favour interpretations that are realistic given the commercial atmosphere, and avoid interpretations the parties would not have contemplated (*Ledcor*, at para. 50; B. Billingsley, *General Principles of Canadian Insurance Law* (3rd ed. 2020), at p. 142).

[141] As I have explained, I agree that the CCE applies to the Guaranteed Rebuilding Cost endorsement, but that does not help determine the proper interpretation of "increased costs" within the CCE itself. For their part, the Emonds asserted that "it is reasonable to expect the insurer to pay for a rebuild of the home based upon the standards as they existed as of the date the policy was issued" (A.F., at para. 110). Trillium made no argument on this point. Its submissions on the second stage of *Ledcor* focused on whether the CCE applies to the Guaranteed Rebuilding Cost endorsement.

[142] I agree with the Emonds. The reasonable expectations of similarly situated parties favour their interpretation. So does commercial reality.

[143] I start with the reasonable expectations of similarly situated parties. Because most insurance contracts are adhesive — that is, presented in a standard "take it or leave it" form, and not negotiated by the parties — their interpretation does not turn on the factual matrix particular to the parties before the court (*Ledcor*, at paras. 27-32). Instead, the parties' reasonable expectations are informed by the purpose for which the general class of insurance contract exists (paras. 65-66). If the "*raison d'être* of insurance is coverage" (para. 67, quoting D. Boivin, *Insurance Law* (2nd ed. 2015),

at p. 288), then the purpose of home insurance is to provide homeowners with coverage in the event of foreseeable damage to their home. A home insurance seeker would not reasonably expect an exclusion clause situated among exclusions for unknowable, uncontrollable *future* contingencies to vitiate their coverage for *existing* legal requirements. And an insurer cannot reasonably expect to eliminate so much coverage based on ambiguous language so situated. Trillium's interpretation of the CCE would eviscerate huge swaths of coverage for anyone insuring an older home, given the overwhelming likelihood of post-construction regulatory development. The parties to an insurance contract would not reasonably expect to find this broad exclusion of foreseeable liability buried in a set of narrow exclusions for unpredictable future liability. And while the endorsement's title — *Guaranteed* Rebuilding Cost Coverage — does not govern the interpretation, it supports the Emonds' reasonable expectations that this endorsement would bring peace of mind.

[144] The background commercial context points in the same direction. The ordinary consumer could not determine the extent to which compliance-related rebuilding costs would already be excluded when their policy was issued. But the insurer's industry knowledge gives them access to — at least — the applicable regulatory landscape. Insurance is based on actuarial risk management: insurers do not accept risks blindly, but assess the risk of a policy to determine a premium (Boivin, at p. 32; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622, at p. 636). The industry knowledge required for those assessments places the insurer in a

better position than the insured to predict the extent to which a home, based on its age and location, is likely to require compliance upgrades.

[145] The Emonds' interpretation reflects this commercial reality by requiring the insurer to cover predictable losses within its field of expertise. That is a practical result, and a fair one, and so should be favoured in resolving the CCE's ambiguity (see *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 901). I emphasize that "one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance" (*Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, at para. 11 (emphasis added)).

[146] Given their expertise, insurers can identify existing risks they are not prepared to assume — and exclude those risks in language an ordinary consumer, without industry knowledge, would understand. If they do not do so, consumers reasonably expect to be indemnified against those risks. That does not make insurers "guarantor[s]" for regulatory non-compliance (Rowe J.'s reasons, at para. 101). It only requires them to use clear language if they want to exclude liability that lies squarely within their industry knowledge, especially if they know an average person would not have the expertise to appreciate those risks (P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at p. 222). That is because commercial reality cuts both ways. It is not just a shield for insurers to wield against potential liability: consumers

are part of the commercial fabric too, and insurers must ensure limits on their coverage are clearly articulated.

[147] My colleague Rowe J. explains that if the CCE *were* ambiguous, he would resolve the ambiguity in favour of Trillium based in part on his concern about the burden the Emonds' interpretation would impose on insurers. I do not agree. Insurers are able to assess their potential liability before agreeing to insure a loss. That assessment is presumably inherent in *any* decision to provide insurance. Nothing in the record suggests compliance assessments are more onerous than ordinary valuation practices. Without that evidence, I hesitate to conclude that accounting for compliance costs is so burdensome that it makes the Emonds' interpretation commercially unworkable. Trillium bears the onus of establishing that an exclusion from coverage applies (*Ledcor*, at para. 52). And if this assessment *is* commercially unfeasible, that would not be something an ordinary consumer would know — so if insurers choose to exclude the associated risk, they must do so in clear language.

[148] Unlike existing compliance costs, legal requirements that arise after contract formation are unknowable to either party. The Emonds' interpretation tracks this commercial reality too: it distinguishes these unknowable losses from the predictable ones, and exempts the insurer from paying only the former.

[149] My colleague also relies on precedent to explain that if the CCE were ambiguous, he would resolve the ambiguity in favour of Trillium. He suggests that

courts "have long given effect to similar language in compliance cost exclusions without inquiring into when the relevant law came into force" (para. 101).

[150] Respectfully, no reported Canadian case addresses the ambiguity at issue here. The Alberta Court of Appeal did not suggest otherwise in *Roth v. Economical Mutual Insurance Co.*, 2016 ABCA 399, 46 Alta. L.R. (6th) 1. In *Roth*, the insured benefited from a clause that was substantially the inverse of the CCE. It *provided* coverage for increased costs arising from the enforcement of any law in force at the relevant time. An insured peril — a storm sewer overflow — *revealed*, but did not *cause*, significant legal non-compliance. The court concluded that the clause did not require the insurer to pay to upgrade the building to achieve compliance because the insured peril had not caused the non-compliance. That would be inconsistent with the fundamental concept of insurance: "Insurance indemnifies against risk whereas requiring an insurer to be responsible for hidden damage pre-existing the fortuitous event in question is more in the nature of a warranty" (para. 23).

[151] *Roth*'s holding, properly understood, is that insurance against *loss* cannot be transformed into a warranty against regulatory non-compliance *revealed by loss*. It does not stand for the broader proposition that *any* requirement to pay for the cost of compliance effects that transformation. The Emonds are not asking Trillium to pay for compliance upgrades unconnected to an insured peril, like the insured party in *Roth*. They are asking Trillium to pay for compliance upgrades required to indemnify them against an insured peril. It follows that *Roth* does not resolve the ambiguity in

Trillium's favour. If anything, because the insurance contract in *Roth* provided coverage for regulatory compliance, that case shows that there is nothing commercially unrealistic about an insurer assessing the risk of indemnifying against regulatory non-compliance.

[152] Nor do I accept that courts have "long given effect to similar language". Justice Rowe cites three cases for that proposition: *Manhas v. Sovereign General Insurance Co.*, 1999 BCCA 162, 172 D.L.R. (4th) 475, *Seivewright v. B.C. Insurance Co.* (1989), 39 C.C.L.I. 145 (B.C.S.C.), and *Allemand v. State Farm Ins. Cos.*, 160 Wn. App. 365, 248 P.3d 111 (2011). None of these three cases address the ambiguity that concerns us here: whether the phrase "increased costs" carries a temporal connotation. That alone is a complete answer. The point of the second stage of *Ledcor* is to resolve ambiguities that arise from reasonable but competing interpretations of contractual language. Cases that resolve *other* interpretive conflicts arising out of similar contractual language cannot be dispositive of those disputes.

[153] In sum, the reported cases do not assist in resolving the ambiguity in the meaning of the CCE, and the reasonable expectations of the parties and background commercial principles favour the Emonds' interpretation. I would resolve the CCE's ambiguity in the Emonds' favour.

(3) <u>*Ledcor* Stage Three: If Ambiguity Persists, Interpret the Policy Against Trillium</u>

[154] Had I concluded that ambiguity persisted after the second stage, I would have resolved it in favour of the Emonds at the third stage of *Ledcor*. At the third stage, courts construe the contract *contra proferentem* — against its drafter — because "[w]hoever holds the pen creates the ambiguity and must live with the consequences" (*Gibbens*, at para. 25). For standard form insurance contracts, that means interpreting coverage provisions broadly, and exclusion clauses narrowly. And in this particular contract, that means interpreting the CCE to only exclude increased costs arising from laws enacted after the issuance of the policy.

IV. Conclusion

[155] I would allow the appeal in part. I conclude that the CCE applies, but its effect is limited to excluding costs required to comply with laws that did not exist at the time the parties entered into or renewed their contract. I would substitute a declaration that the Emonds' policy covers the costs of rebuilding their home on the same location, with materials of similar quality using current building techniques, but excludes legal compliance costs that arose after its issuance.

The following are the reasons delivered by

CÔTÉ J. —

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I. Overview

[156] Guaranteed replacement cost insurance is meant to provide insureds with peace of mind. They expect that in the event of loss or damage covered by the policy, they will receive not merely a portion of the funds needed to recover from their loss, but a replacement of what they lost — not something that is less than what they had, but a replacement of the old with something new.

[157] When offering guaranteed replacement cost insurance, or any other type of insurance, insurers must meet these reasonable expectations. They must draft their policies and endorsements using clear, express, and easily intelligible terms. They must work to confirm that their insureds understand not only their coverage but also its limitations and exclusions. It is not acceptable for insurers to benefit from policies and endorsements that are drafted ambiguously, where the average policy holder would understand that they are fully covered for a loss, only to have the insurer use its own ambiguous policy to avoid liability in court. Insurers cannot give with one hand and take with the other.

[158] This appeal concerns whether an exclusion clause relating to the increased cost of compliance with legal requirements ("compliance cost exclusion") applies to limit the coverage provided by a guaranteed rebuilding cost coverage endorsement ("GRC endorsement"). The insurance in question was provided by Trillium Mutual

Insurance Company and placed on the home of Stephen Emond and Claudette Emond. That home was built in 1968 and was subject to the regulations of a conservation authority. It is undisputed that the Emonds' home was destroyed by a flood in April 2019.

[159] The additional coverage purchased by the Emonds for their home was expansive and billed as "top of the line" (2022 ONSC 5519, 28 C.C.L.I. (6th) 97, at para. 8). Its title, as it appears on the GRC endorsement, was "**GUARANTEED REBUILDING COST COVERAGE**" (Residential Insurance Policy (reproduced in A.R., vol. I, at pp. 75-107), at p. 4-1). It guaranteed the cost of repairs or replacement without deduction for depreciation and without a monetary limit, subject to onerous requirements to maintain the insurance, which the Emonds met. It provided that the rebuilding cost coverage would apply to the use of "current building techniques" (p. 4-1). By contrast, the exclusion that Trillium seeks to rely on was not provided in the GRC endorsement itself. It was conspicuously absent from a list of exclusions meant to apply to all the endorsements and present only in the "comprehensive form" policy purchased by the Emonds ("base policy").

[160] Based on this exclusion, Trillium refused to pay for the increased compliance costs associated with rebuilding the Emonds' home. The Emonds challenged this in court. The application judge held that the compliance cost exclusion did not apply. "Guaranteed Rebuilding Cost Coverage" meant what it said — what the average person seeking insurance would understand it to mean. The coverage

guaranteed the cost of rebuilding the Emonds' home after an insured loss. It was expansive and displaced the compliance cost exclusion. Even if the exclusion did apply, it would be void because it would nullify the very coverage that the Emonds purchased: the guarantee of rebuilding costs.

[161] The Court of Appeal for Ontario overturned the application judge's decision, finding it unambiguous that the exclusion applied and that the Emonds had to pay for the increased costs associated with complying with the legal requirements that had been established since the home was built. The Court of Appeal held that the GRC endorsement functioned only to remove the financial limit on the base policy, leaving all other aspects of the base policy to apply, including the compliance cost exclusion. That exclusion clause, the Court of Appeal found, operated to exclude any and all increased costs related to the application of laws, by-laws, or regulations enacted since the Emonds' house was built. Moreover, the Court of Appeal held that the exclusion clause did not nullify the Emonds' coverage, but only reduced their amount of recovery.

[162] My colleague Rowe J. agrees with the Court of Appeal's disposition and much of its reasoning. With respect, I must say that I do not. I find that the base policy and the GRC endorsement are replete with unclear language and perplexing drafting decisions. When taken together, these rise to the level of an ambiguity concerning whether the compliance cost exclusion applies to limit the GRC endorsement. I find that this ambiguity should be resolved in favour of the Emonds, having regard to the

expectations of the parties and the broader commercial context, as well as interpretative principles favouring the insured in cases of ambiguity.

[163] The GRC endorsement does more than simply remove the monetary limit on the recovery provided in the Emonds' base policy. It provides what it says: a guarantee that the cost of rebuilding the Emonds' home will be paid by the insurer following an insured loss. Trillium decided to use this language, it decided not to include the compliance cost exclusion in the GRC endorsement — when other endorsements specifically listed exclusions — and it decided not to include the compliance cost exclusion in the list of exclusions that apply to all the endorsements. Trillium decided to insure a house that it knew was subject to conservation authority regulations and that it knew, or should have known, was non-compliant with current building standards. It bargained for these risks and collected higher premiums for providing this coverage. It must make good on its guarantee.

[164] Specifically, Trillium must provide coverage for the increased costs associated with compliance with legal requirements up to the point in time when the insurance policy was last renewed. Any further costs associated with legal requirements from that point in time until the time of the loss or damage, if there are any, are the responsibility of the Emonds. Because of this interpretation, I do not address whether the compliance cost exclusion nullifies the GRC endorsement.

[165] What these reasons should make clear is the need for insurers to draft insurance policies and endorsements with care and with a view to the understanding of

the average person. They must be attentive to ambiguity not only in the text of their insurance policies, but also in the relationship between their constituent parts — such as the underlying policy and any endorsements. They must also be cognizant of the principle that, if it is ambiguous whether an exclusion in the underlying policy applies to an endorsement, then the exclusion must be set out in the endorsement itself, or it will not apply.

II. Facts

[166] The Emonds' home was built on the Ottawa River in 1968. As a result of flooding in April 2019, their home was deemed a total loss. Their home was insured under a standard form residential homeowners' insurance contract by Trillium.

[167] The base policy purchased by the Emonds insured their dwelling up to a limit of $585,092. The base policy provided that, in the event of loss, the claim was to be paid on the following basis:

> **Dwelling Building and Detached Private Structures:** If "you" repair or replace the damaged or destroyed building on the same location with materials of similar quality within a reasonable amount of time after the damage, "you" may choose as the basis of loss settlement either (**A**) or (**B**) below; otherwise, settlement will be as in (**B**).
>
> **A.** The cost of repairs or replacement (whichever is less) without deduction for depreciation, in which case "we" will pay in the proportion that the applicable amount of insurance bears to 80% of the replacement cost of the damaged building at the date of damage, but not exceeding the actual cost incurred.

> **B.** The Actual Cash Value of the damage at the date of the occurrence. [p. 1-10]

[168] In its section 1, the base policy set out lists providing 14 excluded forms of property and 21 excluded perils, which precluded coverage for water damage, such as flooding. The lists also contained an exclusion for increased costs of replacement due to the operation of any law regulating the construction of buildings, that is, the compliance cost exclusion, which read as follows:

> "We" do not insure against loss or damage resulting from, contributed to or caused directly or indirectly:
>
> . . .
>
> 8. because of increased costs of repair or replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services; except as provided under Additional Coverages of Section 1; [p. 1-7]

[169] The base policy also included an exception to the compliance cost exclusion called Building By-Law & Code Compliance Coverage ("BBCC"), which provided as follows:

> **Building By-Law & Code Compliance Coverage:** "We" will pay an additional amount up to $10,000 or the amount shown on the "Declaration Page" . . ., for the increased cost of demolition, construction, or repair to comply with any law regulating the zoning, demolition, repair or construction of any insured buildings insured under Section 1 . . . . [p. 1-9]

[170] The Emonds supplemented the base policy with additional coverage by purchasing optional endorsements, which were laid out in section 4 of the insurance policy. They purchased a water protection endorsement, which overrode the exclusion for flood damage in the base policy. The parties agree that the water protection endorsement was active and applied to cover the loss of the Emonds' home.

[171] The Emonds also purchased the GRC endorsement, which read as follows:

> **COVERAGE GRC — GUARANTEED REBUILDING COST COVERAGE**
>
> If the "Declaration Page" shows that the Guaranteed Rebuilding Cost Endorsement applies, the Basis of Claim Payment for the "Dwelling" Building is amended as follows:
>
> When coverage applies "we" will pay for insured loss or damage if "you" repair or replace the damaged or destroyed "dwelling" building on the same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage.
>
> "You" may choose as the basis of loss settlement either (A) or (B) below; otherwise settlement will be as in (B).
>
> (A) The cost of repairs or replacement (whichever is less) without deduction for depreciation even if it is more than the amount of insurance shown on the "Declaration Page" for the "dwelling" building provided:
>
> 1. The amount of insurance shown on the "Declaration Page" for the "dwelling" building represents 100% of the cost to rebuild the insured "dwelling" on the same site with materials of similar quality as determined by a building valuation guide acceptable to "us";
>
> 2. "You" agree to accept each annual adjustment in the amount of insurance as recommended by "us" and pay the additional premium; and

3. "You" notify "us" within 30 days of the start of any additions or other physical changes to the building(s), which may increase the rebuilding cost of the structure by 5% or more, and pay any resulting additional premium.

(B) The "Actual Cash Value" of the damage at the date of the occurrence.

"Actual Cash Value" will take into account such things as the cost of replacement/rebuilding less any depreciation. In determining depreciation "we" will consider the condition immediately before the damage, type of construction material and techniques and their normal life expectancy.

In all other respects, the policy provisions and limits of liability remain unchanged.

This coverage is void if "you" fail to comply with its provisions. [p. 4-1]

Section 4, which contained the GRC endorsement and the water protection endorsement, also provided a list of 14 exclusions that were applicable to the optional endorsements (p. 4-7). This list did not include the compliance cost exclusion listed in section 1.

[172] In the instant case, both parties agree that the GRC endorsement provides coverage for the cost of rebuilding the Emonds' home — save for one area of dispute. The Emonds' home is located in the catchment area of the Mississippi Valley Conservation Authority ("MVCA"), which means that development and building on the Emonds' property is subject to the MVCA's regulation policies. While Trillium agreed to pay certain costs, it refused coverage for the cost of compliance with the MVCA regulation policies and other legal requirements in the rebuilding process, relying on the compliance cost exclusion.

[173] In response, the Emonds brought an application for a declaration that the GRC endorsement coverage entitled them to recover the total costs of rebuilding their home, with no limitation of coverage for the cost of complying with legal requirements.

III. Judgments Below

A. *Ontario Superior Court of Justice, 2022 ONSC 5519, 28 C.C.L.I. (6th) 97 (Ryan Bell J.)*

[174] The application judge allowed the Emonds' application and made the declaration the Emonds sought. She rejected Trillium's position that the compliance cost exclusion contained in the base policy limited the GRC endorsement. She determined that the compliance cost exclusion applied only to increased costs associated with the operation of a "law", in the sense of legislation and not a rule, regulation, by-law, or ordinance. This meant that the cost of compliance with the MVCA regulation policies — which she determined were not "laws" — did not fall within the exclusion. She also applied the nullification of coverage doctrine, concluding that applying the compliance cost exclusion as requested by Trillium would nullify the GRC endorsement coverage and would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

[175] In coming to these conclusions, the application judge assessed the application of the GRC endorsement, the compliance cost exclusion, and the exception to it in accordance with the "generally advisable" order in which to interpret insurance

policies that was provided in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 52, quoting *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 28: coverage; exclusion; exception.

[176] Concerning coverage, the application judge stated that the language of the GRC endorsement was clear and unequivocal: it provided "guaranteed rebuilding cost" coverage (para. 30). She noted that the GRC endorsement itself did not contain an exclusion for compliance costs, like the base policy did. Relying on the Court of Appeal for Ontario's holding in *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101, at p. 120, that "[l]imitations on the apparent coverage in the endorsement that are ambiguous in the sense that they are not clearly apparent, should be set out in the endorsement itself", she found that there was no limitation on the coverage in the GRC endorsement.

[177] The application judge noted that although the GRC endorsement specifically referenced the cost of repairs or replacement "without deduction for depreciation", this did not amount to a limit on coverage in relation to compliance costs (para. 30). Consistent with this reading, she noted that the declaration page did not list a monetary limit for the GRC coverage provided in the GRC endorsement.

[178] The application judge rejected Trillium's argument that including payment for compliance costs in the GRC endorsement would go beyond the principle of indemnity on which insurance is usually based. She noted that, by its nature, guaranteed

replacement cost coverage leaves insureds in a better position than they were at the time of loss, and that this is fully accepted at law.

[179] The application judge then turned to an argument raised by Trillium that her interpretation would lead to insurers becoming "guarantor[s] of construction defects and building code violations" (para. 35), relying upon *Roth v. Economical Mutual Insurance Co.*, 2016 ABCA 399, 46 Alta. L.R. (6th) 1, at para. 23. She disagreed on two bases: first, that the clear wording of the basis of claim payment (as amended by the GRC endorsement) provides that the amount of insurance paid is for "any loss or damage arising out of one occurrence" (para. 36) — deficiencies discovered as a result of a peril insured against are not deficiencies arising out of the occurrence; second, that the specific coverage issue in question did not affect the interpretation of the GRC endorsement more broadly.

[180] Based on the foregoing, the application judge found that the Emonds had established that their claimed loss fell within the initial grant of coverage under the GRC endorsement. The onus therefore shifted to Trillium to establish that the compliance cost exclusion applied.

[181] The application judge found that Trillium failed to meet this onus. She held that the exclusion was "clear and unequivocal" as relating to only the cost of repair or replacement due to the operation of "any law", a term that, she concluded, did not include, and was not intended to include, "rules, regulations, by-laws, or ordinances" (paras. 43-44). She found this evident based on the more specific wording of the BBCC,

which referred to rules, regulations, by-laws, or ordinances, rather than "laws" alone. She found that the inclusion of "rules, regulations, by-laws, or ordinances" in the BBCC endorsement would become superfluous if they were already part of the words "any law". As such, the MVCA regulation policies were not laws covered by the BBCC endorsement, and Trillium was bound to cover the compliance costs associated with rebuilding the Emonds' home.

[182] Though this was sufficient to deal with the question at hand, the application judge went further and concluded that Trillium's interpretation of the GRC endorsement and the compliance cost exclusion would also contravene the nullification of coverage doctrine, thereby rendering it unacceptable.

B. *Court of Appeal for Ontario, 2023 ONCA 729, 489 D.L.R. (4th) 581 (Thorburn J.A., Lauwers and Zarnett JJ.A. Concurring)*

[183] The Court of Appeal for Ontario allowed Trillium's appeal, concluding that the compliance cost exclusion applied to the GRC endorsement because the words "any law" in that exclusion captured by-laws and regulations, such as the MVCA regulation policies. The court held that the compliance cost exclusion worked to exclude "increased costs", which meant those costs over and above the cost to replace the dwelling as it was using current building techniques. The only costs for compliance with legal requirements to be borne by the insurer were those provided for in the BBCC endorsement, which acted as an exception to the compliance cost exclusion. The court held that this interpretation would not result in a nullification of coverage because the

most obvious risks that the GRC endorsement covered were depreciation and inflation, not compliance with legal requirements.

[184] The Court of Appeal found that the compliance cost exclusion applied to the GRC endorsement to exclude coverage for increased costs to demolish and replace the dwelling that are due to the operation of "any law", which, the court held, included the MVCA regulation policies, municipal by-laws, and other regulations.

[185] To arrive at this conclusion, the Court of Appeal noted that the compliance cost exclusion is applicable to the "increased costs of . . . replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings" (para. 52 (emphasis added)). The court stated that the application judge did not specifically address the meaning of "increased costs", and offered its own interpretation:

> From a review of the case law, it would seem that "increased costs" are those that exceed the amount payable by the insurer to replace the dwelling as it was. This necessarily implies that they result from a "law" enacted after the dwelling was originally built that requires features of the house to be enhanced (the position Trillium articulated in the lead up to the litigation, consistent with case law), or that they pertain to correcting deficiencies in the building as it stood at the time of the loss (a meaning that is also consistent with case law). [para. 56]

[186] The Court of Appeal found that the "amount payable" on the declaration page for replacing the dwelling "would not reasonably be expected to include costs associated with correcting legal deficiencies that exist in the building at the time of the

loss, or complying with laws that were enacted after the dwelling was built" (para. 57). The court therefore concluded that increased costs, "in these standard form contracts, are those that exceed the amount payable by the insurer to replace the dwelling as it was, because either existing deficiencies have to be fixed, or a law enacted after the original construction requires enhancements on rebuilding" (para. 63). The court determined that the MVCA regulation policies were captured by the term "any law" in the compliance cost exclusion because they "clearly set out a detailed regulatory scheme which is mandatory in order to construct" (para. 72).

[187] The court concluded that the compliance cost exclusion was explicit and was clearly applicable to the GRC endorsement. While the exclusion was not clearly stated in the GRC endorsement, the court held that this was not determinative because the insurance policy must be read as a whole. In doing so, the court distinguished *Wigle* and its exhortation that limitations on the apparent coverage in an endorsement that are not clearly apparent should be set out in the endorsement itself. The court argued that *Wigle*, unlike the present case, involved the complete absence of the alleged exclusion in either the policy or the endorsement. In the present case, the court found, there was no such ambiguity.

[188] The Court of Appeal also considered and rejected the Emonds' argument that the use of the phrase "current building techniques" in the GRC endorsement created a conflict between the GRC endorsement and the compliance cost exclusion (paras. 82-83). It held that "current building techniques" did not refer to legally

required changes. Instead, the court looked to the dictionary definition of "technique" to find that the word referred only to "'a way of . . .' doing something" (para. 84, quoting *Concise Oxford English Dictionary* (12th ed. 2011), at p. 1480). Applying this dictionary definition to "current building techniques", and in light of evidence from an adjuster for Trillium, the court stated that the phrase referred to "methods that are commonly used today rather than those used in the original construction of the home" (para. 84). "[C]urrent building techniques" did not refer to legal requirements for building construction, and therefore the compliance cost exclusion applied to increased costs required by any law.

[189] Finally, the Court of Appeal held that the nullification of coverage doctrine did not apply. The court disagreed with the application judge's understanding that the compliance cost exclusion would defeat the purpose of the coverage that the GRC endorsement provided, which was to cover depreciation and inflation.

IV. Issues

[190] The issues on appeal are as follows:

1. Does the compliance cost exclusion in the base policy apply to the GRC endorsement?

2. Does the compliance cost exclusion exclude the cost of compliance with all of the conservation authority's requirements?

3. Does the nullification of coverage doctrine prevent the application of the compliance cost exclusion?

V. Analysis

A. *The Interpretation of Insurance Policies*

[191] The interpretation of standard form insurance contracts is a unique exercise. It is to be conducted in a specific order and in accordance with particular interpretive principles. Moreover, many insurance contracts, including the contract in the present case, append optional endorsements and use guaranteed replacement cost for determining an insured's recovery; both are useful to understand for the purposes of this appeal. I will first discuss these various considerations and then apply them to the case at bar.

(1) General Principles for Interpreting Insurance Policies

[192] Our Court set out the order and principles of interpretation applicable to standard form insurance contracts in *Ledcor*, and affirmed them in *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121, at para. 12.

[193] Based on our Court's guidance, the interpretation of standard form insurance contracts is conducted in what is often referred to as the "generally advisable" order, designed to reflect the "alternating" structure present in many insurance

contracts: (1) the provision of a type of coverage; (2) the detailing of exclusions to that coverage; and (3) the laying out of any exceptions to the exclusions (*Ledcor*, at para. 52). In accordance with this ordering, the insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage. The onus then shifts to the insurer to establish that one of the exclusions to coverage applies. Then, if the insurer is successful in establishing the application of an exclusion, the onus shifts back to the insured to prove that an exception to the exclusion applies (*Ledcor*, at para. 52; *Progressive Homes*, at para. 28).

[194] At each stage of the "generally advisable" order, courts apply certain interpretive principles. As stated in *Ledcor*, the "primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole" (para. 49; *Progressive Homes*, at para. 22, citing *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71). The ordinary meaning of the words used in insurance contracts is informed by dictionaries and ordinary conventions of speech, and not by "specialized knowledge of the jurisprudence" (*Sabean*, at para. 29). Terms should be interpreted "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law" (para. 13, quoting *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27).

[195] However, different principles apply if the policy or provision in dispute is ambiguous. Ambiguity arises when there are two reasonable, but differing, interpretations of a policy. It does not arise when parties merely articulate two different interpretations (*Sabean*, at para. 42). As well noted by my colleague Rowe J., ambiguity is not limited to the words of a particular provision. It may also arise when otherwise unambiguous words are read within the context of the broader policy, such as when two provisions in a policy conflict or are otherwise irreconcilable on their face (para. 46; see, e.g., *Compagnie d'assurance vie RBC v. O.C.*, 2022 QCCA 1142, at para. 39).

[196] If the policy's language or structure is ambiguous, then general rules of contractual interpretation can be brought to bear in an attempt to resolve that ambiguity. Those rules include that

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

In addition, courts should give effect to the reasonable expectations of the parties and not read in windfalls in favour of any party: ". . . courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor

anticipated at the time of the contract" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 29, quoting *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 901-2; *Scalera*, at para. 71). Throughout the interpretive process, courts should remain cognizant "of the unequal bargaining power at work in the negotiation of an insurance contract" (*Jesuit Fathers*, at para. 28).

[197] If the general rules of contractual interpretation fail to resolve the ambiguity, then the contract will be construed *contra proferentem* — against the offeror — and therefore in favour of the insured (*Ledcor*, at para. 51; *Jesuit Fathers*, at para. 28). As a corollary to this rule, "coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly" (*Ledcor*, at para. 51).

(2) Interpreting Insurance Policy Endorsements

[198] Given the context of the present dispute, it is helpful to discuss optional endorsements to standard form insurance contracts. As described in B. Billingsley's *General Principles of Canadian Insurance Law* (3rd ed. 2020), at pp. 135-36, endorsements are

> insurance contracts which are subsidiary to a main insurance contract and which either expand or restrict the coverage otherwise provided by the main insurance contract. Endorsements are typically drafted as standard forms and are attached to a standard form policy in exchange for an adjusted premium as agreed upon by the parties.

Thus, endorsements are distinct elements of an insurance policy that are related to the underlying policy of insurance. It is clear that "generally speaking the endorsement does not operate independently of the policy" (*Cabell v. Personal Insurance Co.*, 2011 ONCA 105, 104 O.R. (3d) 709, at para. 12). Instead, endorsements are separate contractual agreements that tend to vary the underlying policy. The foundation of an endorsement is usually the base insurance policy, and, in most cases, endorsements do not have "an independent existence" separate and distinct from the broader policy (*Pilot Insurance Co. v. Sutherland*, 2007 ONCA 492, 86 O.R. (3d) 789, at para. 21).

[199] While the interpretive ordering and principles noted above apply to the interpretation of endorsements, courts must also be alive to the unique circumstances and interpretive issues that often arise with endorsements. For example, while endorsements change or vary the underlying policy, they may be more or less comprehensive in respect of a particular subject matter (*Pilot*, at para. 21). They may make only minor changes to the underlying policy or they may effectively displace an entire subject matter in the underlying policy (for such an example, see the decision of Lauwers J.A. in *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Co.*, 2020 ONCA 487, 151 O.R. (3d) 663, at para. 37).

[200] This variation in the effect of an endorsement may create structural ambiguity concerning the relationship between the underlying policy and the endorsement. The Court of Appeal for Ontario addressed and helpfully clarified this point in *Cabell*. While rightly recognizing that endorsements are usually not

stand-alone policies, the court was seized of the potential for confusion and ambiguity in the relationship between the underlying policy and the endorsement. Dealing with a matter similar to the case at bar, where the endorsement was purported to be affected by limitations in the base policy, Rosenberg J.A., writing for the court, stated:

> . . . if limitation of apparent coverage in an endorsement is ambiguous, the limitation should be set out in the endorsement itself. As Cory J.A. said in *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101, [1984] O.J. No. 3422 (C.A.), at p. 120 O.R., in relation to underinsured motorist coverage:
>
> > Limitations on the apparent coverage in the endorsement that are ambiguous in the sense that they are not clearly apparent, should be set out in the endorsement itself. If it was the intention of the insurer that the endorsement was not to cover an "unidentified" vehicle, it would have been a simple matter to say so in the explanatory note. [para. 13]

[201] While the Court of Appeal in the present case seeks to distinguish *Wigle*, on which *Cabell* relies, its narrow interpretation of *Wigle* does not appear to be consistent with the Court of Appeal's reference to *Wigle* in *Cabell* (C.A. reasons, at paras. 78-80). Nor does it properly reflect the use of that same principle once more in *Le Treport*, at para. 52. I do not believe that the statement of the law in *Wigle*, *Cabell*, and *Le Treport* is to be narrowly construed. First, the issue in *Wigle* was not exactly that the exclusion the insurer sought to rely upon was not *at all* present in the policy or endorsement; rather, the issue was that it was *ambiguous* whether such an exclusion existed and applied. Ambiguity was the driving concern in *Wigle*, and this is reflected in the above quotation from the Court of Appeal's decision in *Cabell*. Second, and perhaps more important, *Cabell* and *Le Treport* stand for the same general proposition.

[202] There are important policy reasons for requiring that exclusions contained in a base policy that purport to affect related endorsements be set out in the endorsements themselves if there is potential ambiguity about their application. These were hinted at by the court in *Wigle*, in the context of motor vehicle insurance, where it stated the following:

> It must be borne in mind that the endorsement is sold to the motorist as additional coverage over and above that provided in the standard automobile policy. As has been noted, the motorist has no real bargaining rights. He cannot negotiate with the insurer or with the Superintendent of Insurance. He can do no more than accept or reject the endorsement as additional coverage to a standard automobile policy. If he is to be faced with that choice, then he should be able to make an informed choice. [pp. 119-20]

The same concerns apply in many, if not all, endorsements. Endorsements themselves are generally standard form contracts, and they attach to broader standard form insurance contracts. In this context, insureds lack any bargaining power; they purchase endorsements precisely to enhance their coverage, and they cannot negotiate. They must be adequately informed of any limit on or exception to the enhanced coverage that they are seeking to attain.

[203] Ambiguity in the relationship between exclusions in base insurance policies and endorsements runs contrary to the consumer protection and fairness that are, and must be, at the heart of the insurance industry. These values are recognized and applied in, for example, the interpretive principles that coverage is to be interpreted broadly, exclusions are to be interpreted narrowly, and ambiguity is to be resolved in

favour of the insured (*Jesuit Fathers*, at para. 28). As my colleague Rowe J. rightly notes, courts "expect insurers to ensure that the policy terms are 'clear, express and easily intelligible'" (para. 39, quoting Billingsley, at p. 148, citing *CIT Financial Ltd. v. Insurance Corporation of British Columbia*, 2017 BCSC 641, at para. 52). Fairness to insureds faced with the "take it or leave it" reality of standard form insurance contracts and standard form endorsements requires such clarity. It is also not onerous for insurers to provide — it merely requires repeating exclusions that are already set out in the base insurance policy in the affected endorsements.

[204] Similar concerns have been raised outside of the insurance policy context. For example, the Court of Appeal for Ontario in *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601, underscored that, in the context of standard form contracts, the party seeking to rely on "stringent and onerous" terms must take reasonable steps to draw those terms to the attention of the other party (p. 609). That court's statement is insightful:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party . . . . [Emphasis added; p. 609.]

Insurers, like corporations employing general standard form contracts, would do well to attend to the confusion that may arise between underlying policies and endorsements and to ensure that there is as little ambiguity as possible in their "take it or leave it" contracts.

[205] Taken together, *Wigle*, *Cabell*, and *Le Treport* and their animating principles support the requirement that insurers bear the responsibility for drafting intelligible and accessible insurance contracts that are considerate of the unequal bargaining power in the standard form contract context. An essential expression of this is the principle that "[l]imitations on the apparent coverage in the endorsement that are ambiguous in the sense that they are not clearly apparent, should be set out in the endorsement itself" (*Wigle*, at p. 120). This principle promotes clear contractual drafting, provides greater commercial certainty, and results in the intention of parties being better reflected in the agreements reached.

[206] To be clear, these particular considerations for interpreting endorsements do not mean that endorsements are to be interpreted as stand-alone policies, nor are they to be interpreted using principles that are different or more stringent than standard form insurance contracts generally. They are to be understood and interpreted through the framework provided by *Ledcor* and *Sabean*. Nor should the concern expressed for the drafting of endorsements be taken as a condemnation of exclusions to endorsements. Such exclusions are legitimate elements of the insurance industry. The burden placed on insurers simply recognizes that the relationship between an

endorsement and a base insurance policy is fertile ground for ambiguity and it behooves insurers and courts to recognize and remedy this potential source of uncertainty, confusion, and, ultimately, unfairness.

(3) Guaranteed Replacement Cost Coverage

[207] As rightly noted by my colleague Rowe J., guaranteed replacement cost endorsements are distinct from the actual cash value primarily used in insurance policies (para. 74). Actual cash value coverage focuses on indemnification. It provides insureds with the value of the loss they actually sustained, taking into account any depreciation in the value of the lost insured property. Actual cash value coverage does not replace "old" with "new".

[208] By contrast, guaranteed replacement cost endorsements replace what was lost, without any deduction for depreciation. As noted in *Carter v. Intact Insurance Co.*, 2016 ONCA 917, 133 O.R. (3d) 721, at para. 23, replacement cost insurance means that "if insureds do indeed repair or replace their damaged property, they are entitled to recover from their insurer the full cost of the repairs or the replacement. They can replace 'old' with 'new'."

[209] While the main purpose of guaranteed replacement cost endorsements is to provide enhanced protection to an insured so that their recovery is not limited by depreciation, that should not be interpreted to mean that insuring against depreciation is their only purpose or that additional value for the insured is unacceptable. Guaranteed

replacement cost endorsements also do what they state: they provide for the reconstruction, repair, or replacement of the insured property. While there may be exclusions to guaranteed replacement cost endorsements that limit the insured's recovery, as alleged here, absent such exclusions, they provide insurance that covers the necessary costs for rebuilding, replacing, or repairing the insured property — regardless of increased costs, such as those to comply with by-laws or building codes.

[210] This broader understanding, while contingent on the absence of directly applicable exclusions, is supported by the case law. For example, even with similar exclusions that related to the costs, losses, or damages associated with laws, regulations, and by-laws, courts have found that insurers who provide guaranteed replacement cost endorsements must pay for the replacement of the property in question, including necessary enhancements to comply with applicable laws, by-laws, and regulations (see, e.g., *Carlyle v. Elite Insurance Co.* (1986), 1 B.C.L.R. (2d) 338 (C.A.), at p. 348; *Folk v. Saskatchewan Mutual Insurance Co.* (1992), 14 C.C.L.I. (2d) 128 (B.C.S.C.), at paras. 7-8; *Schultz v. Mennonite Mutual Fire Insurance Co. of Saskatchewan*, 2014 SKPC 174, 462 Sask. R. 90; *Choukair v. Allstate Insurance Co. of Canada*, 2015 ONSC 4989, [2015] I.L.R. ¶I-5787).

(4) The Nullification of Coverage Doctrine

[211] Concerning the nullification of coverage doctrine, I agree with my colleague Rowe J.'s statement that even where the language of the insurance policy is

unambiguous, the doctrine applies (para. 58). To find otherwise would run contrary to settled law and would abrogate the strong policy considerations underpinning the doctrine. I similarly adopt Rowe J.'s statement that the nullification of coverage doctrine is not an expansion of the principles of unconscionability but rather, a fair, just, and reasonable doctrine suited to the unique needs of the insurance environment (paras. 63 and 65).

B. *Application*

[212] I agree with Rowe J. that, because the insurance policy in question is a standard form contract, its interpretation is a question of law to be reviewed on the standard of correctness (para. 67; *Ledcor*, at para. 24). On this basis, while the reasons of the courts below are valuable, they are not owed deference in the analysis that follows.

[213] Applying the principles that I outlined above, I find both structural and textual ambiguities concerning the application of the compliance cost exclusion to the GRC endorsement. Interpreting the insurance policy as a whole, and using the usual methods of contractual interpretation, I find that the interpretation provided by the Emonds is to be favoured. This interpretation is solidified by the *contra proferentem* rule, the need to interpret coverage provisions broadly and exclusions narrowly, and the requirement that limitations on the coverage in an endorsement that are ambiguous should be set out in the endorsement they purport to limit. As a result, the GRC endorsement covers the costs associated with rebuilding the Emonds' home in

accordance with the MVCA's regulation policies and other legal requirements that were in place at the time that the insurance contract was last renewed, and such costs are not subject to the compliance cost exclusion. Based on this understanding, I will not further interpret the compliance cost exclusion or assess the application of the nullification of coverage doctrine.

(1) The Coverage of the Flood Loss Suffered by the Emonds Is Clear and Uncontested

[214] First, pursuant to the "generally advisable" order in which to interpret insurance contracts, I note that there is no debate concerning whether the peril suffered by the Emonds was covered by the GRC endorsement. That coverage has been recognized and granted. The dispute relates only to the application of the compliance cost exclusion to the GRC endorsement, and the interpretation of that exclusion if it does apply.

(2) There Is Ambiguity Concerning Whether the Compliance Cost Exclusion Applies to Limit the GRC Endorsement

[215] As rightly noted by Rowe J., the burden rests on Trillium to demonstrate that the compliance cost exclusion ousts the GRC endorsement's coverage for increased compliance costs (para. 68). According to *Ledcor*, the first step in assessing whether Trillium has met this burden is determining whether the ordinary meaning of the GRC endorsement and the exclusion, as well as their relationship to one another, is clear and unambiguous (para. 49). I find that there is an ambiguity and that recourse to

the text alone is not determinative of whether the compliance cost exclusion in the base policy applies to limit the GRC endorsement.

[216] Particularly, several structural and textual elements of the insurance policy, when taken together, create significant ambiguity. Textually, the wording of the GRC endorsement is unclear and can be understood to suggest that: (1) the GRC endorsement may cover the field in relation to rebuilding costs, thereby displacing the compliance cost exclusion; and (2) the GRC endorsement's reference to "current building techniques" may include compliance with legal requirements that shape and regulate current building practices. Structurally, the application of the compliance cost exclusion contained in section 1 is also unclear because: (1) the GRC endorsement itself does not contain any exclusion for compliance costs; (2) section 4 lists a series of 14 exclusions that apply to all the endorsements, but the compliance cost exclusion is not included in this list; and (3) while the exclusions in section 4 and section 1 largely overlap, with 10 of the 14 exclusions listed in section 4 being essentially reproductions or recitations of the exclusions contained in section 1, Trillium chose to not carry forward the compliance cost exclusion into section 4. Read together, these elements give rise to two reasonable interpretations, namely: (1) the GRC endorsement applies unencumbered by the compliance cost exclusion; or (2) the GRC endorsement is limited by the compliance cost exclusion.

(a) *The Text of the GRC Endorsement Generates Ambiguity*

[217] The text of the GRC endorsement generates ambiguity in two ways. First, the degree to which it comprehensively addresses the subject matter of reconstruction costs, thereby displacing the compliance cost exclusion, is unclear. Second, the use of the ambiguous phrase "current building techniques" also causes confusion regarding whether this includes the use of building methods that comply with current legal obligations.

[218] Trillium argues that the following sentence from the GRC endorsement indicates that the compliance cost exclusion, as an element of the base policy, applies to the GRC endorsement: "In all other respects, the policy provisions and limits of liability remain unchanged" (R.F., at para. 91; Residential Insurance Policy, at p. 4-1). My colleague Rowe J. agrees and finds that the GRC endorsement "simply amends the Basis of Claim Payment provision in the base policy by extending the amount payable beyond the amount of insurance purchased by the insureds" and that therefore all other elements of the underlying policy continue to apply to the GRC endorsement (para. 78).

[219] I disagree. While I view my colleague's interpretation as reasonable, I find that it is equally reasonable, at this stage of the analysis, to see the GRC endorsement as doing more than simply removing the base policy limit. As the Emonds rightly point out, the wording "[i]n all other respects, the policy provisions and limits of liability remain unchanged" indicates that the GRC endorsement takes precedence and that it is only those parts of the policy *not* amended or displaced by the GRC endorsement that

continue to apply (A.F., at para. 92). This clause throws us back to a broader interpretation of the GRC endorsement.

[220] The issue is that the impact of this clause is unclear given the wording of the GRC endorsement crafted and offered by Trillium. As previously noted, endorsements may cover the field of a particular subject matter, displacing the underlying policy with respect to that subject (*Pilot*, at para. 21; *Le Treport*, at para. 37). The Emonds argue that this is precisely what occurred here: "Guaranteed Rebuilding Cost Coverage" is just that — Trillium guaranteed that it would pay the costs of replacing their home and thereby displaced the exclusions that would run counter to this guarantee. Trillium did not, as counsel for the Emonds put it in the oral hearing, sell the Emonds "[e]xtended limits for non-excluded costs" insurance (transcript, at p. 32).

[221] Against this, my colleague Rowe J. finds that the term "guaranteed" simply refers to "the absence of a limit on the amount payable by the insurer" (para. 82). He argues that the Emonds read the phrase "Guaranteed Rebuilding Cost Coverage" in isolation and improperly used the heading of the GRC endorsement to overwhelm its unambiguous language (para. 82).

[222] With respect, I favour the Emonds' understanding. The ordinary meaning of "guaranteed", as understood by the average person seeking insurance, would not be "the absence of a limit on the amount payable". Instead, as evidenced by a number of dictionary definitions provided by the Emonds, "guarantee" suggests that the GRC

endorsement does more than eliminate the base policy's limits (A.F., at para. 63). These definitions provide a similar meaning, and I point out only one example, from the *Cambridge Dictionary* (online):

> a promise that something will be done or will happen, especially a written promise by a company to repair or change a product that develops a fault within a particular period of time . . . .
>
> . . .
>
> If something guarantees something else, it makes certain that it will happen . . . .
>
> . . .
>
> If something is guaranteed to happen or have a particular result, it is certain that it will happen or have that result . . . .
>
> . . .
>
> If you guarantee something, you promise that a particular thing will happen or exist . . . .

[223] The use of a phrase as clear as "Guaranteed Rebuilding Cost Coverage" favours an understanding that the GRC endorsement does more than provide for "some" or "most" of the cost of rebuilding. Its ordinary meaning suggests that the GRC endorsement covers the field with respect to the cost of rebuilding, guaranteeing it and displacing exclusions that would otherwise impinge upon that broad guarantee. Taken together with the following discussion, this mirrors the situation in *Le Treport*, where an endorsement for flood coverage was read to entirely displace an exclusion for damages and loss caused by surface water (para. 37). The average person seeking insurance coverage would undoubtedly see these words and conclude, reasonably, that

guaranteed replacement would override any exceptions that would negate that guarantee.

[224] Of course, the phrase "Guaranteed Rebuilding Cost Coverage" is not the whole of the policy or the GRC endorsement. It must be read with the policy as a whole. However, it must be given meaning, and it must be given the meaning that the "average person applying for insurance" would give it. While this phrase cannot alone determine the meaning of the GRC endorsement and its relationship with the compliance cost exclusion, I find that it is ordinary language that is sufficiently strong and clear that the average person seeking insurance coverage would view it as suggesting a promise that the insurer would pay for the rebuilding of the insured home.

[225] This is not contradicted by the language in the GRC endorsement, which provides that the settlement of a claim made under this coverage can be made based on the "cost of repairs or replacement (whichever is less) without deduction for depreciation even if it is more than the amount of insurance shown on the 'Declaration Page'" or the actual cash value of the damage taking into account the cost of replacement and depreciation (p. 4-1). Neither of these limit or water down the guarantee provided in the GRC endorsement's heading and on the declaration page. The gap between this clearly worded promise and Rowe J.'s interpretation that the GRC endorsement only amends the "Basis of Claim Payment" demonstrates the existence of an ambiguity, which is reinforced elsewhere in the text and structure of the insurance contract, as I will discuss below.

[226] There is a further textual issue in the GRC endorsement that supports the Emonds' understanding that the GRC endorsement does more than eliminate the base policy limit — the use of the phrase "using current building techniques". The GRC endorsement states: ". . . 'we' will pay for insured loss or damage if 'you' repair or replace the damaged or destroyed 'dwelling' building on the same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage" (p. 4-1 (emphasis added)). By contrast, the base policy's basis of claim payment does not refer to "current building techniques".

[227] The Emonds argue that "these words would be read by an average person to mean that any rebuilding of the home would meet current building standards" and as such operate to override the application of the compliance cost exclusion (A.F., at para. 70).

[228] The Court of Appeal held, and my colleague Rowe J. affirms, that the ordinary meaning of "building techniques" is a particular technical method for building (C.A. reasons, at para. 84; majority reasons, at para. 84). My colleague rightly notes that the ordinary meaning of "technique" may be "a way of carrying out a particular task" and that "current building techniques" may mean "construction methods that are commonly used today rather than those used in the original construction of the home" (paras. 84-85; C.A. reasons, at para. 84), for example, using modern and more efficient tools and machines that reduce the costs of the project.

[229] With respect, while this is one meaning of the phrase used, read in the context of the broader policy, it is not the entirety of the meaning that could reasonably be ascribed to it. In consideration of the word "current", "current building techniques" can also refer to legal requirements that impinge upon and guide almost every aspect of the building process. This is latent in my colleague Rowe J.'s understanding of "technique" as a "way of carrying out a particular task" (para. 84). It is unclear to me why this definition would exclude legally obligatory methods for carrying out the task of rebuilding.

[230] That task of rebuilding can only be lawfully carried out in ways that comply with all legal requirements relating to the process of rebuilding or repairing. All "current building techniques" used in the rebuilding must be compliant with applicable laws. This is not to say that there will be a specific legal requirement for each and every current building technique; there may be an array of legally compliant current building techniques available for any particular task. However, all "current building techniques" must be legally permitted in order to be used and in order to be "current".

[231] This is made clearer with reference to the various discrete tasks involved in the building of a home, each of which must be carried out in compliance with the law. For example, the current way of carrying out the task of building a home would include undertaking the process of electrification in a particular way — it would involve all of the modern methods employed in installing the wiring and it would include the use of modern copper wires rather than outdated and non-compliant knob

and tube wiring, as well as methods of routing or securing the wiring in accordance with the current building requirements. In some sense, many of the practical, technological, and legal aspects of "current building techniques" are inextricable. The way in which the task of rebuilding is currently undertaken is informed and constrained by existing legal requirements. I do not see anything in the text of the policy or the GRC endorsement that would run counter to this interpretation.

[232] Therefore, the phrase "current building techniques" does not unambiguously mean only the voluntary choice of the building method — such as using outdated but still legal ways of completing a task; it can also reasonably be understood to include the use of building methods that comply with current legal requirements. In short, the current building techniques in the area under the MVCA's authority include methods for carrying out the construction of a home that ensure compliance with the MVCA's requirements.

[233] This is evidenced by the use of "techniques" elsewhere in the GRC endorsement. It provides, for example, that

> "Actual Cash Value" will take into account such things as the cost of replacement/rebuilding less any depreciation. In determining depreciation "we" will consider the condition immediately before the damage, type of construction material and techniques and their normal life expectancy. [Emphasis added; p. 4-1.]

[234] The reference to construction techniques here is clearly not a reference to the efficiency of the construction, for example, whether it was done by hand or

machine. Such considerations would have little, if any, impact on the valuation that the clause in question concerns. Instead, what "construction . . . techniques" refers to here, taken together with the reference to "material" and "life expectancy", is the quality of the build. "Techniques" does not just refer to the manner in which the construction was carried out, but includes the nature of what was built in the aggregate and in its parts. As such, "current building techniques" also refers to the creation of a building in line with the current methods of construction. These methods are inseparable from the imposed legal, regulatory, and building code requirements that inform them in practice.

[235] This more comprehensive and practical understanding of "current building techniques" accords with the balanced requirements contained in the same paragraph of the GRC endorsement: that the build occur on the "same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage" (p. 4-1 (emphasis added)). While my colleague Rowe J. sees "current building techniques" as primarily or only limiting the liability of the insurer, the other requirements cut both ways (para. 86).

[236] Insurers may benefit from insureds being unable to change the location of the dwelling, to choose different more expensive materials, and to either rush or wait to reconstruct or repair the dwelling, with the attendant possibility of shifts in costs and profitability. Similarly, insureds may benefit from knowing that they will receive a similar structure, in the same spot, with similar quality materials and in a reasonable amount of time — not a lesser structure, in a cheaper spot, with poorer materials, and

at the convenience of the insurer. The phrase "current building techniques" should be read in the same way: insurers benefit from not having to pay for hand-nailed shingles; while insureds benefit from knowing that the insurer will fund the rebuilding of a structure that is up to date and lawful.

[237] Thus, there are ambiguities in the text of the GRC endorsement based on whether the GRC endorsement covers the field of rebuilding costs and thereby ousts the compliance cost exclusion and whether the GRC endorsement's use of the phrase "current building techniques" specifically includes rebuilding a property to current legal standards. Both sources of ambiguity directly relate to the application of the compliance cost exclusion to the GRC endorsement.

(b) *The Structure of the Insurance Policy as a Whole Generates Ambiguity*

[238] Similarly, the structural relationship between the base policy and the GRC endorsement is ambiguous. Again, this ambiguity goes to the application of the compliance cost exclusion to the GRC endorsement.

[239] To begin, it is uncontroversial that the GRC endorsement itself does not contain any exclusion within its text, including for the cost of compliance with any laws. The application of the compliance cost exclusion to the GRC endorsement (regardless of the interpretation of the content of that exclusion) would be far clearer if Trillium had included the exclusion in the GRC endorsement. Given the evident impact that the application of the compliance cost exclusion would have on the cost of

rebuilding or repairing a home (particularly one built in 1968), including such an exclusion on the face of the GRC endorsement would have been prudent. Trillium chose not to do so.

[240] Given the ambiguities identified above (and the further ambiguities discussed below), this omission weighs heavily against Trillium's interpretation. Relying on *Wigle*, *Cabell*, and *Le Treport*, I would note that ambiguity in the base policy and GRC endorsement means that Trillium should have inserted the compliance cost exclusion directly into the GRC endorsement. Following those cases, I would affirm the general principle that ambiguity in the application of an exclusion to an endorsement strongly supports a finding that the exclusion does not apply. However, before this principle can be relied on, more analysis is required to determine whether there truly is an ambiguity. I note that, because my colleague Rowe J. views the application of the compliance cost exclusion to limit the GRC endorsement as unambiguous, he finds that the principle first laid out in *Wigle* does not apply on the facts of this case (para. 78). However, he does not contest the principle itself.

[241] The lack of an exclusion in the GRC endorsement is particularly noteworthy because the placement of specific exclusions on the face of an endorsement is not without precedent in the policy in question. Many of the endorsements provided by Trillium contain exclusions that are specifically crafted for the coverage in question. For example, the water protection endorsement purchased by the Emonds contains a series of exclusions specific to it. As a further example, the identity fraud coverage

endorsement lists seven different exclusions that are unique to it. Including these exclusions provides clarity for insureds. Indeed, the majority of the optional endorsements contained in section 4 have specific exclusions included in them. This was not done for the GRC endorsement.

[242] The absence of any exclusion in the GRC endorsement, and the common usage of specific exclusions in other endorsements, is coupled with the confusing and unexplained distinction between the section 1 exclusions and the section 4 exclusions. Recall that the GRC endorsement is contained in section 4 of the policy, which contains and is subject to its own exclusion provisions. Most of the exclusions listed in section 4 are essentially reproductions and recitations of the section 1 exclusions contained in the base policy. Of the 14 exclusions contained in section 4, 10 are repetitions of the section 1 exclusions. Four of the exclusions contained in section 4 are unique to section 4 and its specific additional coverages.

[243] Conspicuously absent from section 4 is the exclusion in dispute. Both the section 1 and section 4 exclusions include carve-outs for war, nuclear incidents, radioactivity, pollution, wear and tear, birds and vermin, intentional acts, illegally acquired property, lawful seizure, and terrorism. Only section 1 contains an exclusion for increased compliance costs. In fact, section 1 includes that exclusion in several different places throughout the various elements of the underlying policy document that were not purchased by the Emonds. No explanation has been provided for the difference between the lists of exclusions.

[244] My colleague Rowe J. notes that "[n]othing in the wording of the endorsement suggests the exclusions applicable to that loss, which are also found in section 1, are to be replaced by the distinct list of exclusions in section 4" (para. 88). Though I understand my colleague's argument, the average person seeking insurance would note that there is a separate list of exclusions under section 4, that this list is specific to endorsements, and that this list is different than the more general lists in section 1. On this basis, it is reasonable to understand that the section 4 list that is specific to endorsements would trump the lists in section 1, which apply more generally.

[245] Justice Rowe rejects this understanding of the section 4 exclusions because the section 4 exclusions concern "coverage-granting endorsements" that "insure additional property or perils not covered under section 1" (para. 88). In my colleague's view, the GRC endorsement provides no such coverage because it only alters the applicable limits; therefore, section 1 contains the applicable exclusions.

[246] As discussed above, I disagree with the narrow reading of the coverage granted by the GRC endorsement as relating only to the absence of a policy limit. But in addition, with respect, I find that my colleague Rowe J.'s interpretation is not in keeping with the understanding that insurance policies should be interpreted based on how the average person seeking insurance coverage would understand them and not based on how people "versed in the niceties of insurance law" might perceive them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at

p. 1043). My colleague's interpretation reflects legal complexity and nuance that are beyond the proper interpretive framework. The fine distinction he has drawn between the general exclusions to the policy coverage in section 1 and the section 4 exclusions as referring only to "coverage-granting endorsements" that "insure additional property or perils not covered under Section 1" is not evident on an ordinary reading of the text, particularly when taken together with the textual ambiguities noted previously.

[247] Based on the foregoing textual and structural ambiguities, the average person seeking insurance coverage would be forgiven for adopting either one of the following two reasonable interpretations of the compliance cost exclusion's application to the GRC endorsement: (1) the compliance cost exclusion applies to the base policy alone and is overridden by the GRC endorsement; or (2) the compliance cost exclusion applies to both the base policy and the GRC endorsement.

(3) This Ambiguity Must Be Resolved in Favour of the Compliance Cost Exclusion Not Applying to Limit the GRC Endorsement

[248] Turning to the second step of *Ledcor*, I use the general rules of contractual interpretation to shed further light on this ambiguity. These include ensuring that any interpretation is consistent with the reasonable expectations of the parties and does not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted. I find that the application of these rules supports the Emonds' position and that this interpretation is solidified by principles favouring the insureds in circumstances of ambiguity.

[249] Beginning with the reasonable expectations of the parties, the reasonable expectations of the Emonds were clear. They purchased what a Trillium representative referred to as a "top of the line" policy (application judge's reasons, at para. 8) that was billed and labelled as "Guaranteed Rebuilding Cost Coverage" on the GRC endorsement and as "Guaranteed Rebuilding Cost Endorsement" on the declaration page. The GRC endorsement stated that "'we' will pay for insured loss or damage if 'you' repair or replace the damaged or destroyed 'dwelling' building on the same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage" (p. 4-1) — if the Emonds met certain conditions. The Emonds agreed to comply with those conditions, they paid increased premiums for this coverage, and they expected that the rebuilding of their home would be covered.

[250] This expectation was paired with the clear, indeed resounding and unexplained, absence of the compliance cost exclusion from the GRC endorsement and the section 4 exclusions as well as the absence of any statement in the policy affirming that the section 1 exclusions applied with full force to limit the GRC endorsement. No one brought the Emonds' attention to the compliance cost exclusion. The Emonds reasonably expected that the cost of rebuilding their home was going to be paid for by Trillium. That is what made their coverage "top of the line". This expectation was reinforced by the GRC endorsement's removal of the policy's limits, which would provide the average person seeking insurance with a greater expectation that the cost of rebuilding their house would in fact be "guaranteed", absent clear exclusions.

[251] To this, my colleague Rowe J. argues that the Emonds' interpretation of "guaranteed" is undone by their admission that certain exclusions continued to apply to limit the GRC endorsement, demonstrating that the Emonds did not expect "guaranteed" to mean that Trillium guaranteed the cost of rebuilding, come what may (para. 82).

[252] With respect, I disagree. I find that the Emonds' admission demonstrates both the reasonableness of their expectations and the extent of the ambiguity present in the policy. The Emonds' admission flows from the fact that certain exclusions, such as those relating to damages resulting from war and terrorism, are contained in section 4. It is undisputed that those exclusions apply to limit the GRC endorsement. The "guarantee" that the Emonds received was not wholly unlimited. Instead, the Emonds fairly understood that the effect of the GRC endorsement was limited by the exclusions in section 4. It is in large part the glaring absence of the compliance cost exclusion from section 4 that shaped the Emonds' reasonable expectations and created the present ambiguity and dispute.

[253] Importantly, there is no contradiction in accepting both the guarantee as characterized above and the application of the exclusions contained in section 4 to the GRC endorsement. None of the section 4 exclusions relevant to the loss of a structure go to the question of the costs associated with rebuilding. Instead, they entirely disallow recovery for certain losses. They do not alter the quantum associated with a covered loss and therefore the application of these exclusions does not run counter to the GRC

endorsement's guarantee. Of course, this characterization does not justify the omission of the compliance cost exclusion from section 4 — Trillium makes no such argument and there is no principled reason that the compliance cost exclusion could not have been included. Rather, the lack of conflict between the GRC endorsement and the other section 4 exclusions further tilts the analysis in favour of the Emonds.

[254] By contrast, there are few reasons to think that Trillium would not have expected to pay for the full costs of rebuilding the Emonds' home. Trillium is a highly sophisticated actor that would have been aware of the laws, by-laws, and regulations affecting the Emonds' property. It was aware of the age, state, and location of the property. It was aware that replacement of the property is possible only if done in compliance with the relevant legal obligations. It is also valuable to note that Trillium understood that the GRC endorsement would also guarantee the Emonds the cost of rebuilding their home in compliance with certain legal requirements. As the Emonds point out:

> Trillium acknowledged that the valuation of the property at the time of securing insurance coverage was based upon the costs per square foot *based upon current building standards*. There was no evidence to suggest that the valuation was based upon the cost to rebuild the home as it was built 30 years previously or at the time of its initial construction. [Emphasis in original.]
>
> (A.F., at para. 52)

[255] Turning to the commercial atmosphere, Trillium's acknowledgement quoted above is sensible: the Emonds can only rebuild their home in a legally compliant

manner, and Trillium chose to guarantee the rebuilding costs of that home, subject to certain restrictions. It would be strange for Trillium to evaluate the cost of rebuilding or repairing a home based on the use of standards or materials that can no longer be used. Such an interpretation would prefer coverage based on the cost of building an unlawful and fictional replica of the lost home to rebuilding the home as required by law.

[256] Moreover, I cannot accept that this interpretation "would require insurers to ascertain the state of compliance of the insured's property in each case" or else assume indeterminate liability, as my colleague Rowe J. asserts (para. 98). While there is no policy limit set out in monetary terms — a decision that was taken by the insurer — limits are set out in qualitative terms. The repair or rebuild must occur "on the same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage" (p. 4-1). These are the limits that the insurer itself decided to place on the GRC endorsement.

[257] It should also not be forgotten that the insurer put in conditions that help it control its risk: it insisted upon insurance in the amount of 100 percent of the cost to rebuild the insured building on a valuation guide acceptable to the insurer; it required annual adjustments in amounts of insurance and premiums; and it required notification for physical changes or additions to the building that may increase the costs of rebuilding by 5 percent or more, for which increased premiums associated with that

change would be paid. This is what the insurer offered. If the liability is indeterminate, and I do not think it is, it is so at the choice of the insurer.

[258] In addition, I note that in the case of a total loss, as here, the cost of rebuilding is the same whether the house in question was highly non-compliant, slightly non-compliant, or entirely compliant — the cost of rebuilding is the cost of making a compliant home. This liability is not indeterminate; Trillium calculated the costs of rebuilding in compliance with current standards. While the valuations were and are disputed, they are not indeterminate.

[259] I find that recourse to the expectations of the parties and the commercial context cuts through much of the ambiguity concerning whether or not the compliance cost exclusion applies to limit the GRC endorsement — it does not apply. The expectations of the Emonds clearly favoured the understanding that the "Guaranteed Rebuilding Cost Coverage" would provide just that, and Trillium understood that rebuilding the home would require changes to support its compliance with the myriad of legal requirements that have come into effect since the house was constructed in 1968. This finding does not expose Trillium to indeterminate liability; the GRC endorsement has clear parameters that limit Trillium's liability.

[260] However, the reasonable expectations of the parties cut both ways. I agree that it would not be a reasonable interpretation to suggest that Trillium bargained to insure against any and all unknown increases in cost that may emerge between the date of the issuance or renewal of the policy (wherein Trillium is well aware of, and versed

in, assessing the risks associated with insuring the property) and the date on which the loss eventually occurred. Much can happen during that period, and it would be unreasonable for Trillium to be liable for increased legal costs that would have been wholly unknown to it or the Emonds at the time the policy was agreed to or renewed.

[261] For this reason, the interpretation that accords with the reasonable expectations of the parties and the commercial context is that Trillium was required to insure against increased costs for compliance with any law in effect before the last renewal of the contract, not afterwards. Finding otherwise might indeed subject Trillium to indeterminate liability, in particular where there is no limit associated with the GRC endorsement.

[262] Even if the ambiguity was not fully resolved at this stage, I note that the third stage of the *Ledcor* analysis grants access to the *contra proferentem* rule, the principle that coverage provisions are interpreted broadly and exclusions narrowly, and the requirement that limitations on the coverage in an endorsement that are ambiguous should be set out in the endorsement itself; these all reinforce my interpretation. Because I have found that the compliance cost exclusion does not apply, there is no need for me to discuss the application of the nullification of coverage doctrine.

[263] While I resolved this matter on the analytically prior basis that the compliance cost exclusion does not apply to limit the GRC endorsement, had I found that the exclusion applied, I would have interpreted it in broad agreement with the reasons of Karakatsanis J. The phrase “increased costs” is ambiguous. The Emonds

note that "increased costs" could be measured from: (1) the construction of the residence; (2) the issuance or renewal of the policy; or (3) the occurrence of the loss or damage. Justice Rowe disagrees and states that "increased costs" support a physical, rather than temporal, comparison (para. 91). These interpretations are all reasonably available on the text of the contract. For the reasons provided by Karakatsanis J., recourse to the broader principles of contractual interpretation and the *contra proferentem* rule favour the understanding that the "increased costs" in question are those measured from the issuance or renewal of the contract. Therefore, I would have come to the same result: Trillium must insure the Emonds against increased costs for compliance with any law in effect before the last renewal of the contract, but not afterwards.

VI. Conclusion

[264] When it offered the Emonds GRC coverage, Trillium knew that the Emonds' home was in an area with a flood risk. It knew that the home was built in 1968. This should have alerted it to the fact that the home may have not been compliant with current building standards and regulations. Trillium knew that the home was located in the MVCA's jurisdiction. Trillium knew that rebuilding or repairing the home would be subject to the requirements of the MVCA. Trillium cannot have been blind to the fact that the average person seeking insurance would understand that "Guaranteed Replacement Cost Coverage" would guarantee the cost of replacement for the insured property.

[265] Despite these certainties, the text of the insurance policy and the GRC endorsement, and their relationship to one another, is freighted with ambiguity. The relationship between the compliance cost exclusion contained in the underlying insurance policy and the GRC endorsement is ambiguous. It is ambiguous as a result of the manner in which Trillium chose to structure the GRC endorsement and the underlying policy, and it is ambiguous based on the text that Trillium chose to use in drafting the policy's coverage and exclusions. In the face of these ambiguities, the reasonable expectations of the insureds were that they were purchasing precisely what the GRC endorsement was labelled as: a guarantee that Trillium would pay for the cost of rebuilding their home. The Emonds should be given what they have paid premiums for, and, in line with decades of case law to this effect, the ambiguity of the exclusion that Trillium seeks to rely on should forestall its application to limit the GRC endorsement.

[266] This finding does not expose Trillium to indeterminate liability: the GRC endorsement's conditions are rigorous and the costs covered in the rebuild are governed by clear requirements concerning the structure that is rebuilt. This finding is also sensitive to potential indeterminate liability that could emerge after the insurance contract was agreed to. This finding is not a windfall for the Emonds; it is the fulfilment of the bargain for which they have been paying premiums. Instead, this finding is a signal to insurers that they must be clear and precise in the wording and structure of their standard form insurance contracts, their related endorsements, and, in particular,

any and all exclusions that are contained in the underlying insurance policies that purport to affect any optional endorsements.

[267] For these reasons, I would allow the appeal in part, set aside the judgment of the Court of Appeal and restore the application judge's declaration with the alteration that the coverage does not include increased costs resulting from the operation of any rule, regulation, by-law, or ordinance, not in effect at the time that the insurance policy was last renewed.

APPENDIX

The following are extracts from the Residential Insurance Policy (reproduced in A.R., vol. I, at pp. 75-107):

SECTION 1
PROPERTY COVERAGES

. . .

OPTION 2 RESIDENTIAL PROPERTY — COMPREHENSIVE FORM

If the "Declaration Page" shows that Residential Property — Comprehensive Form applies, "we" insure your "dwelling", detached private structures, "your" improvements and betterments and "your" personal property, against direct physical loss or damage, subject to the terms and conditions below.

. . .

"We" do not insure against loss or damage resulting from, contributed to or caused directly or indirectly:

. . .

8. because of increased costs of repair or replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services; except as provided under Additional Coverages of Section 1;

. . .

ADDITIONAL COVERAGES — SECTION 1

The following Additional Coverages shall not increase the Amounts of Insurance — Section 1 in this policy, unless otherwise stated, and are subject to the exclusions, limitations and conditions of this policy.

. . .

11. **Building By-Law & Code Compliance Coverage:** "We" will pay an additional amount up to $10,000 or the amount shown on the "Declaration Page" . . ., for the

increased cost of demolition, construction, or repair to comply with any law regulating the zoning, demolition, repair or construction of any insured buildings insured under Section 1, Coverages A and B. This endorsement responds only as a result of direct damage caused by an insured peril. This endorsement is extended to pay for:

1. loss resulting from the demolition of any undamaged portion of the insured building(s); or

2. the cost of demolishing, and clearing the site of, and undamaged portion of the insured building(s); or

3. any increase in the cost of repairing, replacing, construction or reconstructing the insured building(s) on the same site or on an adjacent site, of like height, floor area and style, and for like occupancy; arising from the enforcement of the minimum requirements of any by-law, regulation, ordinance or law which:

   a) regulates zoning or the demolition, repair or construction of damaged buildings or structures; and

   b) is in force at the time of such loss or damage.

Limitation

"We" will pay the lesser of:

1. the amount of insurance provided under this Coverage; or

2. the minimum amount required to comply with any by-law, regulation, ordinance or law.

"We" will not pay:

1. the additional cost caused by the enforcement of any by-law, regulation ordinance or law which prohibits "you" from rebuilding or repairing on the same site or an adjacent site or prohibits continuance of like occupancy;

2. more than the minimum amount required to comply with an enforceable by-law, regulation, ordinance or law.

This endorsement does not override any provision in the Basis of Claim Payment of the policy to which this endorsement is attached.

. . .

BASIS OF CLAIM PAYMENT — SECTION 1

When coverage applies, "we" will pay for insured loss or damage up to "your" financial interest in the property but not exceeding the applicable amount(s) of insurance for any loss or damage arising out of one occurrence.

Any loss or damage shall not reduce the amounts of insurance provided by this policy.

. . .

Dwelling Building and Detached Private Structures: If "you" repair or replace the damaged or destroyed building on the same location with materials of similar quality within a reasonable amount of time after the damage, "you" may choose as the basis of loss settlement either (**A**) or (**B**) below; otherwise, settlement will be as in (**B**).

A. The cost of repairs or replacement (whichever is less) without deduction for depreciation, in which case "we" will pay in the proportion that the applicable amount of insurance bears to 80% of the replacement cost of the damaged building at the date of damage, but not exceeding the actual cost incurred.

B. The Actual Cash Value of the damage at the date of the occurrence.

. . .

SECTION 4
MISCELLANEOUS COVERAGES SECTION

. . .

COVERAGE GRC — GUARANTEED REBUILDING COST COVERAGE

If the "Declaration Page" shows that the Guaranteed Rebuilding Cost Endorsement applies, the Basis of Claim Payment for the "Dwelling" Building is amended as follows:

When coverage applies "we" will pay for insured loss or damage if "you" repair or replace the damaged or destroyed "dwelling" building on the same location with materials of similar quality using current building techniques within a reasonable amount of time after the damage.

"You" may choose as the basis of loss settlement either (A) or (B) below; otherwise settlement will be as in (B).

> (A) The cost of repairs or replacement (whichever is less) without deduction for depreciation even if it is more than the amount of insurance shown on the "Declaration Page" for the "dwelling" building provided:

1. The amount of insurance shown on the "Declaration Page" for the "dwelling" building represents 100% of the cost to rebuild the insured "dwelling" on the same site with materials of similar quality as determined by a building valuation guide acceptable to "us";

2. "You" agree to accept each annual adjustment in the amount of insurance as recommended by "us" and pay the additional premium; and

3. "You" notify "us" within 30 days of the start of any additions or other physical changes to the building(s), which may increase the rebuilding cost of the structure by 5% or more, and pay any resulting additional premium.

(B) The "Actual Cash Value" of the damage at the date of the occurrence.

"Actual Cash Value" will take into account such things as the cost of replacement/rebuilding less any depreciation. In determining depreciation "we" will consider the condition immediately before the damage, type of construction material and techniques and their normal life expectancy.

In all other respects, the policy provisions and limits of liability remain unchanged.

This coverage is void if "you" fail to comply with its provisions.

Appeal dismissed with costs, KARAKATSANIS *and* CÔTÉ JJ. *dissenting in part.*

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Solicitors for the intervener Ontario Trial Lawyers Association: Oatley Vigmond, Barrie.

Solicitors for the interveners Canadian Association of Mutual Insurance Companies, Ontario Mutual Insurance Association and Farm Mutual Reinsurance Plan Inc.: McCarthy Tétrault, Toronto.