

COURT OF APPEAL FOR ONTARIO

CITATION: Trillium Mutual Insurance Company v. Emond, 2023 ONCA 729

DATE: 20231103

DOCKET: COA-22-CV-0315

Lauwers, Zarnett and Thorburn J.J.A.

BETWEEN

Trillium Mutual Insurance Company

Appellant

and

Stephen Emond and Claudette Emond

Respondents

Pat Peloso and Jaime Wilson, for the appellant

Joseph Y. Obagi and Elizabeth Quigley, for the respondents

Heard: August 24, 2023

On appeal from the order of Justice Robyn M. Ryan Bell of the Superior Court of Justice, dated September 29, 2022, with reasons reported at 2022 ONSC 5519.

Thorburn J.A.:

I. OVERVIEW

[1] The respondents, Stephen and Claudette Emond, lived in a home on the Ottawa river. Their home was located in the catchment area of the Mississippi Valley Conservation Authority (the “MVCA”). The MVCA Regulation Policies regulate development and activities in or adjacent to rivers, lakes, shorelines, hazardous lands, and wetlands.

[2] The Emonds had purchased a standard form residential Homeowners’ Package Comprehensive Form Insurance Policy from the appellant, Trillium Mutual Insurance Company. The Policy provided coverage from September 27, 2018 to September 27, 2019.

[3] On April 29, 2019, the Emonds’ home was severely damaged by a flood and was deemed a total loss.

[4] Although Trillium acknowledged coverage for the loss under the Policy, the parties could not agree on what, if any, costs of “replacement” of the Emonds’ dwelling were excluded from coverage under the Policy.

[5] The Policy includes (i) a Guaranteed Rebuilding Cost Coverage endorsement to pay the insured to replace a dwelling with materials of similar quality using current building techniques (the “GRC”); (ii) an exclusion for “increased costs of repair or replacement due to the operation of any law regulating the zoning, demolition, repair, or construction of buildings” (the “para. 8

Exclusion”); and (iii) a Building By-Law and Code Compliance Coverage endorsement (the “BBCC”) that provides for payment of up to \$10,000 for increased costs of demolition, construction, or repair to comply with any law regulating the zoning, demolition, repair, or construction. The coverage limit listed on the Declaration Page for the dwelling was \$585,092.

[6] The application judge accepted the Emonds’ position that the GRC coverage was intended to guarantee the costs of rebuilding their home on the same location, using materials of similar quality and current building techniques, without any limitation of coverage resulting from the operation of any rule, regulation, by-law, or ordinance. She rejected Trillium’s position that such a limitation applied because rules, regulations, by-laws and ordinances fell within the meaning of “any law” in the para. 8 Exclusion. This meant that costs of compliance with the MVCA Regulation Policies did not fall within the para 8 Exclusion.

[7] Trillium claims that the application judge erred in her interpretation of this standard form Policy and that if her interpretation is upheld, this will have a wide-reaching and detrimental effect on the insurance industry in Canada.

II. BACKGROUND TO THIS APPEAL

[8] The central dispute between the parties is: what costs of rebuilding, if any, are excluded from coverage under this Policy?

[9] The Emonds claimed that the GRC fully guaranteed their rebuilding costs.

[10] Trillium acknowledged that the GRC applied to replace their dwelling with materials of similar quality using current building techniques, but took the position that the costs to be incurred to comply with the Regulation Policies enacted by the MVCA and other by-laws and regulations enacted after the original building of the house (the “compliance costs”) were excluded from coverage by the para. 8 Exclusion. Trillium was required and did agree to pay an additional \$10,000 to cover such costs under the BBCC.

[11] Trillium advised the Emonds that pending resolution of their compliance costs dispute, they would be paid Trillium’s calculation of the Actual Cash Value of \$498,107.13, (which is “the cost of replacement/rebuilding, less any depreciation without prejudice to their right to dispute the Actual Cash Value assessment and/or the application of the GRC”).

[12] The GRC provides that if the dwelling is rebuilt, the insured has the option to be paid either “[t]he 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 to receive “[t]he ‘Actual Cash Value’ of the damage at the date of the occurrence” which includes depreciation.

[13] Because the Emonds’ property is subject to the MVCA Regulation Policies, there were major costs associated with the requirement that the rebuild comply with the Regulation Policies enacted by the MVCA under the *Conservation*

Authorities Act, R.S.O. 1990, c. C.27, s. 28. In oral submissions, counsel for the respondents noted that those Regulation Policies came into effect after the original building of the house.

[14] Trillium retained two contractors to prepare rebuild estimates based on a designer's renderings, the topography and features of the property, and the drainage and septic requirements. Trillium estimated the construction costs at between \$553,452.37 and \$612,900.72.

[15] The Emonds rejected these estimates. They took the position that since rebuilding their home required compliance with the MVCA Regulation Policies, municipal by-laws, and other building code regulations, the compliance costs could increase construction costs by as much as \$700,000.

[16] Trillium updated its construction cost estimates on a without prejudice basis to include the relevant compliance costs. This increased Trillium's estimates to between \$580,261.06 and \$873,830.48.

[17] The Emonds continued to dispute the estimates and provided their own valuation of replacement costs which reflected an increase to between \$925,000 and \$1,252,668.04.

[18] The Emonds brought an application for a declaration that the GRC entitled them to recover the total costs of rebuilding their home, with no limitation of coverage for compliance costs.

[19] The parties sought only an interpretation of the relevant provisions in this standard form Policy. Neither party sought quantification of the loss and neither party provided evidence to enable the court to determine the exact compliance costs.

III. THE ISSUES

[20] The central issues on this appeal are whether the application judge erred in holding that the GRC entitled the Emonds to recover all costs of rebuilding their home, with no limitation of coverage for compliance costs, and whether the effect of excluding compliance costs would nullify the GRC coverage under the Policy.

[21] An analysis of these issues entails a review of:

- a) The coverage provided in the GRC;
- b) The exclusion of coverage in the para. 8 Exclusion for “increased costs of repair or replacement due to operation of any law”;
- c) The effect of the Policy coverage in the BBCC for “an additional amount up to \$10,000 or the amount shown on the ‘Declaration Page’, for the increased cost ... to comply with any law”;
- d) The extent to which, if at all, the para. 8 Exclusion limits coverage in this case; and
- e) Whether applying the para. 8 Exclusion to the GRC would nullify the GRC.

IV. THE RELEVANT POLICY PROVISIONS

[22] The relevant Policy provisions are as follows:

The Guaranteed Rebuilding Cost Endorsement

[23] The GRC provides that:

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”;

...

(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. [Emphasis added.]

The Exclusion of Increased Costs of Repair or Replacement Due to Any

Law

[24] The para. 8 Exclusion provides that:

“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. [Emphasis added.]

The Building By-Law & Code Compliance Coverage (“BBCC”)

[25] While increased costs due to the operation of any law are excluded by the Exclusion at para. 8, some coverage for those costs is set out in the BBCC. The BBCC, found in both the “Additional Coverages – Section 1” and the “Section 4 Miscellaneous Coverages Section” of the Policy, provides that:

“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 building(s). This endorsement responds only as a result of direct damage caused by an insured peril. This endorsement is extended to pay for:

...

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.

...

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

V. THE APPLICATION JUDGE’S DECISION

[26] The application judge accepted the Emonds’ position that the GRC coverage was intended to guarantee the cost to rebuild, and she rejected Trillium’s position that the GRC did not include coverage for increased costs to comply with “any law”.

[27] She relied on *Wigle v. Allstate Insurance Co. of Canada*, 49 O.R. (2d) 101 (C.A.), and held that limitations on endorsements such as the GRC that are not clearly apparent should be set out in the endorsement itself. Since the GRC did not purport to limit compliance costs, in her view, the GRC covered all of these costs.

[28] The application judge found that the para. 8 Exclusion did not apply to the MVCA Regulation Policies. She held that the term “law” in the para. 8 Exclusion was restricted to statutes and did not include rules, regulations, by-laws, or ordinances:

The para. 8 Exclusion is clear and unequivocal: it excludes only the costs of repair or replacement due to the operation of “any law.”

That the term “law” in the para. 8 Exclusion does not include, and was not intended to include, rules, regulations, by-laws, or ordinances is evident from the wording of the Policy itself: the BBCC coverage uses the terms “law”, “by-law”, “regulation”, and “ordinance.” The language of the Policy must be read to give effect to each word of the Policy and the Policy should not be interpreted in a manner which would render any words superfluous. Had Trillium wanted the term “law” to include subordinate authority for the purpose of the para. 8 Exclusion, it could have drafted the Policy accordingly. It did not.

[29] She held that since the onus was on the insurer to prove that the para. 8 Exclusion clearly applied, and the MVCA Regulation Policies were not “laws”, the

para. 8 Exclusion did not limit the complete replacement cost coverage provided to the Emonds under the GRC.

[30] The application judge also found that Trillium’s interpretation of the Policy would contravene the nullification of coverage doctrine. Trillium knew that the Emonds’ home was not new, that it was located within the MVCA’s catchment area, and that the Emonds were required to comply with the MVCA Regulation Policies and other laws regulating the construction and repair of the home. In the application judge’s view, under Trillium’s interpretation, almost all compliance costs would be excluded from coverage. She held that this would “render nugatory the coverage for the most obvious risks” for which the GRC was issued and would be contrary to the reasonable expectations of the insured.

[31] The application judge concluded that under the Policy, the Emonds were entitled to recover the cost of rebuilding their home on the same location and with materials of similar quality using current building techniques, without any limitation of coverage resulting from the operation of any rule, regulation, by-law, or ordinance.

VI. THE PARTIES’ POSITIONS ON THIS APPEAL

[32] Trillium claims that the application judge erred in concluding that the respondents were entitled to recover 100% of the costs of rebuilding their home “without any limitation of coverage resulting from the operation of any rule,

regulation, by-law, or ordinance”. Trillium submits that such an interpretation would render the GRC a warranty for any and all rebuilding costs, is commercially unreasonable, and would have the effect of reading out the para. 8 Exclusion.

[33] Trillium submits that (i) the GRC is part of the Policy of insurance and the Policy should be read as a whole with all of its terms, including the exclusions and limitations on coverage; (ii) the words “any law” in the exclusion clause include subordinate legislation such as by-laws and regulations; (iii) the BBCC confirms this interpretation, specifically providing that only up to \$10,000 will be paid by the insurer to comply with laws, by-laws, and regulations; and (iv) the fact that there is no reference to the BBCC on the Declaration Page is of no moment because the BBCC itself provides that “‘We’ will pay an additional amount up to \$10,000 or the amount shown on the ‘Declaration Page’” (emphasis added). Trillium denies that its proposed interpretation of the Policy would nullify the GRC.

[34] The Emonds submit that the application judge correctly interpreted the GRC to mean there is no cap on the costs to be reimbursed by the insurer to rebuild because (i) the GRC provides for the full cost to rebuild using “current building techniques” and the terms of the GRC prevail; (ii) the term “law” in the para. 8 Exclusion only refers to statutes, not to any subordinate authority such as by-laws, regulations, or the MVCA Regulation Policies; (iii) the BBCC does not appear on the Declaration Page for the Policy and therefore does not limit the available coverage under the GRC; and (iv) if the para. 8 Exclusion applies, coverage under

the GRC would be effectively nullified since the GRC clearly provides coverage for replacement using “current building techniques”.

[35] The parties did not precisely articulate what the additional costs in dispute are for, or what regulation, by-law, or provision of the MVCA Regulation Policies required the additional costs, save to say that some involved the construction of a more expensive foundation to provide flood protection for the dwelling. The application judge proceeded, as do I, on the basis that the parties may have resort to the appraisal remedy under the *Insurance Act*, R.S.O. 1990, c. I.8 to quantify the claim in accordance with the interpretation of the Policy that results from these proceedings.

VII. PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

[36] I begin my analysis with a review of the principles applicable to the interpretation of contracts of insurance.

[37] As the Supreme Court of Canada explained in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24:

[W]here an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[38] The factual matrix is less relevant in such standard form contracts because, as Wagner J. (as he then was) explained, “the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition”: *Ledcor*, at para. 28, citing *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 33, leave to appeal refused, [2016] S.C.C.A. No. 39.

[39] The general principles for interpreting insurance policies as set out in *Ledcor*, at paras. 49-51, are that:

[W]here the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole.

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

Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer. [Citations omitted.]

[40] All parts of a policy should be given meaning: *RBC Travel Insurance Co. v. Aviva Canada Ltd.* (2006), 82 O.R. (3d) 490 (C.A.), at para. 11.

[41] Provisions granting coverage should be construed broadly and provisions excluding coverage construed narrowly: *Sam's Auto Wrecking Co. Ltd. v. Lombard General Insurance Company of Canada*, 2013 ONCA 186, 114 O.R. (3d) 730, at para. 37. Even a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy: *Sam's Auto Wrecking*, at para. 37.

[42] Endorsements to an insurance policy should be read together with the other policy provisions because “an endorsement is generally not understood to be a self-contained policy”: *Pilot Insurance Co. v. Sutherland*, 2007 ONCA 492, 86 O.R. (3d) 789, at para. 21.

[43] The objective of replacement cost insurance as distinct from actual cash value, and the reasons for providing such coverage, were articulated by Laskin J.A. in *Carter v. Intact Insurance Company*, 2016 ONCA 917, 133 O.R. (3d) 721, at paras. 20-24, leave to appeal refused, [2017] S.C.C.A. No. 53. He held that:

The insurance industry has marketed two types of protection for residential and commercial properties: actual cash value coverage and replacement cost coverage. Under actual cash value coverage, property is insured to the extent of its actual cash value. This coverage recognizes that the insurer is entitled to deduct reasonable depreciation from the value of the loss. Under replacement cost coverage, the insured is entitled to the full cost of repair or replacement without any deduction for depreciation.

A main objective of property insurance is indemnity, and a policy providing for actual cash value coverage is a

pure indemnity contract. Actual cash value recovery puts insureds in the position they were in before the loss. Since most property depreciates over time, actual cash value is equivalent to replacement cost less depreciation. So actual cash value recovery prevents insureds from profiting or benefiting from their loss.

But actual cash value recovery poses a problem for insureds who want to build a similar structure to replace the insured property that was damaged or destroyed. Because of depreciation, these insureds will incur a cash shortfall, which they may not be able to afford, and which will thus prevent them from reconstructing their damaged structure.

Replacement cost insurance solves this problem. It 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”. In that sense, even though replacement cost insurance makes insureds better off and violates the indemnity principle, it is justifiable, because without it, many property owners would be unable to cover the shortfall caused by the depreciation of their damaged or destroyed property. [Emphasis added.]

[44] In short, what is insured in the case of replacement cost insurance is the cost of replacing the dwelling without taking into account depreciation: see also *Brkich & Brkich Enterprises Ltd. v. American Home Assurance Co.*, 8 B.C.L.R. (3d) 1 (C.A.), at para. 28, aff'd [1997] 1 S.C.R. 1149.

[45] With these guiding principles in mind, I will analyze the relevant provisions in the Policy.

VIII. ANALYSIS OF THE MEANING OF THE RELEVANT POLICY PROVISIONS

[46] Because this is a standard form contract, the standard of review of the application judge's contractual interpretation on this appeal is correctness.

[47] I will begin by reviewing what is covered and what is excluded in the Policy, followed by an analysis of the application judge's determination of coverage in view of the provisions in the Policy.

Coverage for Flood Protection

[48] This Policy provides coverage for flood protection. As acknowledged by Trillium, while "Section 1 Property Coverages" does not include flood loss coverage, flood protection is covered in the "Water Protection Endorsement" which extends coverage for losses resulting from "direct physical loss or damage to insured property caused by: 1) flood...."

[49] Because the Emonds' house was destroyed in a flood, Trillium acknowledged coverage under the Policy.

Coverage to Repair or Replace a Dwelling

[50] The Policy provides that where there is coverage, the insured may choose as the basis of loss settlement, either the cost of repairs or replacement or the actual cash value:

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.

[51] The GRC enhances the coverage in the Policy to repair or replace the dwelling by excluding any “deduction for depreciation even if it is more than the amount of insurance shown on the ‘Declaration Page’.” It also provides that the dwelling will be replaced “using current building techniques.” This language opens up the possibility of coverage in excess of the coverage limit listed on the Declaration Page, in this case, \$585,092.

The Para. 8 Exclusion of Coverage and the BBCC Coverage

[52] The para. 8 Exclusion specifically excludes coverage for “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.”

[53] The onus rests on the insurer to establish an exclusion of coverage: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 51.

(1) The meaning of “increased costs”

[54] The application judge did not specifically address the meaning of “increased costs” in the para. 8 Exclusion nor did the parties raise this issue on the application or address it on this appeal other than in response to questions from the bench. However, some understanding of it is necessary to appreciate the scope of the para. 8 Exclusion.

[55] The para. 8 Exclusion was the subject of discussion between representatives of the parties before the litigation. Trillium’s representative explained the concept this way:

By contrast, bylaws passed and building code changes made since the original date of construction force a homeowner to enhance some of the features when they are required to renovate or rebuild their house. These can include such things as enlarging the size of joists or

studs, improving electrical wiring, increasing the insulation factor or creating a flood proof foundation. Trillium sees these requirements as being separate from the term “using current building techniques” and, as such, allows up to \$10,000.00 for bylaw and building code requirements.

[56] 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).

[57] The determination of what constitutes “increased costs” begins with an explanation of the “amount payable” on the Declaration page of the Policy for the dwelling, which is: \$585,092. The “amount payable” to replace a 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.

[58] In *Roth v. Economical Mutual Insurance Company*, 2016 ABCA 399, 46 Alta L.R. (6th) 1, the Alberta Court of Appeal considered whether an insurance policy covers costs associated with fixing pre-existing deficiencies discovered as a result

of, but not caused by, an insured peril (these types of costs are specifically excluded from coverage in the Emonds' Policy). The court found, at para. 23, that

“[e]xtending coverage in such cases would require that the insurer determine in each case whether the property complied with all relevant bylaws ... Quite apart from the fact that this would be practically impossible in most cases, it would also effectively turn an insurer into a guarantor of construction defects and building code violations.” [Emphasis added]

[59] In *Allemand v. State Farm Ins. Cos.* (2010), 160 Wn. App. 365, the policy excluded “increased costs resulting from enforcement of any ordinance or law”, except for a specified amount in an additional coverage clause. The Washington Court of Appeal excluded from coverage the rebuilding costs to address deficiencies in the foundation, crawl space, and electrical wiring as required by law. This reasoning is consistent with the Alberta Court of Appeal’s reasoning in *Roth* that extending coverage in such cases “would require that the insurer determine in each case whether the property complied with all relevant bylaws” which would turn the insurer “into a guarantor of construction defects and building code violations”: *Roth*, at para. 23.

[60] The para. 8 Exclusion for increased costs in this case takes into account the fact that the insurer has not accounted for these types of costs in its estimate of the replacement cost listed on the Declaration Page. As such, any “increase” to the cost of repair or replacement that results from any law that does not allow the building to be rebuilt with the deficiencies that existed at the time of the loss, is

excluded from coverage by the para. 8 Exclusion. There is recognition however, that there may be compliance costs borne by the insurer: the BBCC provides up to \$10,000 payable by the insurer for such costs.

[61] In terms of what is being repaired or rebuilt, “increased costs” only includes those increased costs related to replacing the dwelling “as it was”. Therefore, enhancements required by laws enacted after the building was constructed are increased costs.

[62] In *Fabian v. BCAA Insurance Corporation*, 2022 BCSC 552, for example, the “increased costs” excluded were those costs to add a sprinkler system and other items that were not part of the home before it was destroyed, but were now required by a by-law: see paras. 15 and 19. Those costs were excluded by an exclusion similar to the para. 8 Exclusion.

[63] For these reasons, in my view, “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.

(2) The meaning of the words “any law”

[64] The application judge held that the words “any law” in the para. 8 Exclusion do not include by-laws or regulations. In support of her proposition, she noted that the BBCC specifically refers to “any by-law, regulation, ordinance or law,” while the

para. 8 Exclusion only refers to “any law”. She held that, “[h]ad Trillium wanted the term ‘law’ to include subordinate authority for the purpose of the para. 8 Exclusion, it could have drafted the Policy accordingly. It did not.” As such, she held that the increased costs to comply with by-laws and regulations were not subject to the para. 8 Exclusion.

[65] For the reasons that follow, I do not agree with this interpretation of the words “any law”.

[66] First, the word “law” is a clear and well-known concept. It is defined in the Oxford Dictionary as “a rule or system of rules recognized by a country or community as regulating the actions of its members and enforced by the imposition of penalties”: Angus Stevenson and Maurice Waite, eds., *Concise Oxford English Dictionary*, 12th ed. (New York: Oxford University Press, 2011), at p. 807. Case law has also defined “law” as, in essence, creating or imposing an enforceable obligation: *Valley Rubber Resources Inc. v. British Columbia (Minister of Environment, Lands & Parks)*, 2002 BCCA 524, 5 B.C.L.R. (4th) 1, at para. 25. See also *Armada Communications Ltd. v. Saskatoon (City)* (1990), 90 Sask. R. 23 (Q.B.), at para. 9, where the court found that, in general terms, “the term ‘law’ includes rules of conduct laid down by a legislative authority by way of statute, regulation, ordinance, by-law or some other form of prescribed method.” The plain meaning of the word “law” therefore includes both legislation and rules of subordinate authority such as by-laws and regulations.

[67] Second, the para. 8 Exclusion refers not just to “law” but to “any law” (emphasis added). The term “any” is all-embracing and without limitation or qualification: *Epp School District v. Park (Rural Municipality)*, [1936] 2 W.W.R. 331 (S.K.C.A.), at para. 20. The words “any law” are expansive.

[68] Third, the BBCC supports the interpretation that “any law” includes by-laws, regulations, and other subordinate legislation. It provides that the insurer will pay up to an additional \$10,000 or the amount on the Declaration Page for the increased cost to comply with “any law” regulating construction. Like the para. 8 Exclusion, it uses the general term “any law” in the opening words articulating this additional coverage. It goes on to specify that this sum is to pay for, among other things, “any increase in the cost of...construction or reconstruction...arising from the enforcement of the minimum requirements of any by-law, regulation, ordinance or law.” Within the Policy, the term “any law” is an umbrella term that includes by-laws, regulations, ordinances, and laws. Furthermore, if the para. 8 Exclusion did not apply to cost increases relating to by-laws, regulations, or ordinances, the BBCC could not purport to provide “additional coverage”. Such costs are already fully covered under the GRC.

[69] Fourth, even if the MVCA Regulation Policies are “policies” as suggested by the respondent, they are included in the definition of “any law”.

[70] The MVCA Regulation Policies provide a detailed regulatory scheme that must be followed by those within the MVCA's catchment area. Counsel for the respondents conceded in oral submissions that the MVCA Regulatory Policies reflect building requirements set by a public authority. They are not optional; the Emonds must comply with them when rebuilding their home.

[71] In *Ainsley Financial Corp. v. Ontario (Securities Commission)*, 21 O.R. (3d) 104 (C.A.), Doherty J.A. considered the characterization of a policy statement issued by the Ontario Securities Commission. He held, at paras. 18-21, that the policy was regulatory in nature and constituted a "de facto legislative scheme" because it set out a comprehensive and minutely detailed regime that attracted sanctions if not followed. Doherty J.A. accepted the lower court's finding that to hold otherwise would "ignore the plain language of the document itself and the reality of the regulatory environment in which it [was] to be implemented": see para. 18.

[72] Similarly, the MVCA Regulation Policies clearly set out a detailed regulatory scheme which is mandatory in order to construct. As such, they are a de facto legislative scheme that captured by the term "any law".

[73] Finally, the decision in *Choukair v. Allstate Insurance*, 2015 ONSC 4989, relied on by the respondents, is distinguishable. The exclusion clause in *Choukair* only excluded by-laws, a much more specific term than the more general term,

“law”. Furthermore, the *Choukair* policy did not contain anything similar to the BBCC coverage in this Policy, which applies to by-laws, regulations, ordinances, or laws that clearly fall under the umbrella of the term “any law”.

[74] For these reasons, I find that the para. 8 Exclusion applies to increased costs to demolish and replace the dwelling as it was that are due to the operation of “any law” including the MVCA Regulation Policies, municipal by-laws, and other regulations regarding demolition or reconstruction of the dwelling, in the manner I have described above.

Whether the Exclusion Clause Applies to Coverage in the GRC

Endorsement

[75] As stated above, the law is clear that endorsements must be read together with the policy of insurance as a whole, including any exclusions from or limitations on coverage: *Pilot Insurance Co.*, at para. 21. This is recognized in the GRC itself, which provides that “in all other respects, the Policy provisions and limits of liability remain unchanged.”

[76] The application judge held that, since there was no limitation on compliance costs in the GRC, the Emonds could recoup all of these costs. In so finding, she relied on the decision in *Wigle*.

[77] For the reasons that follow, I disagree with the conclusion that the para. 8 Exclusion does not limit the Emonds’ coverage under the Policy.

[78] In my view, the decision in *Wigle* relied on by the application judge, is distinguishable from this case. In *Wigle*, the insured was injured in a motor vehicle accident by an unidentified automobile. The insured had purchased a standard automobile insurance policy and an additional “underinsured motorist endorsement”. The insurer denied coverage under the endorsement on the ground that the endorsement did not provide for indemnification where the injury resulted from an unidentified automobile. The insurer argued that the term “uninsured automobile” in the endorsement did not include an “unidentified automobile”. Importantly, there was no exclusion clause elsewhere in the policy that purported to exclude injuries resulting from unidentified automobiles from coverage. There was also no language elsewhere in the policy that would exclude “unidentified automobiles” from the meaning of the term “uninsured automobiles”. The court held that it was not clearly apparent in the endorsement that the term “uninsured automobile” excluded unidentified automobiles. Since this limitation was not apparent, it should have been set out in the endorsement itself.

[79] By contrast, this Policy contains the para. 8 Exclusion of coverage for the increased costs of demolition and replacement due to the operation of any law. The para. 8 Exclusion applies “except as provided under Additional Coverages of Section 1”, which includes the BBCC. The BBCC provides a coverage limit of \$10,000 for these increased costs. The fact that this coverage limit is not repeated

in the GRC itself is not determinative because the Policy provisions must be read as a whole: *Pilot Insurance Co.*, at para. 21.

[80] For these reasons, I conclude that when the GRC is read along with the para. 8 Exclusion and the BBCC, there is a limit on the increased costs (as defined above) to comply with “any law”, including the MVCA Regulation Policies: they are only covered up to \$10,000. This is not a circumstance, as in *Wigle*, where the alleged limitation was not set out anywhere in the policy. Here, the exclusion for costs associated with legal compliance is explicit in the Policy and is clearly applicable to the GRC.

[81] I also reject the respondents’ submission that because the BBCC is not included on the Declaration Page, it does not apply to this Policy. Unlike many of the other “Section 4 Miscellaneous Coverages Section” provisions, the BBCC does not say that “coverage is shown as covered on the Declaration Page.” Rather, the BBCC specifically provides that the increased amount for compliance is either “an additional amount up to \$10,000 or the amount shown on the ‘Declaration Page’” (emphasis added). Trillium has conceded that the BBCC applies and that the Emonds would receive the full \$10,000 under that provision.

[82] The Emonds make much of the fact that the GRC uses the term “current building techniques”, which is not defined in the Policy and only appears in the GRC. According to the respondents, this constitutes a conflict between the GRC

coverage and the para. 8 Exclusion which must be resolved in favour of the insured: *Sam's Auto Wrecking*, at para. 37.

[83] Trillium concedes that the Policy provides for replacement costs which “will be determined by the lowest estimate which can rebuild the home with ‘*materials of similar quality using current building techniques within a reasonable amount of time following the loss,*’ so the insured does not profit from its loss” (emphasis in original).

[84] The plain language meaning of the term “technique” is “a way of...” doing something: *Concise Oxford English Dictionary*, at p. 1480. Trillium confirmed that in using the phrase “current building techniques”, it undertook to use construction methods that are commonly used today rather than those used in the original construction of the home. Trillium’s adjuster noted that in many instances, current building techniques are, in fact, cost-effective. However, even where they are not, they are clearly provided for in the GRC.

[85] Trillium concedes that replacing the dwelling as it was, includes the use of similar quality materials and “current building techniques” as provided for in the GRC. Whether increased costs are covered as costs of using similar quality materials or current building techniques are questions to be determined by the trier of fact.

[86] As such, the para. 8 Exclusion only applies to increased costs required by “any law”.

Does this Interpretation Nullify the Coverage in the GRC?

[87] Nullification occurs when a policy defeats the purpose of the coverage the policy provides: *Cabell v. Personal Insurance Company*, 2011 ONCA 105, 104 O.R. 3(d) 709, at para. 14; *Indemnity Insurance Co. of North America v. Excel Cleaning Service*, [1954] S.C.R. 169, at pp. 177-78; see also *Foodpro National Inc. v. General Accident Assurance Co. of Canada* (1988), 63 O.R. (2d) 288 (C.A.), at p. 288, leave to appeal refused, [1988] S.C.C.A. No. 707.

[88] The GRC provides the Emonds with enhanced coverage to rebuild their home the way it was, using materials of similar quality and current building techniques, (i) without deduction for depreciation and (ii) even if the cost of replacement exceeds the policy limit on the Declaration Page (i.e., inflation protection). The application of the para. 8 Exclusion does not deny the Emonds these benefits; it only applies to increased costs required by “any law”.

[89] While the operation of the para. 8 Exclusion may deny the insured some funds, this does not “render nugatory coverage for the most obvious risks for which the endorsement [was] issued”: *Foodpro*, at p. 288. It is clear that the “most obvious risks” for which the GRC was issued are depreciation and inflation, not [bylaw] compliance costs: see e.g. *Carter*, at paras. 20-24.

[90] I therefore reject the Emonds' submission that the application of the para. 8 Exclusion to the GRC would result in nullification of coverage.

IX. CONCLUSION

[91] In sum, a proper interpretation of the Policy provides that,

- a) Floods are an insured peril;
- b) The GRC is part of the Policy of insurance and all of the terms of the Policy should be read as a whole. The GRC provides coverage without any deduction for depreciation even if the amount exceeds the Policy limit to repair or replace the dwelling as it was, using similar materials and current building techniques. (Trillium concedes that the flood coverage provides for use of current building techniques);
- c) The para. 8 Exclusion excludes coverage for "increased costs" (over and above the cost to replace the dwelling as it was using current building techniques) to comply with "any law". The words "any law" include by-laws and regulations such as the MVCA Regulation Policies;
- d) Notwithstanding this exclusion, the BBCC provides up to \$10,000 to pay for these excluded costs; and
- e) The Policy does not nullify coverage.

[92] The Emonds may therefore recover the costs of rebuilding their home, without any deduction for depreciation, even if the amount exceeds the Policy limit.

The home is to be built on the same location, with materials of similar quality using current building techniques, but without full coverage for “increased costs” to comply with any law regulating the construction or repair of the home. This excludes full coverage for the MVCA Regulation Policies’ and other regulations and by-laws enacted after the original dwelling was built that would require fixing deficiencies or making enhancements to any features of the home as it stood before the loss occurred. The Emonds have been offered \$10,000 to cover these additional costs.

[93] As noted, on this appeal, the parties have not sought quantification of the loss provided for in this standard form Policy. Moreover, quantification is not possible because the parties did not provide information as to the requirements of the MVCA and other laws and concomitant costs to be incurred to comply with same.

[94] The issue of quantification of the replacement loss must now be determined. This will involve determinations of fact as to (i) whether an increased expense is covered as a “current building technique”, or as “materials of similar quality” that are covered under the Policy, or (ii) whether the increased costs are not covered under (i), but are required by “any law”, and are therefore excluded from coverage except for payment of up to \$10,000.

[95] For these reasons, I would allow the appeal.

[96] On the agreement of both parties, I would award costs to the appellant, Trillium as the successful party, in the amount of \$20,000 (including HST) and disbursements (on which HST must be calculated).

Released: November 03, 2023 "P.D.L"

"Thorburn J.A."

"I agree. P. Lauwers J.A."

"I agree. B. Zarnett J.A."