

S.C.C. Court File No.:

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**STEPHEN EMOND and CLAUDETTE EMOND**

**APPLICANTS**  
(Respondents)

AND:

**TRILLIUM MUTUAL INSURANCE COMPANY**

**RESPONDENT**  
(Appellant)

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**APPLICATION FOR LEAVE TO APPEAL**  
**(STEPHEN EMOND and CLAUDETTE EMOND, APPLICANTS)**  
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview of Application

1. Does “Guaranteed Rebuilding Cost” coverage in a homeowners’ policy of insurance guarantee homeowners the cost of rebuilding their home, or does it mean something else? Something less? Homeowners across the country have a right to receive from their insurers what they have bargained and paid for. Without clarification from this Honourable Court, Canadian homeowners will not have the peace of mind that has been sold to them by insurers under the guise of a “guarantee”.

2. This case arises from the interpretation of a common standard form endorsement that appears in homeowners insurance policies across Canada. The endorsement in question is commonly referred to as a "Guaranteed Rebuilding Cost" endorsement ("GRC"). Various iterations of substantively similar GRC endorsements are being offered by insurers. Courts will normally be reluctant to depart from judicial precedent interpreting a policy where an issue arises subsequently in a similar context and the policies are similarly framed.<sup>1</sup> As stated by Justice Wagner in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 it is “undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason.”<sup>2</sup>

3. As such, the interpretation of the GRC endorsement in this case by the Court of Appeal for Ontario extends well beyond the interests of the immediate parties and has implications for households nationwide, as well as the insurance industry in Canada. The seismic impact the interpretation of this common endorsement will have on Canadians and the insurance industry makes the outcome of this case one of national importance which warrants review by this Honourable Court. Indeed, the Respondent made the same submission before the Court of Appeal for Ontario in seeking to overturn the application judge’s decision at first instance.

4. GRC coverage is peace of mind coverage that Canadians turn to in their darkest hour, when they have lost their home. To obtain this coverage, insureds must meet onerous

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<sup>1</sup> *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016 SCC 37](#), at para. [40](#).

<sup>2</sup> *Ibid* at para. [39](#).

requirements, including, *inter alia*, maintaining insurance representing 100% of the cost to rebuild their home, as deemed acceptable by the insurer. In exchange, insurers represent to their insureds that they will “guarantee” the cost of rebuilding an insured dwelling, even if doing so exceeds policy limits. Fundamentally, this case is about determining the scope and extent of the “guarantee” that insurers have sold Canadians to protect their most valuable asset, their home.

5. The following chart contains examples of various iterations of the GRC endorsement that has been sold to Canadians by insurers across the country under various labels:<sup>3</sup>

| <b>Insurer</b>                    | <b>Endorsement</b>                                       |
|-----------------------------------|--|
| Trillium Mutual Insurance Company | <b>Guaranteed Rebuilding Cost Coverage</b>               |
| Allstate Insurance Canada         | <b>Home Replacement Cost Guarantee</b>                   |
| Aviva Canada                      | <b>Guaranteed Replacement Cost on Dwelling Buildings</b> |
| Desjardins Insurance Company      | <b>Guaranteed Repair or Replacement Cost</b>             |
| PEI Mutual Insurance Company      | <b>Replacement Cost Guarantee Endorsement</b>            |
| SE Mutual Insurance               | <b>Guaranteed Rebuilding Cost Endorsement</b>            |
| Pembroke Insurance Company        | <b>Home Replacement Cost Guarantee</b>                   |
| Co-operators Insurance            | <b>Guaranteed Replacement Cost for Dwellings</b>         |
| Economical Insurance              | <b>Unlimited Replacement Cost</b>                        |
|                                   |  |

6. According to the Ontario Court of Appeal, guaranteed rebuilding costs endorsements do not guarantee rebuilding costs at all, instead the Court of Appeal stated that the “most obvious risks” for which the GRC is issued are depreciation and inflation, not compliance costs.<sup>4</sup>

7. With all due respect to the Court of Appeal below, this is a fundamental misunderstanding of the purpose of a GRC endorsement. A home may be built in the 1920's or in the 2000's or in 2023. If that home is totally destroyed by an insured peril, that family

<sup>3</sup> Documents Relied Upon, Tabs 3A, 3B and Authorities Tabs 4A-4H.

<sup>4</sup> *Trillium Mutual Insurance Company v. Emond*, [2023 ONCA 729](#) at para. 89.

expects, and indeed bargained for, a guarantee that their home will be replaced within a reasonable time and their family can return home. The Court of Appeal's decision below suggests otherwise. It suggests that the homeowner who purchased a 1920 home that is destroyed by an insured peril will not get guaranteed replacement but instead will have to finance each and every by-law, zoning and building code upgrade between 1920 and the date of reconstruction from their own funds. In other words, that family does not have guaranteed replacement coverage, but something drastically less than what was bargained for and may never be able to rebuild their home if they do not have access to a necessary reserve of funds.

8. This Honourable Court can take judicial notice that building code revisions occur nearly every single year across Canada. They apply to new construction and older homes are grandfathered provided they complied with the standards in force at the time of construction. After a total loss, the homeowner must now comply with up to date building codes, regulations and the like if they wish to replace and rebuild their home. Their reasonable expectation is that, having purchased and bargained for a GRC endorsement, their insurance will cover them to rebuild the same home they had before the loss in accordance with whatever laws need to be complied with at the time of construction. The decision below suggests that this is an unreasonable expectation and not at all what the GRC endorsement is intended to cover.

9. The Applicants submit the Ontario Court of Appeal erred. This error will have implications for Canadian insureds across the country and will constitute a windfall to insurers.

10. The undisputed facts of this case are not complex, remarkable or unique. This case arises after the Emonds' home was totally destroyed in a flood and they turned to their GRC endorsement to rebuild their home. There is no dispute that insured damage occurred, nor that the "Guaranteed Rebuilding Cost" endorsement was triggered. The only issue was determining what costs of rebuilding, if any, are excluded from coverage under the GRC endorsement.

11. The Applicants argue that the plain language of GRC endorsements "guarantees" them the cost to rebuild their home, without limitation, even if it exceeds stated policy limits. GRC endorsements amend the underlying policy and should supercede contradictory terms and exclusions contained in the standard policy. Conflict between additional coverage granted by

GRC endorsements and exclusions must be resolved in favour of insureds.<sup>5</sup> Even if inconsistent exclusion clauses are found to apply, such clauses are of no force and effect by operation of the doctrine of nullification of coverage. This doctrine operates even in the absence of an ambiguity.<sup>6</sup> The application judge, at first instance, fully agreed with the Applicants and found that any limitation of coverage for compliance with current laws would negate the whole purpose of the GRC endorsement and result in the nullification of coverage.<sup>7</sup>

12. This Honourable Court has ruled that insurance contracts must 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.<sup>8</sup> When purchasing the “COVERAGE GRC – GUARANTEED REBUILDING COST COVERAGE”, it was the insureds’ understanding that if their home was ever destroyed by an insured peril, their insurer would pay the full costs associated with rebuilding their home. The “guaranteed” coverage was important to them because their home was on the waterfront.<sup>9</sup> The Emonds situation is by no means unique. As underscored by Canada’s Task Force on Flood Insurance and Relocation (2022), climate change is projected to increase the frequency, severity and variability of all types of flooding in the coming decades while Canada’s exposure to flooding simultaneously grows as a result of increasing housing, infrastructure development and asset concentration in flood-prone areas.<sup>10</sup> According to the Insurance Bureau of Canada, in 2022 alone severe weather events caused \$3.1 billion in insured damage, making it the third worst year for insured damage in Canadian history.<sup>11</sup> As severe weather events become more common, so, too, will claims under GRC endorsements. Situated in context, the outcome of this case is one of national importance that warrants review by this Honourable Court especially given the impact that the Court of

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<sup>5</sup> *Sam’s Auto Wrecking Co. Ltd. v. Lombard General Insurance Company of Canada*, [2013 ONCA 186](#) at para. [37](#).

<sup>6</sup> *Cabell v. Personal Insurance Co.*, [2011 ONCA 105](#) at para. [17](#).

<sup>7</sup> *Emond v. Trillium Mutual Insurance Company*, [2022 ONSC 5519](#) at para. [49](#).

<sup>8</sup> *National Bank of Greece (Canada) v. Katsikonouris*, [\[1990\] 2 SCR 1029, 74 DLR \(4th\) 197](#), [“*Katsikonouris*”].

<sup>9</sup> *Ibid* at para. [7](#).

<sup>10</sup> Canada’s Task Force on Flood Insurance and Relocation, “Adapting to Rising Flood Risk An Analysis of Insurance Solutions for Canada” (August 2022), [online](#).

<sup>11</sup> Insurance Bureau of Canada, “Severe Weather in 2022 Caused \$3.1 Billion in Insured Damage -- making it the 3rd Worst Year for Insured Damage in Canadian History” (18 January 2023), [online](#).



Appeal's decision will have on the scope of GRC coverage on other Canadians facing the same fate as the Emonds.

## **B. Relevant Facts**

### *(i) Underlying Facts*

13. The essential facts giving rise to the present claim under the Emonds' GRC endorsement are not in dispute. On April 29, 2019, the Emonds' home was destroyed by a flood. The home was deemed a total loss.<sup>12</sup> The Emonds intend to rebuild their home.<sup>13</sup> The Emonds' home is located in the catchment area of the Mississippi Valley Conservation Authority ("MVCA").<sup>14</sup> The MVCA is empowered to regulate development and activities on or adjacent to rivers, lakes, shorelines, hazardous lands and wetlands.<sup>15</sup> The MVCA has in fact implemented regulations to regulate development activities within its catchment area and the Emonds are required to comply with these regulations if they wish to rebuild their home.<sup>16</sup> There are major costs associated with the requirement that the rebuild comply with the regulations enacted by the MVCA.<sup>17</sup>

14. At the time of the loss, the Emonds' home was insured by a homeowners' insurance policy. The underlying policy includes an exclusion for the increased costs of repair or replacement "due to the operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services." It also provides additional building by-law and code compliance coverage of up to \$10,000. However, when selecting the policy, the Emonds did not purchase the standard policy and, instead, purchased optional "Guaranteed Rebuilding Cost Coverage"<sup>18</sup> which amended the underlying policy.<sup>19</sup> The "Guaranteed Rebuilding Cost Coverage" was important to the Emonds because their home was located along the waterfront. Their understanding and expectation was that if anything happened to their home

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<sup>12</sup> [2022 ONSC 5519](#), *supra*, at para. [2](#).

<sup>13</sup> *Ibid* at para. [13](#).

<sup>14</sup> *Ibid* at para. [2](#).

<sup>15</sup> *Ibid* at para. [14](#).

<sup>16</sup> *Ibid* at paras. [14-15](#).

<sup>17</sup> [2023 ONCA 729](#), *supra*, at para. [13](#).

<sup>18</sup> [2022 ONSC 5519](#), *supra*, at paras. [1-2](#).

<sup>19</sup> *Ibid* at para. [18](#).

as a result of an insured peril, their insurer would pay for the full costs of rebuilding and replacing their home at the same location with similar materials.<sup>20</sup>

15. The “Guaranteed Rebuilding Cost Coverage” in question is worded 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:**

...

"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;

...

In all other respects, the policy provisions and limits of liability remain unchanged.<sup>21</sup>**[Emphasis added]**

16. The wording used in this GRC endorsement is similar, and in some cases, identical in wording to those policies listed in paragraph 5 above. Excerpts of the GRC wording found in other policies from PEI through to BC are enclosed in the Documents forming part of this application. A review of those endorsements establishes why the Court of Appeal's interpretation of the GRC endorsement in this case will have wide ranging implications across the country. Indeed, this is precisely the argument made by the Respondent before the Court of Appeal below and reproduced at paragraph 7 of the Court of Appeal's decision, which reads as follows:

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<sup>20</sup> *Ibid* at para. 7.

<sup>21</sup> *Ibid* at para. 18.

*[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.*<sup>22</sup>

17. In essence, under this and other similar GRC endorsements across a number of policies in Canada, if an insured agrees to onerous and stringent terms, including, *inter alia*, a requirement to purchase insurance representing 100% of the cost of rebuilding, then the insurer agrees to “guarantee” the cost of rebuilding, even if the cost of doing so exceeds policy limits.

18. Effectively, a reasonable consumer would believe that they have bargained for peace of mind and the guarantee that their home will be rebuilt, even if insurance limits representing 100% of the cost to rebuild their home are, for whatever reason, insufficient. The reasonable expectation of Canadians purchasing these policies across the country is the same. They believe they have purchased guarantees to rebuild and replace their homes in the event of an insured peril. The Court of Appeal’s decision below suggests otherwise. It suggests that there is no guaranteed rebuild of one’s home irrespective of what the GRC endorsement says or how it is labeled by insurers.

#### *(ii) The Claims*

19. In the Courts below, the Applicants argued that the Guaranteed Rebuilding Cost Coverage means what it says: that it amends their policy to provide them with “guaranteed” rebuilding costs to rebuild their home, without limitation, even if the total cost exceeds the stated limit of insurance for the insured dwelling.

20. In the alternative, the Applicants relied on the nullification of coverage doctrine to assert that any exclusion clause limiting rebuilding costs is unenforceable as it is inconsistent with the main purpose of the GRC coverage, i.e. guaranteed rebuilding cost, and to apply it would be contrary to the reasonable expectations of ordinary Canadians purchasing this insurance endorsement.<sup>23</sup>

21. By contrast, the Respondent argued that exclusions written into the underlying policy are applicable to the GRC endorsement, even where these exclusions contradict the guarantee

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<sup>22</sup> [2023 ONCA 729](#), *supra*, at para. [13](#).

insureds have been sold. It says exclusions apply to limit the “guaranteed” cost of rebuilding promised by the “Guaranteed Rebuilding Cost” endorsement and that it does not provide coverage to comply with current laws governing new construction.<sup>24</sup> In other words, the GRC endorsement provides no guarantee at all.

### C. Procedural History

#### (i) *Application Judge’s Decision: 2022 ONSC 5519 (per Justice Bell)*

22. The application proceeded in the Ontario Superior Court of Justice before Justice Ryan Bell in Ottawa. The application judge agreed with the insureds and rejected the interpretation advanced by the Respondent insurer. The application judge made, *inter alia*, the following findings:

- (a) the language of the GRC endorsement is clear and unequivocal: it provides “guaranteed rebuilding cost” coverage;<sup>25</sup>
- (b) limitations on the coverage in the endorsement that are not clearly apparent, should be set out in the endorsement itself and there is no limitation on the coverage in the GRC endorsement itself;<sup>26</sup>
- (c) the rebuilding costs resulting from compliance with the applicable regulatory policies are covered under the GRC endorsement;<sup>27</sup> and
- (d) the interpretation offered by the Respondent insurer would contravene the nullification of coverage doctrine.<sup>28</sup>

23. The trial judge found that the Applicants were entitled to a declaration that the “COVERAGE GRC – GUARANTEED REBUILDING COST COVERAGE” entitled them to recover the costs of rebuilding their home with materials of similar quality using current building

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<sup>23</sup> [2022 ONSC 5519](#), *supra*, at para. [2](#).

<sup>24</sup> *Ibid* at para. [29](#).

<sup>25</sup> *Ibid* at para. [30](#).

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* at para. [4](#).

<sup>28</sup> *Ibid* at para. [49](#).

techniques, without any limitation of coverage resulting from additional costs incurred to comply with current MVCA regulations.<sup>29</sup>

**(ii) Court of Appeal for Ontario: 2023 ONCA 729  
(per Lauwers, Zarnett and Thorburn, J.J.A.)**

24. The Respondent appealed the application judge’s decision and argued that the application judge erred in her interpretation of the policy. It argued that, if the application judge’s decision were upheld, it would have a wide-reaching and detrimental effect on the insurance industry in Canada.<sup>30</sup>

25. The Court of Appeal allowed the appeal. In reversing the application judge’s decision, the Court of Appeal reasoned, *inter alia*, as follows:

- (a) “increased costs” in these standard form contracts are those that exceed the amount payable by the insurer to replace the dwelling due to the operation of a law enacted after the original construction of the insured premises;<sup>31</sup>
- (b) 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 subject to the BBCC coverage limited to an additional \$10,000.00;<sup>32 33</sup>
- (c) the most obvious risks for which the GRC was issued are depreciation and inflation, not compliance costs. As such applying the exclusion does not result in nullification of the GRC coverage.<sup>34</sup>

26. In effect, the Court of Appeal held that “Guarantee Rebuilding Cost” coverage is not intended to guarantee the cost of rebuilding. Instead, it is intended to cover the cost of rebuilding the dwelling as it was, at the time it was originally built. This does not guarantee insureds

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<sup>29</sup> *Ibid* at para. [55](#).

<sup>30</sup> [2023 ONCA 729](#), *supra*, at para. [7](#).

<sup>31</sup> *Ibid* at para. [63](#).

<sup>32</sup> *Ibid* at para. [60](#).

<sup>33</sup> *Ibid* at para. [68](#).

anything, as insurers would never be required to pay the full rebuild costs of an insured dwelling. Instead, it would mean that the GRC endorsement only secures coverage for some fictional replacement home which cannot, in fact, be built, as it would not comply with current laws. The insured would, in effect, need to have capital on hand to bridge the gap if they wanted to rebuild or replace their home notwithstanding that they had bargained for a “Guaranteed Rebuilding Cost” endorsement and sustained a total loss.

## **PART II – STATEMENT OF ISSUES**

27. The prospective appeal raises the following issues of national importance:

**ISSUE #1** Can the plain language of expanded coverage pursuant to GRC endorsements (Guaranteed Rebuilding Costs) be limited by contradictory exclusions written into the underlying policy?

**ISSUE #2** Should the nullification of coverage doctrine apply to prevent the application of exclusions that have the effect of limiting the guaranteed cost of rebuilding that Canadian insureds have bargained for through the purchase of GRC endorsements?

28. The Applicants submit that the Court of Appeal’s conclusion was incorrect. The court offered a bald conclusory statement that when GRC is read along with the exclusion and the policy there is a limit on the increased costs to comply with “any law”, including the MVCA Regulation Policies.

29. In reaching its conclusion, the Court of Appeal failed to give any effect to the reasonable expectation of ordinary Canadians being sold endorsements entitled “Guaranteed Rebuilding Cost”, “Home Replacement Cost Guarantee”, “Guaranteed Replacement Cost on Dwelling Buildings”, “Guaranteed Repair or Replacement Cost”, “Replacement Cost Guarantee Endorsement”, “Home Replacement Cost Guarantee”, “Guaranteed Replacement Cost for Dwellings” and “Unlimited Replacement Cost”. Each of these endorsements are included in the Documents attached to this application and all of those policies are similar in wording to the Applicants’ GRC endorsement which is the subject-matter of this application.

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<sup>34</sup> *Ibid* at paras. [88-90](#).

30. If leave is not granted, the Court of Appeal’s reasoning would apply equally to each and every one of these policies from PEI through to B.C. The Court of Appeal’s decision, which entirely ignores the reasonable expectation of the consumer purchasing a GRC endorsement, should not be the last word on the scope of GRC coverage in Canada.

### **PART III – STATEMENT OF ARGUMENT**

**ISSUE #1: Can the plain language of expanded coverage pursuant to GRC endorsements (Guaranteed Rebuilding Costs) be limited by contradictory exclusions written into the underlying policy?**

#### *(i) General Principles of Contract Interpretation and GRC Endorsements*

31. This Court has ruled that insurance contracts must 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. It is incumbent on the insurer, in drafting its policy, to use clear, express and easily intelligible terms.<sup>35</sup> In drafting the “**COVERAGE GRC – GUARANTEED REBUILDING COST COVERAGE**” endorsement, the insurer did just that. The tantalizing and sensational words deliberately deployed by the insurer would lead the average consumer to believe the words mean exactly what they say: that they are purchasing additional coverage that guarantees the rebuild of their home. This is precisely what the Emonds did believe.<sup>36</sup>

32. The plain words contained within the endorsement would also lead an average person applying for insurance to believe they were obtaining “guaranteed” rebuilding costs. The plain language of the endorsement guarantees “[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.” The GRC endorsement specifically states that when coverage applies, the insurer will pay the insured’s cost to rebuild their home on the same location with materials of similar quality using current building techniques. The average purchaser of insurance will understand this to mean that the insurer is guaranteeing the cost to rebuild their home in the

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<sup>35</sup> *Katsikonouris, supra.*

<sup>36</sup> [2022 ONSC 5519](#), *supra*, at para. [53](#).

event of a total loss. The language in the GRC endorsement is clear and unambiguous and the Court of Appeal below should have given effect to this language, as did the application judge.

33. In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*<sup>37</sup>, this Court set out the principles applicable to the interpretation of insurance policies. Where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole.<sup>38</sup> In this case, the GRC endorsement is clear and unambiguous: this amendment to the underlying policy guarantees insureds the cost of rebuilding their home on the same location with materials of similar quality and using current building techniques, even if the cost is more than amount of insurance shown on the Declaration Page.

34. As sophisticated parties, insurers are aware of the location and age of the homes they insure, and they are, or ought to be, fully aware of applicable laws in any region they choose to offer homeowners' insurance. With this knowledge, they choose to sell "Guaranteed Rebuilding Cost Coverage" that guarantees rebuilding costs using current building techniques. This was true in the underlying case. The insurer admits it knew that the insured dwelling was not new, and that the insureds were required to comply with laws regulating the construction and repair of the home.<sup>39</sup> The insurer admits that valuation of the risk, at the time the policy was issued, is assumed to have been based upon "current construction techniques or the average cost per square foot in today's market".<sup>40</sup>

35. It is striking how this contrasts with the insurer's position below that any additional costs relating to changes in law, regulation, zoning, policy or really anything that has occurred in the past 30 years is excluded from coverage under a GRC endorsement intended to guarantee replacement costs of the insured home. It is also repugnant to the Court of Appeal's conclusion that the exclusion for increased costs takes into account the fact that the insurer has not accounted for these types of costs in its estimate of the replacement cost.<sup>41</sup> An interpretation that excludes compliance with laws applicable at the date of the loss would limit the applicability of

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<sup>37</sup> [2016 SCC 37](#), *supra*.

<sup>38</sup> [2016 SCC 37](#), *supra*, at para. 49.

<sup>39</sup> [2022 ONSC 5519](#), *supra*, at para. 52.

<sup>40</sup> Cross-examination transcript of David Colyn, Q. 181, Tab 3C.

<sup>41</sup> [2023 ONCA 729](#), *supra*, at para. 60.



the GRC endorsement to only newly constructed homes and enable insurers to pocket premiums without providing the purchased coverage to its insureds. Such an interpretation does not accord with the understanding of the average consumer of insurance products.

***(ii) GRC Endorsements Supercede Inconsistent Terms***

36. The Applicants submit that, when properly interpreted, GRC endorsements supercede any clauses in the pre-amended underlying Policy that are inconsistent with the terms of the GRC endorsement.

37. An average person would not understand that a purported guarantee contained within GRC endorsements would be limited by exclusion clauses in the standard terms of the policy given the use of the word “guarantee”. Where the guarantee sold to consumers conflicts with any exclusions contained in the standard form policy, the guarantee must take precedence and the inconsistency should be resolved in favour of the insured.<sup>42</sup> The result being that GRC endorsements supercede inconsistent exclusions contained in the policy.

38. This is precisely what was found by the application judge wherein she made the following findings:

***[49] In my view, Trillium’s interpretation of the Policy would also contravene the nullification of coverage doctrine.***

***[52] I have no difficulty in finding that Trillium’s interpretation of the para. 8 Exclusion would “render nugatory the coverage for the most obvious risks” for which the GRC endorsement was issued. The fact that the Emonds’ home was not a new home was known to Trillium at the time the Policy was purchased. That it was located on the waterfront within the catchment area of the MVCA was also known to Trillium. It is not disputed that the Emonds are required to comply with the MVCA’s regulation policies, current building code regulations, and municipal by-laws governing construction on their property.***

***[53] The Emonds purchased the Policy, including the GRC coverage, with the expectation that, if their home was destroyed by an insured peril (including an overland flood), Trillium would pay for the full costs associated with rebuilding or replacing their home. In order to rebuild***

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<sup>42</sup> [2013 ONCA 186](#), *supra*, at para. [37](#).

*in the same location, the Emonds are required to comply with the MVCA's regulation policies, current building code requirements, and municipal by-laws. Subject to coverage issues relating to pre-existing deficiencies, it is difficult to conceive of any compliance costs that would not be excluded under Trillium's expansive interpretation of the para. 8 Exclusion.*

*[54] I find that to interpret the para. 8 Exclusion and the Policy in the manner contended by Trillium would virtually nullify the GRC coverage and would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.<sup>43</sup>*

***(iii) Inconsistent Exclusions Do Not Apply Unless Explicitly Stated***

39. Complimentary to the proposition that GRC endorsements supercede inconsistent terms, the application judge was correct in concluding limitations on apparent coverage granted by the GRC endorsement that are ambiguous, in the sense that they are not clearly apparent, should be set out in the endorsement itself.<sup>44</sup>

40. This analysis is consistent with this Court's decision in *National Bank of Greece (Canada) v. Katsikonouris*<sup>45</sup> and the settled principle of insurance law that insurance contracts must be interpreted as they would be understood by the average person applying for insurance.

41. In reaching her conclusion, the application judge relied on *Wigle v. Allstate Insurance Co. of Canada*<sup>46</sup>, (leave to appeal dismissed by the Supreme Court of Canada (Estey, McIntyre and Wilson JJ.) on March 25, 1985.). In that case, Cory J.A. (as he then was) held that 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. Cory J.A. reasoned that in the context of an endorsement that provides for insurance coverage which is additional to that provided by the standard policy, any ambiguity in the wording and terms of the endorsement, coupled with the policy, should be construed in favour of the insured.

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<sup>43</sup> [2022 ONSC 5519](#), *supra*, at paras. [49](#) & [52-54](#).

<sup>44</sup> *Ibid* at para. [30](#).

<sup>45</sup> *Katsikonouris*, *supra*.

<sup>46</sup> *Wigle v. Allstate Insurance Co. of Canada*, [1984 CanLII 45, 14 DLR \(4th\) 404](#) ["Wigle"].

42. Consistent with *National Bank of Greece (Canada) v. Katsikonouris*<sup>47</sup>, Cory J.A.’s analysis recognized that in the context of standard form insurance contracts, average Canadians are unlikely to decipher the dangers and complexities of the contract, what is included and what is excluded, and then submit an amended contract to the insurer. In this special context, there is an inequality of bargaining power and individuals can do no more than accept or reject the policy. For these reasons, ambiguities are resolved in favour of the insured.<sup>48</sup>

43. In distinguishing *Wigle* from the present case, the Court of Appeal failed to recognize the special context in which coverage disputes concerning standard form contracts arise and misapprehended the fundamental principles applicable to these matters. The only distinction drawn by the Court of Appeal was that in *Wigle* there was no exclusion clause elsewhere in the policy, whereas here, there is an exclusion in the underlying policy. The Court of Appeal went on to dismiss the significance of the fact that this coverage limit is not repeated in the GRC itself on the basis that the policy provisions must be read as a whole.<sup>49</sup>

44. With respect, the Court of Appeal missed the point. Average Canadians are unlikely to decipher the dangers and complexities of an insurance contract. Insurance contracts must therefore 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. The GRC endorsement expands coverage and must be interpreted broadly. The GRC in question purports to amend the underlying policy to “guarantee” rebuilding costs, without any stated limitations. Even accepting an exclusion in a pre-amended, underlying policy would otherwise apply, the purported “guarantee” of rebuilding costs with no apparent limitation must be interpreted as understood by the average person. Recognizing the special context within which these disputes arise, 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, consistent with the principles enunciated above.

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<sup>47</sup> *Katsikonouris, supra.*

<sup>48</sup> *Wigle, supra.*

<sup>49</sup> [2023 ONCA 729](#), *supra*, at paras. [78-79](#).

45. This approach is, in fact, consistent with the Court of Appeal’s correct observation that Policy provisions must be read as a whole. As observed by Cory. J.A. in *Wigle* [**emphasis added**]:

*The endorsement provides for insurance coverage which is additional to that provided by the standard policy and any ambiguity in the wording and terms of the endorsement, coupled with the policy, should be construed in favour of the insured.*<sup>50</sup>

46. While the Court of Appeal correctly observed that Policy provisions must be read as a whole, the Court of Appeal went on to offer a bald conclusory statement that when the GRC endorsement is read alongside other provisions, the exclusion was “clearly” applicable.<sup>51</sup> The Court of Appeal lacked the requisite analytical rigor in reaching their conclusion.

47. When reading the terms of a policy together, if inconsistencies are identified as between the optional endorsement and the underlying policy, the resulting ambiguity should be construed in favour of the insured, particularly when there are no limitations set out in an endorsement which grant additional coverage that is at odds with underlying exclusions. Inconsistent with this analytical framework, the Court of Appeal did not make any attempt to reconcile the inconsistency between the GRC endorsement and the exclusion. It merely concluded that the exclusion “clearly” applied. This was an error of law.

48. Where limitations on apparent coverage granted by endorsements are ambiguous in the sense that they are not clearly apparent, they should be set out in the endorsement itself and any ambiguity should be resolved in favour of the insured.

***(iv) The Court of Appeal Erred in Applying Established Principles***

49. It is trite law that provisions granting coverage must be construed broadly and provisions excluding coverage must be construed narrowly.<sup>52</sup> The plain words of the GRC endorsement grants additional coverage by amending the basis for claim payment and must therefore be

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<sup>50</sup> *Wigle, supra.*

<sup>51</sup> [2023 ONCA 729](#), *supra*, at para. [80](#).

<sup>52</sup> [2013 ONCA 186](#), *supra*, at para. [37](#).

construed broadly. Conversely, exclusions that purportedly limit the coverage granted by GRC endorsements must be construed narrowly.

50. With respect, it appears from the decision below that the Court of Appeal reversed established principles of interpretation. It limited the scope of the GRC endorsement, which uses the term “guaranteed”, and expanded the operation of the exclusion clause relating to compliance issues. The Court of Appeal should have done the precise opposite. It ought to have given the GRC endorsement the broadest possible interpretation and limited the application of the exclusion, as did the application judge.

#### *(v) Conclusion*

51. Guaranteed means guaranteed. The only way to provide that guarantee is to ensure that all costs are included to rebuild the replacement home that the insurer has “guaranteed.” The insurer’s reliance upon an exclusion clause, and its suggestion that it applies to negate or reduce GRC coverage, is simply incorrect in law. GRC endorsements grant extended guaranteed coverage for the costs of rebuilding on the same location with materials of similar quality and must be construed broadly. Conversely, terms restricting this coverage must be construed narrowly. Terms inconsistent with GRC endorsements are superceded. The law is clear that if there were ambiguities in the policy wording which could support the insurer’s preferred interpretation, those ambiguities should be interpreted in favour of the insured.

52. As aptly stated by Justice Binnie in *Co-operators Life Insurance Co. v. Gibbens*, “[w]hoever holds the pen creates the ambiguity and must live with the consequences”.<sup>53</sup>

**ISSUE #2 : Should the nullification of coverage doctrine apply to prevent the application of exclusions that have the effect of limiting the guaranteed cost of rebuilding that Canadian insureds have bargained for through the purchase of GRC endorsements?**

53. Even if inconsistent exclusion clauses are found to apply to GRC endorsements, such clauses should nevertheless be held of no force and effect via the doctrine of nullification of

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<sup>53</sup> *Co-operators Life Insurance Co. v. Gibbens*, [2009 SCC 59](#) at para. [25](#).

coverage. This doctrine is independent and operates even in the absence of an ambiguity.<sup>54</sup> Although an exclusion clause may be clear and unambiguous, it will not be enforceable where:

- (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and***
- (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.***<sup>55</sup>

54. Applying exclusions to exclude costs necessary to rebuild an insured dwelling would virtually nullify the guarantee that the insured dwelling will be rebuilt following an insured peril resulting in a total loss. If the insurer's interpretation were accepted, then only a newly built home would ever truly qualify for the guarantee, and only for a fleeting moment. Any older home, which must comply with new construction requirements, would necessarily require that the homeowner invest their own capital in order to rebuild or replace the home that they thought was otherwise covered by a guaranteed replacement endorsement.

55. The Applicants submit that to apply the exclusion clause in this manner is contrary to the main purpose of GRC coverage and the average consumer's reasonable expectations. It would, in effect, render the GRC endorsement nugatory.

56. GRC endorsements require insureds to maintain insurance equal to 100% of the cost of rebuilding, as determined by the insurer, and to accept each annual adjustment in the amount of insurance as recommended by the insurer and pay the additional premiums. What are insureds obtaining in exchange for meeting these stringent requirements if not a guarantee that their home will be rebuilt in the event of a total loss?

57. As sophisticated parties, insurers are aware of the location and age of the homes they insure, and they are aware, or ought to be aware, of applicable construction laws in the regions in which they choose to offer insurance. With this knowledge, the insurance industry has made a conscious decision to deploy words like "Guaranteed Rebuilding Cost Coverage" to sell people peace of mind, at a cost. It is inconceivable that insurers would be selling "Guaranteed

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<sup>54</sup> [2011 ONCA 105](#), *supra*, at para. [17](#).

<sup>55</sup> *Zurich Insurance Co. v. 686234 Ontario Ltd.*, [2002 CanLII 33365](#) at para. [28](#) [ONCA].

Rebuilding Cost” endorsements to the public, which do not, in fact, cover the actual costs to rebuild an insured home.

58. The Court of Appeal’s interpretation is entirely contrary to the reasonable expectations of any insured purchasing this endorsement. If “Guaranteed Replacement Cost” coverage does not actually guarantee the cost of rebuilding or replacing the home, then the peace of mind that a consumer thought they were buying becomes illusory.

59. The interpretation adopted by the Court of Appeal for Ontario in this case means that GRC endorsements provide nothing more than a waiver of depreciation and inflation protection. If that interpretation is correct then the GRC endorsements, sold by insurers throughout the country to unsuspecting consumers, only pays for some fictional replacement home which cannot, in fact, be built. The law is clear that courts should avoid interpretations where the insurance company is able to “pocket the premium without risk”.<sup>56</sup>

60. The Emonds purchased a policy which included a GRC endorsement for peace of mind and to ensure that, should anything ever happen to their home, the insurance they purchased would enable them to rebuild it exactly as it was. They took comfort in the wording chosen by the insurer, namely “Guaranteed Rebuilding Cost” endorsement. To interpret the policy in the manner adopted by the Court of Appeal for Ontario is contrary to reasonable expectations of every Canadian homeowner across the country. Given the serious implications to Canadians from coast to coast, the Court of Appeal’s decision should be reviewed by the country’s highest court.

#### **PART IV – SUBMISSIONS ON COSTS**

61. Costs of this application should be in the cause.

#### **PART V – ORDER SOUGHT**

62. The Applicants request that leave to appeal be granted with costs in the cause.

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<sup>56</sup> *Consolidated-Bathurst v. Mutual Boiler*, [1979 CanLII 10 \(SCC\)](#), [\[1980\] 1 SCR 888](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of December, 2023.

A handwritten signature in blue ink, consisting of several overlapping, fluid strokes that form a stylized, somewhat abstract shape.

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**Joseph Y. Obagi**  
Counsel for the Applicants



**PART VI – TABLE OF AUTHORITIES**

| <b>APPLICANTS' AUTHORITIES</b>  | <b>CITED AT<br/>PARAGRAPH<br/>NO.</b> |
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| <i>Sam's Auto Wrecking Co. Ltd. v. Lombard General Insurance Company of Canada</i> , <a href="#">2013 ONCA 186</a>  | 11                                    |
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| <i>Zurich Insurance Co. v. 686234 Ontario Ltd.</i> , <a href="#">2002 CanLII 33365</a>  | 53                                    |
| <b>SECONDARY SOURCES</b>  |                                       |
| Canada's Task Force on Flood Insurance and Relocation, "Adapting to Rising Flood Risk An Analysis of Insurance Solutions for Canada" (August 2022), online: <a href="https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/dptng-rsng-flt-rsk-2022/index-en.aspx">https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/dptng-rsng-flt-rsk-2022/index-en.aspx</a>   | 12                                    |
| Insurance Bureau of Canada, "Severe Weather in 2022 Caused \$3.1 Billion in Insured Damage -- making it the 3rd Worst Year for Insured Damage in Canadian History (18 January 2023), online: <a href="https://www.ibc.ca/news-insights/news/severe-weather-in-2022-caused-3-1-billion-in-insured-damage-making-it-the-3rd-worst-year-for-insured-damage-in-canadian-history">https://www.ibc.ca/news-insights/news/severe-weather-in-2022-caused-3-1-billion-in-insured-damage-making-it-the-3rd-worst-year-for-insured-damage-in-canadian-history</a> ". | 12                                    |
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