

**CITATION: Nordik Windows v. Aviva, 2021 ONSC 4477**  
**COURT FILES NO.: CV-20-643386-CP**  
CV-20-001041-CP  
CV-20-000981-CP  
**DATE: 20210715**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

NORDIK WINDOWS INC.

Plaintiff

and

AVIVA INSURANCE COMPANY OF CANADA, AVIVA GENERAL  
INSURANCE COMPANY and AVIVA CANADA INC.

Defendants

**A N D B E T W E E N :**

THE ROYAL CANADIAN LEGION, VICTORY BRANCH # 317

Plaintiff

- and -

AVIVA INSURANCE COMPANY OF CANADA

Defendant

**A N D B E T W E E N :**

MATT MCCALLUM and MATT MCCALLUM DENTURIST PROFESSIONAL  
CORPORATION

Plaintiffs

- and -

AVIVA INSURANCE COMPANY OF CANADA

Defendant

Proceedings under the *Class Proceedings Act, 1992*

**BEFORE:** Justice Edward Belobaba

**COUNSEL:** *Kevin L. Ross, Peter W. Kryworuk, Anthony J. Bedard, Alfonso Campos Reales, Jacob R.W. Damstra and Jacqueline M. Palef* for the Plaintiffs Royal Canadian Legion, Victory Branch #317 (CV-20-001041-CP) and Matt McCallum and Matt McCallum Denturist Professional Corporation (CV-20-000981-CP)

*Crawford G. Smith, Rahool P. Agarwal, Matthew R. Law, Cole A. Pizzo, L. Craig Brown, Robert Ben, Stephen Birman, Ava N. Williams, Chris T. Blom and Mark Frederick* for the Plaintiff Nordik Windows Inc. (CV-20-643386-CP)

*Alan L. W. D'Silva, Glenn Zacher, Daniel S. Murdoch and Lesley Mercer* for the Aviva defendants in the above actions

**HEARD:** May 18, July 5 and July 6, 2021 via Zoom video

### **Certification Motions**

[1] These are motions for the certification of three proposed class actions against Aviva Insurance for what appears to be a blanket denial of coverage for COVID-19-related business loss claims.<sup>1</sup>

[2] As a result of an earlier carriage decision<sup>2</sup>, the claims against Aviva were carved out of a larger omnibus proceeding and assigned to two groups of counsel:

- (i) Lerner LLP would advance the claims of (i) some 625 Royal Canadian Legion branches and (ii) about 250 Ontario denturists (“the Lerner Actions”); and
- (ii) The Nordik Consortium (Lax O'Sullivan Lisus Gottlieb LLP, Thomson Rogers, and Miller Thomson LLP) would advance the claims of the 27,000 or so remaining Aviva insureds (“the Nordik Action”).

[3] The claims against Aviva were carved out of the larger proceeding because the decoupling was in the best interests of the Aviva insureds. Of the 16 insurers sued in the omnibus proceeding, only Aviva provided business interruption or “BI” coverage that arguably was directly on point. More specifically, Aviva provided “restricted access coverage” for loss of

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<sup>1</sup> Aviva advised its brokers in a Bulletin in May, 2020 that “on the vast majority of our policies, there’s no coverage for business interruption losses related to COVID-19 ...”

<sup>2</sup> *Workman Optometry et al v. Aviva Insurance et al*, 2021 ONSC 142.

income “caused by the interruption of the business when ingress or egress from the premises is restricted in whole or in part by order of a civil authority resulting from an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities.”<sup>3</sup>

[4] Given the business loss caused by the COVID-19-related lockdowns and restrictions and what appeared to be (arguably) on-point coverage provisions, it made sense that the Aviva class members be permitted to advance a faster and more focused claim aimed only at Aviva.<sup>4</sup> Hence, these three proposed class actions.

[5] Counsel for Aviva point out that the Nordik Action has improperly named Aviva General Insurance Company, which does not issue commercial property policies, and Aviva Canada Inc., which is a holding company that does not issue insurance policies — that the only proper defendant in this proposed class action is Aviva Insurance Company of Canada. I accept this correction and I will therefore refer to the defendant as “Aviva” or “the defendant”.

### **Decision**

[6] For the reasons that follow, the Lerner Actions and the Nordik Action (with one proviso) are certified as class proceedings.

[7] The certified common issues are attached in the Appendix.

[8] Before turning to the certification analysis, I will briefly set out the backdrop and summarize the coverage issues.

### **Backdrop**

[9] In March 2020, civil authorities across Canada began to respond to outbreaks of COVID-19. In Ontario, for example, the provincial government issued an Order in Council on March 17, 2020 declaring a state of emergency expressly recognizing that “the outbreak of a communicable disease namely COVID-19 coronavirus disease constitutes a danger of major proportions that could result in serious harm to persons”.<sup>5</sup>

[10] Provincial and other civil authorities nation-wide issued orders requiring the closure of schools and non-essential businesses, and imposing strict limitations on indoor and outdoor gatherings. It was more than a year later and only after most of the population was vaccinated

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<sup>3</sup> *Ibid.*, at para. 15.

<sup>4</sup> *Ibid.*, at para. 18.

<sup>5</sup> Order-in-Council 518/2020 (O. Reg 50/20) declaring a provincial emergency pursuant to the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, as am.

that the various restrictions began to ease and the economy was allowed to re-open, albeit in strictly controlled steps and stages.

[11] The impact of the closure orders and related restrictions on both small and large business operations has been devastating. National studies found that the debt load of small businesses increased by more than \$135 billion in a matter of months. And that “more than 239,000 businesses could vanish because of Covid-19 as the new wave of restrictions and lockdowns leave a growing number of entrepreneurs considering giving up”.<sup>6</sup> I said this in the carriage decision:

The Covid-19 restrictions and lockdowns continue to decimate Canadian business. This is that rare class action where real people are sustaining real harm in real time. It is therefore important to every class of BI claimants to get to a legal determination as quickly as possible.

[12] The proposed class actions before me are aimed at the BI coverage provided by the Aviva defendants.

### **The coverage issues**

[13] Aviva offers three types of policies containing BI coverage:

- a. *Enterprise*: For small to medium sized enterprises, providing comprehensive base coverage that can be supplemented with business interruption coverage. The Enterprise policies and supplementary coverages are, in Aviva’s evidence, “standard form” and the coverage language is “set by Aviva and largely not open to negotiation.” “Program policies” designed for industry groups largely use the Enterprise wording;
- b. *Manuscript*: Custom-made policies designed to meet the specific needs of particular insureds or groups of insureds (e.g., the Hotel Program policy);
- c. *Subscription*: Policies where multiple insurers share the risk of underwriting the policy.

[14] There are three “standard clauses” relating to BI coverage: Restricted Access (“RA”), Negative Publicity (“NP”) and Physical Damage. In 2020, there were just over 28,000 businesses with Aviva insurance policies that contained the RA, NP and Physical Damage clauses. According to Aviva, each of the RA, NP and Physical Damage clauses are contained in “standard form” supplementary coverages and are “substantively the same” across each policy.

[15] The relevant language in the RA coverage provides as follows:

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<sup>6</sup> *The Globe & Mail Report on Business* (January 21, 2021) at B-1.

This form insures the actual loss of “business income” sustained by the Insured caused by the interruption of the “business” at the “premises” when ingress to or egress from the “premises” is restricted in whole or in part ...

by order of civil authority resulting from any of the following occurrences:

an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities.

[16] Here is the relevant language in the NP coverage:

This form is extended to insure the actual loss of "business income" sustained by the Insured as a direct result of any of the following occurrences ...

an outbreak of a contagious or infectious disease within 25 kilometres of the “premises” that is required by law to be reported to government authorities;

[17] The relevant language in the Physical Damage coverage reads as follows:

The Insurer will indemnify the Insured for the actual loss of “business income” sustained by the Insured directly resulting from the necessary interruption of the “business” caused by “damage” occurring during the policy period.

“damage” means the direct physical loss of or damage to property at the “premises” from an insured peril.

[18] There is evidence that Aviva received and considered some of the COVID-19-related BI claims. But there is also evidence that the defendants issued a Bulletin in May, 2020 advising its brokers that “on the vast majority of our policies, there’s no coverage for business interruption losses related to COVID-19 ...” And for those that submitted a claim and were denied coverage, there is evidence that the defendant’s denial letters all used the same language:

As the COVID-19 virus itself does not constitute “direct physical loss or damage” to property, [the Physical Damage coverage does] not apply. Also, the negative publicity and restricted access coverages ... do not provide cover for global pandemics such as COVID-19.

[19] In her affidavit, Aviva’s chief technical underwriter explained Aviva’s corporate position as follows:

- Restricted Access: “The RA Clause does not provide coverage for business interruption losses caused by province-wide shutdown orders...”
- Negative Publicity: “...[T]he NP Clause does not provide coverage for business income losses arising from global pandemics.”
- Physical Damage: “...[T]he actual or suspected presence of COVID-19 at an insured premises as well as restrictions placed on access to an insured premises as a result of any applicable government shutdown orders, does not amount to “physical loss of or damage to” those premises...”

[20] The two Lerner Actions (Legions and Denturists) limit their claims to the RA and NP coverage provisions. The Nordik Action advances all three: RA, NP and Physical Loss or Damage.

### **Counsel agree to partial certification**

[21] To their credit, counsel on both sides were able to agree by the end of the certification hearing that almost all of the requirements for certification as set out in s. 5(1)(a) of the *Class Proceedings Act*<sup>7</sup> were arguably satisfied. This was a sensible realization. As I said to counsel in an earlier Direction, the coverage issues are complicated and will be hard-fought on the merits but certification should be relatively simple and straight-forward. Indeed, as I noted in the Direction, this was a “plain vanilla certification”.

[22] Aviva has issued well over 20,000 policies with the same standard-form and non-negotiable Restricted Access, Negative Publicity, and Physical Damage coverages. There is evidence that the denial of coverage letters were identical in form and content. There is evidence that the defendant had adopted a company-wide position that its policies did not cover “global pandemics”. And, as already noted, a largely blanket denial was communicated to the brokers in May, 2020. In short, there is ample evidence of commonality and of numerous key issues that should be decided on a class-wide basis via a class proceeding. Counsel were right to come to some agreement.

[23] In the Lerner Actions, Aviva consented early on to a partial certification. The defendant accepted the cause of action (breach of contract), the class definition, six of the seven proposed common issues, preferability and suitable representative plaintiff. The only point in dispute was the proposed common issue about the Negative Publicity coverage and whether these was sufficient class-wide commonality.

[24] In the Nordik Action, all five of the certification requirements were contested initially but as the hearing concluded, counsel were able to achieve a reasonable level of agreement. After the plaintiff limited its causes of action to breach of contract and breach of the duty of good faith, the defendant no longer contested the s. 5(1)(a) requirement. The defendant also consented to a revised list of common issues — with the result that the only PCI in dispute in the Nordik Action (as in the Lerner Actions) was the one that dealt with the Negative Publicity coverage.<sup>8</sup>

[25] Counsel on either side of the Nordik Action, however, could not agree on the class definition under s. 5(1)(b) or the suitability of the proposed representative plaintiff under s. 5(1)(e). With respect to the latter, Aviva argued that the business operation of Nordik Windows

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<sup>7</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6. Please note that the original (unamended) CPA applies to these proceedings.

<sup>8</sup> I commend class counsel for accepting my suggestion that their proposed “aggregate damages” and “relief from forfeiture” common issues be deferred to the summary judgment motion (or trial).

had not been interrupted by any COVID-19-related orders of any civil authority — that it had no viable insurance claim and was therefore not a suitable class representative. Indeed, Aviva had filed a pre-certification motion on this very point — and I had directed that this motion would be heard after certification.

[26] This earlier direction, however, was based on an understanding of the evidence that had changed considerably as the certification hearing progressed. I therefore advised counsel during the certification hearing that in fairness to Aviva and to the overall manageability of the certification process, I would hear and decide Aviva’s motion challenging Nordik Windows as the proposed representative plaintiff as soon as it could be scheduled.<sup>9</sup>

[27] Counsel for Aviva should understand that another representative plaintiff can easily be added should this prove necessary. Indeed, the plaintiff has recently advised that they intend to add Nordik Cash and Carry and two other class members as proposed representative plaintiffs.

[28] In any event, Aviva’s motion challenging the proposed representative in the Nordik Action (if it goes ahead) will be argued next month. In the meantime, I will release my reasons dealing with everything except this remaining requirement. After I hear Aviva’s motion, I will issue an Addendum to these reasons limited to the s. 5(1)(e) issue.

### **The Lerner Actions are certified**

[29] The CPA requirements relating to causes of action (here only breach of contract), class definition, common issues, preferability and suitable representative plaintiffs are satisfied.

[30] **Common issues.** The defendant consents to six of the seven PCIs. These are set out in the attached Appendix. The only issue in dispute is PCI No. 2 that asks about the Negative Publicity coverage:

What constitutes an occurrence of an outbreak of a contagious or infectious disease within 25 km of a Class Member’s premises, or such other distance as specified in the policy, required by law to be reported to government authorities that will trigger coverage under the supplemental Negative Publicity coverage for loss of business income sustained as a direct result of such occurrence?

[31] The defendant says that the answer to this PCI is highly individualized, cannot be answered on a class-wide basis and should not be certified as a common issue. I do not agree. The PCI does not ask “*was* there an outbreak ... within 25 kilometres of a class member’s premises” — if that were the question, then individualized determinations would be necessary. The PCI asks “*what constitutes* an outbreak ...” (that is – does it mean one case, more than one case, more than ten cases?) — and this question requires no individual determinations. There is inherent and class-wide commonality.

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<sup>9</sup> Section 12 of the CPA provides ample jurisdiction for this revised sequencing direction.

[32] The applicable caselaw supports the certification of PCI No. 2. An issue can be a common issue even if it makes up a limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.<sup>10</sup> A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.<sup>11</sup> Finally, as s. 6 of the CPA makes clear, certification shall not be refused solely because the relief claimed includes a claim for damages that would require individual assessments after the determination of the common issues.

[33] The court’s analysis of PCI No. 2 will not decide individual coverage claims (these will be determined at a later stage if coverage is established) but it will advance the litigation significantly by interpreting key coverage components — such as the interpretation of “outbreak”, “contagious or infectious disease”, and “required by law to be reported to government authorities” — each of which has a common application. There is at least some basis in fact that these standard-formulations in the defendant’s standard-form policies about NP coverage can be answered on a class-wide basis. Indeed, most if not all of these key coverage components will be addressed when the court answers PCI No. 1, the agreed-to RA common issue: and see Note Two at the end of the attached Appendix.

[34] In short, the proposed common issue about NP coverage in the Lerner Actions is easily certified. This means that the identical issue in the Nordik Action will also be certified.

[35] ***Class definitions.*** For the sake of completeness, I set out the agreed-to class definitions in the Lerner Actions. In both the Legions and Denturists actions, class counsel agreed to limit the class to Aviva-insureds who “have submitted a claim”. This claims-made limitation made sense in the Lerner Actions because class counsel were satisfied that all affected Legion and Denturist class members have submitted insurance claims. (I note that class counsel in the Nordik Action, where class size is in the many thousands, prefer to use a broader class definition).

[36] The agreed-to class definition in the Legions action provides as follows (emphasis added):

All persons, natural or corporate, carrying on operations as branches of The Royal Canadian Legion and other veterans, service, and legacy organizations operating in a similar manner to Legion Branches across Canada (except British Columbia) which were insured by *and have submitted a claim* to Aviva Insurance Company of Canada (“Aviva”) under a Commercial Insurance Policy issued by Aviva on behalf of The Royal Canadian Legion, pursuant to the PIB Provincial Command Insurance Program (“Legion Program”), which included “Restricted Access” coverage and/or “Negative Publicity” coverage under

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<sup>10</sup> *Cloud v. Canada (Attorney General)*, (2004) 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref’d, [2005] S.C.C.A. No. 50.

<sup>11</sup> *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at para. 81, leave to appeal to SCC refused, 2013 CanLII 14307 (SCC); *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111, at para. 65.

Business Income Actual Loss Sustained Form (912000-01), *and which claimed loss of business income:*

- a) caused by the interruption of its business when ingress to or egress from its premises was restricted in whole or in part (“Restricted Access”) by the mandatory closure order made by the Province of Ontario on March 23, 2020, and similar closure orders made in all Provinces and Territories in Canada in March or April 2020 (the “Closure Orders”), and/or
- b) caused by the interruption of its business when ingress to or egress from its premises was restricted in whole or in part by any subsequent order of civil authority, and/or
- c) as a direct result of an outbreak of COVID-19 *within 25 kilometres* of its premises.

[37] The agreed-to class definition in the Denturists action is the same but has a one-kilometre geographic limitation for the NP coverage (emphasis added):

All persons, natural or corporate, carrying on operations usual to a dentist who were insured by *and have submitted a claim* to Aviva Insurance Company of Canada (“Aviva”) [under listed policies] and *which claimed loss of business income:*

- a) while access to its premises was restricted in whole or in part (“Restricted Access”) by the mandatory closure order made by the Province of Ontario on March 23, 2020 (the “Closure Order”), and/or
- b) while access to its premises was restricted in whole or in part by any subsequent order of civil authority, and/or
- c) as a direct result of an outbreak of COVID-19 *within 1 kilometre* of its premises.

[38] Both the Legion and Denturists actions propose workable class definitions that satisfy the CPA and applicable caselaw. As already noted, the defendant, sensibly, did not contest preferability or the suitability of the representative plaintiffs.

[39] I conclude that the Lerner Actions should be certified as class proceedings.

### **The Nordik Action is conditionally certified**

[40] Given counsel’s agreement, and my decision herein to certify PCI No. 2 in the Lerner Actions, it follows that all 11 common issues are certified in the Nordik Action: see the attached Appendix. The only remaining points of dispute in the Nordik Action are the class definition and the representative plaintiff. The latter, as already noted, will be addressed in an Addendum that will be released after next month’s s. 5(1)(e) motion. That leaves the class definition.

[41] **Class definition.** In the Lerner Actions, class counsel were content to limit the class to persons “who were insured by and have submitted a claim” to Aviva. The defendant submits that

the same class definition should be approved in the Nordik Action. Indeed, says the defendant, in the Nordik Action it would even accept a class definition that covers persons that “have submitted *or will submit* a claim”. Aviva goes on to note, however, that it contests the inclusion of the more individually negotiated Manuscript and Subscription policies.

[42] Class counsel in the Nordik Action ask the court to certify the following class definition that is broader, not claims-based and that includes the Manuscript and Subscription policies (emphasis added):

All persons, natural or corporate, who were insured by Aviva Insurance Company of Canada (“Aviva”) under an “Aviva Policy” (as defined below) and *who sustained a loss of business income:*

a) caused by the interruption of their business when ingress to or egress from their premises was restricted in whole or in part (“Restricted Access”) by the mandatory closure order made by the Province of Ontario on March 23, 2020, and other orders of civil authority in all Provinces and Territories (the “Closure Orders”); and/or

b) caused by the interruption of its business when ingress to or egress from its premises was restricted in whole or in part by any other orders of civil authority; and/or

c) as a direct result of an outbreak of COVID-19 within 25 kilometres of its premises.

“Aviva Policy” means: (i) Business Income Actual Loss Insurance Form 912000-01, Business Income Extended Form 912001-03, Business Income Limited Form 912002-03, Business Income Additional Coverage Form 912005-01, or Business Income – Actual Loss Sustained (Broadform Perils) Form 402014-02, (ii) a Global Corporate Specialty insurance policy, (iii) Form H-001803 or Form H2, (iv) *a manuscript or subscription commercial policy for which Aviva is the lead insurer*, or (v) any other commercial property policy (collectively, the “Policies”), provided that such Policies include coverage for business income losses in respect of “Restricted Access”, “Negative Publicity”, “Damaged Reputation” and/or “BI Physical Damages” coverage.

[43] Dealing first with the Manuscript and Subscription policies, I agree with class counsel that Aviva’s objection to their inclusion is unwarranted. The evidence of their own chief technical officer is that at least some of the policies in each of these categories contain “some form of RA and/or NP language” or “some equivalent of those clauses, as negotiated”. The same witness also implied that most, if not all, contain the Physical Damage coverage. Class counsel offered one concession that is reflected in the class definition above — they have agreed to narrow the scope of the action to Subscription Policies in which Aviva is the lead insurer. This is a sensible concession.

[44] What about the core of the proposed class definition? The plaintiff defines the class, in essence, as any person insured under an Aviva BI policy who sustained a loss of business income caused by one or more of three specified occurrences (tracking the actual language of the

respective coverage provisions). In other words, the proposed class definition includes anyone who sustained a loss of business income that falls within coverage.

[45] I agree with the defendant that amounts to is a merits-based class definition and as such cannot be certified. The law is clear that no one should not have to wait until a future adjudication to know if they are members of a proposed class action. Class membership must be defined using objective criteria and, as the Supreme Court of Canada noted in *Dutton*,<sup>12</sup> “the criteria should not depend on the outcome of the litigation”.<sup>13</sup> This court made the same point in *Robertson*:

[C]ircular [class] definitions referencing the merits of the claim ought to be avoided [because they] ... make it difficult to identify who is a member of the class until the merits have been determined.<sup>14</sup>

[46] Aviva says it would consent to a class definition that used the phrase “have submitted or will submit a claim”. Here is Aviva’s proposed class definition (emphasis added):

All persons, natural or corporate, who were insured by and *have submitted or will submit an insurance claim* to Aviva Insurance Company of Canada (“Aviva”) under an “Aviva Policy” (as defined below) *and who claimed or claim a loss of business income*:

a) caused by the interruption of their business when ingress to or egress from their premises was restricted in whole or in part (“Restricted Access”) by the mandatory closure order made by the Province of Ontario on March 23, 2020, and similar closure orders made in all Provinces and Territories in Canada in March or April 2020 (the “Closure Orders”); and/or

b) caused by the interruption of its business when ingress to or egress from its premises was restricted in whole or in part by any other orders of civil authority or, in the case of Form H-001803 and Form H2, any other orders of civil authority or Public Health Authority or similar Authority [*Form H-001803 and Form H2 are the policies applicable to Hotels*]; and/or

c) as a direct result of an outbreak of COVID-19 within 25 kilometres of its premises [*if the NP PCI is certified*].

[47] This proposed class definition provides class members with an immediate ability to self-identify — they do not have to wait for a future merits-adjudication. Counsel in the Nordik Action, however, submit that the claims-based focus is unacceptable because it prejudices the

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<sup>12</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46.

<sup>13</sup> *Ibid.*, at para. 38.

<sup>14</sup> *Robertson v. Thomson Corp.* (1999) 43 OR (3d) 161 (Gen. Div.) at 14.

issue of whether notice of a claim is required under the policies — that this is a matter that remains in dispute under the caselaw and should be resolved on the merits and not at certification.

[48] I understand and accept class counsel’s concern about prejudging the notice question but, in my view, the answer for the purposes of class definition is found in class counsel’s own letter of July 3, 2021:

Nordik accepts that for Class Members to actually recover money from Aviva following a positive adjudication on the merits, they will have to submit a claim.

[49] Thus, class counsel correctly acknowledge that *eventually* (most likely at the individual damages stage) class members will be obliged to submit an insurance claim. This acknowledgement allows me to accept Aviva’s proposed language, adding only the word “eventually” — that is, “have submitted or will *eventually* submit a claim”. In this way, the legitimate dispute about notice requirements and even the ‘relief from forfeiture’ issue can sensibly be deferred to the last stage of (individual) adjudication.

[50] Aviva’s proposed class definition as set out above is therefore certified with two small tweaks in the opening paragraph: “or will *eventually* submit a claim” and “or will *eventually* claim a loss of business income”. I hasten to add that if class counsel would still prefer a class definition that is not claims-based and can be stated without being merits-based, I will remain open to a viable proposal for amendment.

[51] This completes the first part of my reasons for certification. The second part (the Addendum) will soon follow.

### **Disposition**

[52] The two Lerner Actions (Legions and Denturists) are certified. The common issues are set out in the attached Appendix.

[53] The Nordik Action is conditionally certified and will be fully certified when I release the Addendum dealing with the representative plaintiff requirement.

[54] I will discuss costs and the parties’ written submissions in this regard in the Addendum.

[55] I am obliged to all counsel for their assistance.

**Signed:** *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment

**Date:** July 15, 2021

**Appendix:**

**Certified Common Issues**

**Common Issues in the Lerner Actions and the Nordik Action**

1. Does loss of business income caused by the interruption of the “business” at the “premises” by order of civil authority or the advice of the Public Health Authority or similar authority, issued in response to COVID-19, including the Lockdown Orders or a subsequent order of civil authority restricting access in whole or in part to a Class Member’s premises trigger coverage under the Restricted Access Coverage on the basis that:
  - a. the Order(s) constitute an order of civil authority and/or the advice of the Public Health Authority or similar authority;
  - b. the Order(s) restrict ingress to or egress from, or prohibit access to, the Class Member’s premises, in whole or in part; and
  - c. the Order(s) result from, or were given as a direct result of, an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities, or that is notifiable?
2. What constitutes an occurrence of an outbreak of a contagious or infectious disease within 25 km of a Class Member’s premises, or such other distance as specified in the policy, required by law to be reported to government authorities that will trigger coverage under the supplemental Negative Publicity coverage for loss of business income sustained as a direct result of such occurrence?
3. If Class Members have coverage, when does the period of indemnity start to run?
4. If Class Members have coverage, can a Class Member claim period(s) of indemnity for each order of a civil authority issued in response to COVID-19 restricting ingress to or egress from a Class Member’s premises or each outbreak of COVID-19 within 25 kilometres of the Class Member’s premises, or such other distance as specified in the policy?

5. Is the quantification of actual loss of “business income” sustained in the Restricted Access Coverage or the Negative Publicity Coverage subject to the “Measure of Recovery” and/or the definitions in that form relating to the calculation of Business Interruption losses, including the “Business income percentage” and “Expected Revenue” clauses?
6. If Class Members have coverage, are Class Members entitled to coverage under their policies for accountants’ fees incurred for producing particulars or details or other proofs, information or evidence as may be required by the defendants for the purpose of investigating or verifying any claim and reporting that such particulars or details are in accordance with the Class Member’s accounting records?
7. To what extent, if any, is any government assistance, subsidies or other government benefits, which Class Members received or were eligible to receive, to be considered in quantifying Class Members’ losses?

#### **Additional Common Issues in the Nordik Action**

8. Do the restrictions placed on Class Members’ access to their insured premises, and/or on access to the premises of “contributing businesses”, by the Lockdown Orders constitute “physical loss of or damage to” those premises within the meaning of the Policies? If so, does an exclusion for the peril of “loss of use or occupancy” apply?
9. Are the defendants prevented from relying on any statutory or policy-based limitation periods or other conditions, on the basis that the defendants have breached their duties of care and/or good faith to Class Members?
10. In quantifying Class Members’ losses, are the defendants entitled to take into account any COVID-19-related impacts on the economy generally or the Class Member’s business specifically?
11. In quantifying Class Members’ losses, are the defendants entitled to offset or otherwise take into account the performance of the Class Members’ business after the period for which coverage is claimed?

**Note One:** For purposes of the Common Issues, the following definitions apply:

*Restricted Access Coverage* means: the “Restricted Access” coverage found in the Aviva Enterprise policy, the “Restricted Access made necessary by a Civil Authority or Public Health Authority or similar authority” coverage found in the Gallagher Aviva hotel policy, as well as any other similar coverages found in any other Aviva policies, including but in no way limited to program polices, manuscript polices, GCS policies, and subscription policies.

*Negative Publicity Coverage* means: the “Negative Publicity Coverage” coverage found in the Aviva Enterprise policy, the “Damaged Reputation Coverage” coverage found in the Gallagher Aviva hotel policy, as well as any other similar coverages found in any other Aviva policies, including but in no way limited to program policies, manuscript policies, GCS policies, and subscription policies.

*Orders* means: all federal, provincial, territorial, municipal, public health official, and regulatory orders or directives across Canada, as well as all public health advice or guidance issued by any of those entities or any other entities across Canada, that relate to COVID-19.

**Note Two:** I advised counsel that the interpretation of the RA and NP common issues will most likely involve a consideration of the following:

- is COVID-19 “a contagious or infectious disease”?
- what constitutes “an outbreak” of COVID-19?
- is it the “outbreak” or the “disease” that has to be reported to government authorities;
- is it the business itself that is required by law to make this report or is it enough that physicians or others have this reporting obligation; and
- to the extent that this can be decided on a class-wide basis, was access to insured premises restricted in whole or in part by “an order of civil authority that resulted from” an outbreak of COVID-19?

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