CITATION: Nordik Windows Inc. v. Aviva Insurance Co.**,** 2023 ONSC 1804
COURT FILE NO.: CV-20-643386-CP
DATE: 20230322

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

RE: NORDIK WINDOWS INC., Plaintiff

– and –

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

BEFORE: Justice E.M. Morgan

COUNSEL: *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

Alan L. W. D'Silva, Glenn Zacher, Daniel S. Murdoch, and *Lesley Mercer,* for the Defendants

HEARD: January 30 – February 1, 2023

CERTIFICATION AND RELATED MOTIONS

I. The re-hearing

[1] On December 20, 2021, having already heard a certification motion in this action, Justice Belobaba issued an Order that a new hearing be convened to re-argue the certification issues. At the same time, he recused himself from that re-hearing due to a perception of bias that had arisen at the first hearing, thereby requiring a different judge to preside at the re-hearing. This Order was upheld and confirmed by Divisional Court in an endorsement dated March 11, 2022.

[2] The matter was re-argued before me over the course of three days. I stress that it was a hearing *de novo* on all issues; it did not proceed as a review or appeal of Justice Belobaba's initial certification decision.

[3] As I directed at a pre-hearing case conference, the certification motion was heard together with a number of other related or ancillary motions: *Nordik Windows v. Aviva Insurance*, 2022 ONSC 2536. Counsel for the Plaintiff, Nordik Windows Inc. ("Nordik"), framed the hearing, or re-hearing, as the Plaintiff's certification motion combined with a motion to add two new Plaintiffs; counsel for the Defendants, Aviva Insurance Company of Canada et al. ("Aviva"), framed it as a certification motion combined with Aviva's own motions seeking summary judgment against Nordik and a declaration with respect to the tolling of the limitation period.

[4] In my view, this multiplicity of motions and cross-motions adds a procedural awkwardness to the matters at hand, but does not really impact on the analysis of the relevant issues. The submissions made by Aviva's counsel in support of their client's motions could just as well have been made in the context of responses to the certification motion, while Nordik's counsel's submissions with respect to the newly proposed Plaintiffs were in effect a partial response to Aviva's submissions about Nordik's own status as Plaintiff.

[5] I understand why counsel on both sides packaged their respective motions the way they did. The responses of each side to the other necessarily entailed a request for certain remedies which required them to bring separate motions. But those remedies aside, the separate motions are really part and parcel of the overall certification debate and will be treated that way in these reasons for judgment. Both sides' counsel have provided me with an index of their arguments which serve as a roadmap for putting all of the issues in the several motions together in a coherent way. I very much appreciate counsels' efforts in that regard.

II. The regulatory and insurance context

[6] The dispute between the parties is, at its core, an insurance coverage dispute. Nordik and the putative class members had purchased "business interruption" insurance policies issued by Aviva. The class members proposed by Nordik either made claims under those policies and were denied coverage, or refrained from making claims under those policies because, according to Nordik's counsel, Aviva's across-the-board denial of business interruption coverage in the wake of the COVID-19 pandemic had become widely known. The distinction between those two groups of putative class members will be discussed later in these reasons, but the significant introductory point is that the interruption to business which was the catalyst for the present controversy was the pandemic.

[7] On January 22, 2020, prior to the declaration of a pandemic but when COVID-19 had already begun to appear worldwide, the government of Ontario amended O. Reg. 135/18 (*Designation of Disease*), a regulation enacted under the *Health Protection and Promotion Act*, RSO 1990, c. H.7 ("*HPPA*"). The amendment designated all diseases caused by a novel coronavirus (including COVID-19) as diseases of public health significance.

[8] Starting on or about March 1, 2020, instances of COVID-19 were required by the *HPPA* to be reported to government authorities. Then, on March 17, 2020, the Ontario government declared a state of emergency under the *Emergency Management and Civil Protection Ac*, RSO 1990, c. E.9 ("*EMCPA*"), stating 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": O. Reg. 50/20 (*Declaration of Emergency*).

[9] The following week, on March 23, 2020, the Ontario government issued O. Reg. 82/20 under subsection 7.0.2 (4) of the EMCPA (*Closure of Places of Non-Essential Businesses*) closing non-essential businesses. The order contained recommended health protections – in particular, the recommendation of physical distancing within buildings and workplace facilities – for those businesses deemed essential and permitted to remain open, and mandatory closure for non-essential businesses.

[10] Nordik is a custom window and door manufacturer, supplier, and installer operating in Ontario and Quebec. It and the affiants that support it, along with all of the putative class members, had purchased business interruption insurance from Aviva.

[11] The Motion Record details that business insurance policies generally come in three varieties: i) enterprise insurance for smaller businesses that provides comprehensive base coverage that can be supplemented with business interruption coverage; these policies are written in "standard form" contracts and are for the most part not specifically negotiated or tailored to the insured; ii) manuscript insurance polices which are specifically crafted to address the particular needs of the insured or the industry in which the insured does business; and iii) subscription policies in which a number of different insurance companies share the underwriting of the policy.

[12] Aviva's evidence is that it has three types of "standard clauses" relating to business interruption coverage: i) physical damage coverage; ii) negative publicity coverage; and iii) restricted access coverage. In March 2020, there were somewhere in the neighbourhood of 44,000 businesses with Aviva insurance policies that contained these three clauses. The clauses are each written as what Aviva calls "standard form" supplementary coverages and are substantively the same in each policy. It describes the clauses as follows:

> Physical damage coverage:
>
> 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.
>
> Negative publicity 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: …

> ii. 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;
>
> Restricted access coverage:
>
> 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:…
>
> ii.(a) by order of civil authority resulting from any of the following occurrences:…
>
> (2) an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities.

[13] Shortly after the beginning of the pandemic, Nordik and each of its supporting affiants, all unrelated businesses (with one exception, to be discussed later in these reasons), submitted claims to Aviva for business interruption coverage. Nordik’s claim was sent to Aviva on May 15, 2020. Aviva responded to this submission by letter dated June 1, 2020 in which it denied the requested coverage. The significant sentences of Aviva’s denial letter state:

> As the Covid-19 virus itself does not constitute ‘direct physical loss or damage’ to property, sections 1 and 2 above do not apply. Also, the negative publicity and restricted access coverages, described in section 3 do not provide cover for global pandemics such as COVID-19.

[14] Although signed by different individual adjusters, Nordik and its supporting affiants all received identically worded responses from Aviva.

[15] The Chief Technical Underwriter for Aviva has provided an affidavit in which she explains Aviva’s position on each of the three forms of coverage: i) “the [restricted access] Clause does not provide coverage for business interruption losses caused by province-wide shutdown orders…”; ii) “the [negative publicity] Clause does not provide coverage for business income losses arising from global pandemics.”; and iii) “the 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…”

[16] In addition to providing the same answer to each of the insureds, Aviva advised its independent insurance brokers of its position on business interruption coverage and the pandemic. The record contains an advisory letter from Aviva to a broker dated May 22, 2020, in which it states that, “on the vast majority of our policies, there’s no coverage for business interruption losses related to COVID-19.” It would appear that this advisory was sent to all brokers that sell Aviva insurance products.

[17] The evidence in the record makes it apparent that Aviva's denial of coverage in relation to closures and restrictions prompted by the pandemic and health regulations related to the pandemic was a standard, across-the-board policy. Aviva applied this standard approach to all of the relevant varieties of business interruption insurance. There is nothing in the record to indicate that coverage or denial of coverage for pandemic business interruption losses was made on a case-by-case basis for each insured that submitted a claim.

[18] As indicated earlier, Nordik's certification motion is accompanied by a motion to add several new representative Plaintiffs. Each of them has had an experience with pandemic-related business losses that is largely similar to Nordik's experience. One of them is Nordik's sister company, Cash and Carry Inc. ("C and C"), which operates out of the same premises as Nordik and acts as Nordik's retail arm. It is a named insured under Nordik's insurance policy with Aviva and, accordingly, has the identical restricted access, negative publicity, and physical damage coverage as Nordik.

[19] C and C services the Ottawa area, the entire city limits of which lies within a 25-kilometre radius of its facility. As indicated, this is the distance that triggers the negative publicity coverage in Aviva's policy when a case of COVID is reported.

[20] The affidavit evidence relates that C and C began receiving numerous customer cancellations of orders at the beginning of March 2020, as the first cases of COVID began to be reported. On March 23, 2020, the Ontario government ordered all non-essential retail businesses to close. At that point, C and C restricted its retail staff from accessing the business premises that it shares with Nordik.

[21] On April 4, 2020, Ontario's order was amended to include a mandatory shut down of all new residential construction. The order effectively restricted C and C's installers from accessing their facility to obtain the newly manufactured windows and their installation supplies, and, consequently, from performing installations. One affiant on behalf of C and C estimates that it lost $1,324,538.00 in business income as a combined result of the COVID-19 closure orders and the reported outbreaks of COVID-19 in the Ottawa area that caused customer cancellations.

[22] On May 15, 2020, Nordik and C and C both gave notice to Aviva of a claim for loss of business income as a result of COVID-19. On June 1, 2020, Aviva denied them coverage. On March 2, 2021, Nordik and C and C both submitted a proof of loss to Aviva.

[23] Another of the proposed new Plaintiffs, Hangar9 Studios Inc. ("Hangar9"), is a retailer of women's clothing in downtown Toronto. It was compelled to close its store pursuant to the closure order directed at all non-essential businesses issued by the Ontario government on March 23, 2020. Hangar9 was again compelled to close by government closure orders in November 2020 and April 2021. Its affidavit evidence states that it incurred business losses estimated to be in the range of $125,000 as a result of the closure orders from the 2020 orders and an as yet unknown amount for the 2021 order.

[24] Hangar9 is insured by Aviva for restricted access, negative publicity, and physical damage coverage. It submitted a claim to Aviva for business interruption losses, which was denied by Aviva on June 16, 2020. The following month, on July 16, 2020, Hangar9 commenced an action against Aviva claiming coverage under its policy. That action was not stayed by the carriage order issued on by Belobaba J. on January 26, 2021, as it is not a proposed class action: *Workman Optometry et al v Aviva Insurance et al*, 2021 ONSC 142.

[25] The third proposed new Plaintiff is Real Food for Real Kids Inc. ("RFRK"), a catering company serving day care centres and children's summer camps in Toronto. During the first weeks of March 2020, there was a marked increase in reported COVID-19 cases in Toronto, with the total in the first two weeks of March reaching 387 reported cases. In terms of Aviva's negative publicity coverage, it is significant to note that a 25-kilometre radius around RFRK's business premises would cover the entire City of Toronto.

[26] On March 17, 2020, the Ontario government declared a state of emergency and ordered all licensed daycare centres to close. This caused RFRK's customer base to instantly dry up, resulting in a loss of all of its revenues. Affidavit evidence submitted in support of Nordik's motion indicates that, among other things, RFRK was forced to lay off 90 of its 115 employees.

[27] RFRK was insured under an Enterprise Food Manufacturers policy issued by Aviva. The policy included restricted access, negative publicity, and physical damage coverage. On March 24, 2020, RFRK submitted a claim to Aviva for business interruption losses. Aviva denied the claim two months later, on May 22, 2020. Then, on July 7, 2020, RFRK commenced a proposed class action against Aviva seeking coverage for COVID-19-related business losses. RFRK's claim was stayed as a result of Justice Belobaba's carriage order. It has continued to pursue its claim for coverage as part of the present proposed class action.

III. The certification test

[28] Certification is governed by a multipart test set out in section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("*CPA*"). Each subsection of section 5(1) will be reviewed below and applied to the facts in the record.

[29] The Supreme Court of Canada has indicated that, "[t]he question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action": *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para 16. Accordingly, "[t]he certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action": *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 477, at para102.

(a) Reasonable cause of action

[30] Section 5(1)(a) of the *CPA* is analyzed in accordance with the standard applicable to pleadings motions. Assuming the facts pleaded to be true, the court must determine whether it is plain and obvious that the claim has no reasonable prospect of success: *Hollick*, at para 25.

[31] Nordik's pleading contains claims for breach of contract and breach of the duty of good faith. These are recognized causes of action. The Statement of Claim pleads the essential elements for each of those claims. Since the facts for now can be assumed to be true, the claims are appropriately pled and satisfy the plain and obvious test.

(b) Identifiable class

[32] The Plaintiffs propose a class defined as:

> All persons, corporations, or other entities carrying on business in Canada who suffered a loss of business income and:
>
> (i) there was at least one case of COVID-19 within 25 km of their premises (or such other distance as may be specified in each Class Member's Policy); and/or
>
> (ii) access to their premises was restricted, in whole or in part, by any of the Orders (as defined in the common issues); and/or
>
> (iii) had the actual, suspected, or potential presence of COVID-19 at their premises or at contributing/neighbouring premises;
>
> and who purchased business interruption insurance from the Defendants, whether Aviva Enterprise, Aviva Commercial, or any other policy, including but not limited to the following (collectively, the "Policies"):
>
> (i) Business Income Actual Loss Insurance Form 912000-01, Form 912000-01, Form 921005-01, Form 402014-02, Form H-001803, Form H2; and/or
>
> (ii) such other policies as may contain 'Negative Publicity' or 'Restricted Access' coverage; and/or
>
> (iii) such other policies issued by the Defendant as may contain coverage for suspension of the insured's business caused by damage to the insured's or contributing/neighbouring premises; and/or
>
> (iv) such other policies as may provide substantially similar coverage.

[33] The proposed definition incorporates amendments proposed by Plaintiff's counsel to ensure that its language is objective and that it does not provide for any suggestion of a merits-based test of inclusion: *Hollick*, at para 17. It is worded so as to encompass the terms of the business interruption policies held by those insureds who suffered losses relating to COVID-19 closures and restrictions.

[34] Aviva objects to including in the proposed class policyholders who have not yet given individual notice of their claims. Aviva's counsel submits that giving individual notice, and having the claim denied, is a necessary precondition for commencing or participating in a lawsuit seeking damages for denial of coverage.

[35] Nordik relies on the Court of Appeal's statement in *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88, at para 20, that "the claimant for indemnity under the [insurance policy] suffers a loss from the moment [the insurer] can be said to have failed to satisfy its legal obligation [under the policy]." Aviva's view is that to the extent that there are insureds who did not actually put in a claim, they could not have recovered whether Aviva had determined they had coverage or not since a submission provides the trigger for recovery: *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, at para 26.

[36] Nordik responds by arguing that imposing Aviva's version of a strict notice requirement would put form over substance: *2352392 Ontario Inc. v. Msi*, 2020 ONCA 237, at paras. 12, 15. Nordik's counsel point out that in *Dams v. TD Home and Auto Insurance*, 2016 ONCA 4, at para 20, the Court of Appeal explained that the purpose of the notice requirement is to provide an insurer with sufficient information to allow it to investigate a claim. It is not a formal requirement for its own sake.

[37] Nordik states that its Statement of Claim, which proposes a class action encompassing all business interruption policyholders, serves the purpose of notice. It identifies the class of insureds making claims, the causes of their claimed losses, and the policy provisions under which their claims are advanced. Nordik states that this is the same information provided in individual notices and is, in effect, exactly what Aviva says that it would want to see.

[38] Moreover, the evidence in the record establishes that Aviva effectively issued a blanket denial of coverage for all of its business interruption insureds with losses stemming from COVID-related restrictions. The affiants on behalf of Nordik who submitted formal notices to Aviva have produced rejection letters in identical language. It is apparent from the evidence that Nordik sent out form-letter rejections to all insureds who submitted notices of claims under the business interruption provisions.

[39] In fact, Aviva's own newsletter of May 2020, sent to all of its brokers, stated expressly that the "vast majority" of its policies provided no coverage for business losses resulting from pandemic restrictions. It went on to assure the brokers that, "Where coverage exists, we've contacted those brokers already."

[40] The evidence also establishes that all policyholders purchase this insurance through brokers. In this context, it stands to reason that many would have first contacted their brokers about a potential claim, and would have been made to understand the futility of submitting a notice of claim. As the British Columbia Supreme Court observed in *West Coast Securities Ltd v Continental Insurance Co.* (1975), [1976] 2 WWR 444, at para 13, "where it is clear that the insurer will not pay in any event, it is absurd to require the insured to do acts which will prove useless."

[41] There is therefore an argument that insisting that policyholders submit individual notices of claim would not be in conformance with the Court of Appeal's purposive approach to the notice requirement. That issue is one that goes to the merits of the claim, and should not serve as a basis for limiting the class and the claim from the outset.

[42] In response to Aviva's objection to the inclusion of class members who did not submit formal notice, counsel for Nordik has now added an additional common issue to its proposed list. The new common issue (common issue 13, discussed in part III (c) below) addresses the question of notice. Given the substantive content of this issue and its commonality to a large sub-class of putative class members, the issue of notice is properly dealt with as a common issue rather than as a class definition issue.

[43] Beyond all of that, Nordik's counsel submits that any notice requirement contained in an insurance policy at issue is tolled by section 28 of the *CPA*. That statutory provision applies to "any limitation period applicable to a cause of action asserted in a proceeding", and includes any and all contractual limitations.

[44] The purpose of section 28 is to protect class members from "the operation of limitation periods until it is determined whether they actually have the option of membership in a class proceeding".: *Coulson v Citigroup Global Markets Inc.*, 2010 ONSC 1596, at para. 49. Limiting the class to those policyholders who have submitted notices, notwithstanding the commencement of a proposed action, would be counter to this purpose. Such a limitation cannot be the rationale for restricting the proposed class.

(c) Common issues

[45] Counsel for Nordik propose the following common issues:

> 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?

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?
>
> 12. Is the Class entitled to an award of aggravated, exemplary or punitive damages?
>
> 13. Is giving notice a necessary prerequisite to commencing a claim or being entitled to coverage under Class Members' policies?
>
> > a. if so, did Aviva anticipatorily breach and/or repudiate the policies, through a blanket denial of coverage or otherwise, such that Class Members are not required to give notice prior to commencing a claim?
> >
> > b. if not, does commencement of this action satisfy the nice requirement under each Class Member's policy?

[46] In addition, Nordik's counsel would add the following explanatory Note to the list of common issues:

> The interpretation of the RA [restricted access] and NP [negative publicity] 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?

[47] In order to qualify as common issues, the court must be satisfied that each issue meets the "some basis in fact" standard, and that it can be determined in common among the class. Nordik submits that each of the proposed common issues is a substantial ingredient to class members' claims such that all members of the class will benefit from their determination in a common issues trial: *Musicians' Pension Fund of Canada (Trustee of) v Kinross Gold Corp*., 2014 ONCA 901 at para. 115; *Pro-Sys, supra*, at para. 108.

[48] It is Nordik's view that certifying the entire list of proposed common issues will avoid duplication of the fact-finding and legal analysis required for each class member's claims. As a consequence, certifying them will therefore facilitate the *CPA*'s goals of judicial economy and

access to justice: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at paras 39-40.

[49] Counsel for Aviva advises that its submissions in response to the common issues are limited to three of the proposed issues: a small amendment to number 8 (whether restrictions amount to physical loss or damage and whether exclusions apply), an objection to number 9 (does a breach of duty by Aviva deprive it of any statutory limitation period or other defense), and an objection to number 12 (entitlement to punitive damages). Aviva also objects to the note that Nordik proposes appending to the common issues questions (guidance to the common issues judge in analyzing restricted access and negative publicity).

[50] First of all, counsel for Aviva explains that Aviva is prepared to consent to proposed common issue 8, if a rather small change is made, as follows.

> 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, do any exclusions ~~does an exclusion for the peril of "loss of use of occupancy"~~ apply?

[51] It is Aviva's view that the question for the common issues court should allow for consideration of other potentially applicable exclusions upon which Aviva may rely. This is a reasonable suggestion, given that liability under the business interruption policies is generally at issue. I see no prejudice to Nordik in adding Aviva's proposed language. Although I am not certain at this point, it may add relevant considerations to the common issues judge's contemplation of the policy terms, and in fairness to Aviva these considerations ought to be left to that judge to weigh.

[52] As for common issue 9, Aviva opposes its inclusion altogether. Counsel for Aviva submits that the question contains a false premise in that it assumes that Aviva has acted in bad faith. It is Aviva's view that this phrasing is deployed strategically by Nordik in order to bolster its argument that there exists a group of insured class members that sustained business interruption losses but because of Aviva's denial of pandemic claims – here said to be an act contrary to good faith – did not submit insurance claims.

[53] This common issue, which presupposes that these policyholders should be included in the putative class, asks whether they should be relieved of complying with statutory and policy-based limitation periods. While there is some basis in fact for this allegation by Nordik – several of the affiants as well as Aviva's own behaviour indicate that this need for relief may have been brought on by Aviva – the issue will have to be decided by the common issues court.

[54] To pose a question such as common issue 9 – i.e. one that presupposes a lack of good faith – is an unfair way to put the issue. Adherence to a duty of good faith, and its impact, if any, on the applicability of limitation periods, can and should be explored as questions common to the entire class. However, the phrasing of the question should be open-ended, not pre-judgmental and conclusory.

[55] I will add here that Nordik has pursued its claim in breach of contract, but has not pursued a claim in negligence against Aviva. Given this cause of action, Aviva's counsel submits that there is no relevance to a question that includes duty of care. That is a tort concept that will not come into play in a contracts claim, and as such it should be eliminated from the common issues questions.

[56] Common issue number 9 is to be re-phrased, as follows:

> Have the defendants breached any duty of good faith to the Class Members, and, if so, does that have any impact on the defendants' ability to rely on any statutory or policy-based limitation periods or other conditions?

[57] Aviva likewise objects to common issue 12, and seeks to eliminate it altogether. In the first place, Aviva's counsel points out that the question of aggravated damages is out of place in a common issues trial. Aggravated damages compensate for "additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant": *Whiten v. Pilot Insurance Co*., [2002] 1 SCR 595, at para. 116.

[58] The harms caused by such conduct include loss of dignity, humiliation, or psychological injury: *McIntyre v. Grigg*, (2006), 83 OR (3d) 161, at para 50 (SCJ). These aggravated harms are compensatory in nature and need to be proven on an individualized rather than a class-wide basis: *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, at para. 350.

[59] Furthermore, Professor Waddams points out that exemplary and punitive damages are synonymous: Stephen Waddams, *The Law of Damages* (Toronto: Thomson Reuters, 2019), at section 11.10. Accordingly, one or the other may be appropriate, but not both. Doubling the phrase gives the question as to whether these damages should be awarded a sense of urgency, which in turn creates an uncalled-for tilt toward an affirmative answer.

[60] Counsel for Aviva also argues that the question of punitive damages lacks a factual basis here, as it is a form of punishment that first requires that the conduct complained of be independently actionable. As the Supreme Court put it in *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, "The punitive damages were ordered because of the offensive attitude and conduct of the defendant before the final injury occurred, which conduct…, in addition to its abusive nature, was tortious".

[61] It is self-evident that, in a breach of contract/good faith claim, a finding of breach will necessarily precede a determination of whether punitive damages are appropriate. Once such a finding is made, the punitive damages question can be addressed on a class-wide basis. The determination is based on the conduct of Aviva as defendant, and not on the reactions or reception of the conduct by class members: *Robertson v Ontario*, 2022 ONSC 5127, at para 93.

[62] There is therefore no reason not to include the punitive question here. Any common issues trial judge will understand that the basis for punitive damages requires, first and foremost, that liability be established on the cause of action pleaded.

[63] Common issue number 12 is to be re-phrased:

Is the Class entitled to an award of punitive damages?

[64] Finally, Aviva's counsel object to inclusion of the explanatory note that Nordik's counsel have added as a footnote to the list of common issues. Aviva sees the note as doing nothing more than providing guidance to the common issues trial judge on matters that may be considered in determining the common issues. As Aviva's counsel point out, this may or may not represent a proper or complete list of considerations on those issues.

[65] A trial judge will be capable on his or her own of determining how and what to consider in analyzing the common issues. Aviva's counsel argues, with some cogency, that providing a common issues judge with a list of things to consider in answering the certified questions is more of a pre-judging of the common issues than a guide to analyzing the common issues. In my view, the note is not necessary for understanding the common issues and should be eliminated.

(d) Preferable procedure

[66] To establish that a class proceeding is the preferable procedure, it must be shown that a class action would be a fair, efficient, and manageable method of advancing the claims of the class members: *Hollick*, at paras 28-31. It must also be demonstrated that a class action "would be preferable to any other reasonably available means of resolving the class members' claims": *AIC Limited* ***v.*** *Fischer*, [2013] 3 SCR 949, at para 48.

[67] Counsel for Aviva have advised that Aviva does not oppose the preferable procedure criterion. I agree that the preferable procedure test has been met. Thousands of policyholders suing on the identical provisions in their insurance policies could not be managed with any efficiency or effectiveness using any other procedure.

(e) Adequate representative Plaintiff and Aviva's summary judgment motion

[68] In order to achieve certification, the representative plaintiff must be found to be adequate to that task. The existence of a representative Plaintiff who can "fairly and adequately represent the interests of the class" and who puts forward "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding", are requirements under subsections 5(1)(e)(i) and (ii) of the *CPA*, respectively.

[69] Aviva's objection to Nordik's notice plan is, quite simply, a repetition of its argument with respect to the class definition. In short, Aviva opposes mailing notice of the claim to all 44,000 insureds who purchased business interruption insurance from Aviva. Rather, it argues that notice should be sent only to those who actually submitted a notice of claim. Aviva's counsel submit that since those are the only policyholders entitled to make a claim, they are the only ones entitled to notice of the class claim.

[70] Given that the question of entitlement for those who did not make a claim is itself one of the common issues, it makes no sense to limit the scope of notice in the way that Aviva suggests. To do so would be to pre-judge the answer to common issue number 13. It would also deprive a portion of the class, as defined in part III (b) above, of notice. In my view, Nordik's proposed notice plan is appropriately broad and is workable and proper.

[71] As for Aviva's objections to Nordik as representative Plaintiff, several of its grounds are based on the apparent lack of detailed knowledge of the case by Nordik's CEO and affiant, Philippe Béchard. In their factum, Aviva's counsel argue that, among other things, Mr. Béchard could not articulate the legal theory of the case, had not prepared the affidavits filed on behalf of Nordik, had not devised Nordik's litigation plan, was unaware of the strategy behind bringing a summary judgment motion as set out in the litigation plan, admitted in cross-examination that Nordik had received funding from the Class Proceedings Fund despite having said during the earlier carriage motion that Nordik was self-funding the litigation, and generally relied on evidence procured by counsel.

[72] With all due respect to Aviva's counsel, none of these criticisms amount to anything substantive. As Perell J. observed in *Doucet v. Royal Winnipeg Ballet*, 2018 ONSC 4008, at para 139, a representative plaintiff "must demonstrate autonomy and a minimum level of general knowledge about the nature of class proceedings and his or her responsibilities to give instructions on behalf of the class"; but beyond that, "the court should be skeptical of the defendant's attacks against the qualifications of the representative plaintiff": *Ibid*.

[73] Aviva's counsel's questioning of Mr. Béchard's, and, by extension, Nordik's suitability to act as representative counsel goes beyond anything actually required of him or his company. I am, to use Justice Perell's phrase, skeptical of the multifaceted attack on the representative plaintiff launched by Aviva.

[74] A representative plaintiff need not be a legal theorist; likewise, he or she need not be a lawyer capable of explaining substantive and procedural aspects of the case in a cogently legal way. I dare say that most non-lawyers – indeed, many solicitors and perhaps even some barristers – could not explain the difference between a motion to strike pleadings and a motion for summary judgment, or a common issues trial and a trial on liability and damages.

[75] Further, and without putting too fine a point on it, there is no realistic expectation that a representative plaintiff (or, for that matter, any affiant, including those put forward by defendants) draft their own affidavit or devise their own litigation plan. Everyone knows that although affidavits are sworn by litigants and must reflect the litigants' truthful rendition of the facts, the drafting is done by lawyers. Representative plaintiffs do not have to be litigation counsel themselves in order to be adequate to the task of representing the class. The criticism of Mr. Béchard and the other affiants on Nordik's behalf do not pose a serious challenge to Nordik as representative plaintiff.

[76] In addition, I do not see Nordik's decision to apply for funding from the Class Proceedings Fund as a contradiction of its statement at the carriage motion that it was self-funding the litigation.

Counsel for Nordik is upfront about this in their factum, explaining that, to the surprise of no one, the litigation has become protracted and has gotten expensive. Nordik sought litigation funding at a post-carriage motion stage out of financial prudence, and it received that funding from an appropriate and respected source. There is nothing controversial about that.

[77] The record establishes that Nordik is entirely capable of providing adequate representation to the class. Nordik has shown itself to be motivated to pursue the action on behalf of the class and, indeed, has vigorously prosecuted the action. It appears from the record that it has no conflicts of interest with the class: *Dutton*, at para 41. Nordik has also produced an acceptable litigation plan.

[78] Aviva's one substantive challenge to Nordik's position is relevant to section 5(1)(e) of the *CPA*, but is more fully developed in its summary judgment motion against Nordik. That is, that Nordik has no valid claim against Aviva on the merits. It is Aviva's view that Nordik was always designated as an essential business during the COVID-19 pandemic, and so was never subject to the governmental restrictions on its operations that triggered its claim for coverage.

[79] This challenge, of course, goes far deeper than Aviva's other attempts to disqualify the representative plaintiff, as discussed above. If Aviva is correct in its summary judgment motion, Nordik's own claim will be at an end and it will no longer be in a position to instruct counsel on behalf of the class as it will no longer be a class member.

[80] That consequence flows as a matter of logic, and has been confirmed by the Court of Appeal. In *Stone v. Wellington County Board of Education*, 1999 CanLII 1886, at para 10, held:

> Where a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim…he or she cannot be said to be a member of the proposed class. The continuation of the action in those circumstances would be inconsistent with the clear legislative requirement that the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome.

[81] The fact that there are other class members whose interests and claims may be impacted by Nordik's status as litigant is, for the purposes of analyzing Nordik's claim, beside the point. "[I]t is well settled that a class proceeding cannot be continued without a representative plaintiff who has a claim against the defendant": *Farquhar v. Liberty Mutual Insurance Co*., 2004 CanLII 28727 (SCJ).

[82] As discussed in part II of these reasons, the relevant clauses in Nordik's insurance policy were the restricted access clause and the negative publicity clause. Turning first to Nordik's claim under the restricted access claim, Aviva contends that the claim is invalid as Nordik cannot show that it suffered any losses from the type of restricted access covered by the policy. Counsel for Aviva points out, correctly, that no government order ever restricted access to Nordik's business premises, as Nordik was throughout the pandemic classified as an essential business that was exempt from the restrictions imposed under O. Reg. 42/20 of March 23, 2020.

[83] Nordik's counsel responds by pointing out, also correctly, that the preamble to the Ontario regulation is important in that it told all businesses to put in place infectious disease safety measures. Counsel for Nordik submits that despite being characterized as an essential business that was permitted to keep its place of business open, Nordik was "nevertheless required to operate in accordance with the recommendations and instructions of public health authorities. That included controlling access to premises so as to maintain social distancing": *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, 2020 ONSC 7397, at para 226.

[84] Since the admonition to act safely in light of the pandemic was contained in the preamble rather than the operative part of the government order, Aviva's counsel discounts it as a source of obligation imposed on Nordik. On the other hand, Nordik's counsel contextualizes the preambular language and reads it as mandatory.

[85] Other "essential businesses" similar to Nordik have been held to have operated under legally mandated restrictions notwithstanding that they were formally exempted from the government's lockdown order. They operated under a legally enforceable "obligation to keep its employees and customers safe. Operating exactly as it had before the pandemic would not have done so and would have exposed [it] to the risk of legal liability": *Ibid*. Nordik's senior process engineer, Ralph Mitton, has deposed that it took roughly 6 weeks to physically reconfigure the Nordik manufacturing facility to comply with social distancing.

[86] Thomas Noel, Nordik's Director of Corporate Affairs and Human Resources, has deposed that on March 16, 2020, approximately half of Nordik's customer orders were cancelled due to pandemic concerns. Aviva's counsel says that this is hearsay that comes from C and C rather than from Nordik's own records, but I see no reason not to admit this form of what may technically be hearsay. Nordik and its affiliate share their business premises and share information; I would admit the Noel statement and, frankly, not discount its weight due to its being hearsay. It is from an insider source in terms of the Nordik corporate family, and is both reliable and credible.

[87] Counsel for Aviva more generally expresses some skepticism that the Ontario lockdown order was the real cause of Nordik's closing and the losses it says it incurred during the first four months of the pandemic. He notes that in cross-examination, Mr. Noel said that he was not aware of the preamble to the Ontario government order on which Nordik now relies. Aviva's counsel flags this admission as demonstrating that Nordik's argument is really a lawyers' construct, and does not reflect Nordik's real thinking.

[88] Frankly, I do not understand this aspect of Aviva's argument. If it was not the COVID-19 lockdown that caused Nordik's losses during the first four months of the pandemic, what would have caused those losses?

[89] Moreover, the fact that a management employee at Nordik was unaware of the preambular language of the lockdown regulation does not mean that he was unaware of the policy it contained. The society-wide need to put in place social distancing and other disease-protective measures manifested everywhere. Only the most reclusive would not have been cognizant of the public health imperative that had taken hold of society.

[90] The cross-examination question put to Mr. Noel was, in my view, too clever by half. Considering the circumstances in the spring of 2020, "proving" that a deponent does not know the specific terms of O. Reg. 42/20 is akin to proving that a deponent does not know the specific terms of subsections 146(2) and (4) of the *Highway Traffic Act*, RSO 1990, c. H.8 – i.e. the traffic light sections that require drivers to stop on red and go on green. Almost no one is aware of the legislative measures, but virtually everyone is aware of their content.

[91] In the supporting affidavits contained in its Motion Record, Nordik has related in some detail the effect that COVID-19 and associated public health requirements and accommodations had on its business. In 2019, it employed 185 people and generated approximately $41.7 million in annual revenue. In 2020, its business premises were closed for some four months due to public health directives, as described above. A decline in revenues naturally ensued.

[92] Exacerbating the problem was that Nordik's affiliated retail arm, C and C, was declared non-essential when the Ontario government amended its closure order on April 4, 2020. Affidavit evidence indicates that the reduced demand for Nordik's products that resulted from C and C's closure coincided with Nordik's own temporary closure due to its inability to procure masks for employees and the need to reconfigure its facility to allow for social distancing. Nordik, along with C and C, estimates that its total estimated business interruption loss caused by the first lockdown was over $1.5 million.

[93] Although there was never a reported case of COVID-19 in Nordik's workplace, there were certainly reported cases within a 25-kilometre radius of its workplace (as there was in virtually all urban areas of the province). Counsel for Nordik submit that this would have triggered the negative publicity clause in Nordik's policy.

[94] Despite all of that, it is fair to say that Aviva's counsels' skepticism about Nordik's claim of loss is not entirely unfounded. In its record, Nordik has not proved its losses in the way it will have to ultimately do at trial. There are still some questions around distinguishing Nordik's losses from C and C's losses. There is also an important question about whether Nordik recovered its initial losses during the latter half of 2020 and 2021, when the pandemic arguably caused an upturn rather than a downturn in its business. In addition, there is a question to be addressed as to whether losses resulted from the lockdown of others, but after the first few months not of Nordik itself, are covered by the insurance policies in issue.

[95] Cogent and interesting as some of these questions might be, all of these challenges to Nordik's claim are for another day. In responding to a summary judgment motion under Rule 20.01(3) of the *Rules of Civil Procedure*, Nordik does not have to definitively prove its case; rather, it has to show that there is a genuine issue requiring a trial. Nordik has certainly passed that test here. The issue of Nordik's losses is contentious, but on the record before me neither side has a definitive answer.

[96] It has often been said that summary judgment should not be granted in a class action where the motion requires answering some of the very questions posed by the common issues: *Patel v. Groupon Inc.*, 2012 ONSC 1799, at para 5. The courts have previously held that in a motion such

as the one brought by Aviva, it is necessary to consider "whether the motion will do little more than resolve the particular claim of the plaintiff without affecting the claims of other class members that might succeed even if the plaintiff's individual claim failed and…whether the motion raises discrete issues of law that potentially affect the claims of class members": *Singh v. RBC Insurance Agency Ltd.*, 2020 ONSC 182, at para 28.

[97] All of which leads me to the conclusion that Aviva's summary judgment motion is not well founded. In general, summary judgment motions against representative plaintiffs should be limited to those that do not raise the common issues. Summary judgment should not pre-empt consideration of the common issues: *Moyes v. Fortune Financial Corp.,* [2001] OJ No 4455 (SCJ); *McKenna v. Gammon Gold Inc*., 2009 CanLII 66994 (SCJ).

[98] More specifically, Aviva has not demonstrated that Nordik's claim presents no genuine issue requiring a trial. The contentious nature of some of the issues raised by Aviva seem to call out for a full trial.

[99] In these circumstances, summary judgment is not a "proportional [procedure] tailored to the needs of the particular case" and does not provide "a process that allows the judge to make the necessary findings of fact, apply the law to those facts": *Hryniak v. Mauldin*, [2014] 1 SCR 87, at paras 2, 3. In order to answer the questions raised on the motion, the case must be permitted to proceed, at the very least, to a common issues trial.

[100] Nordik has established on the record that it is a suitable representative plaintiff.

IV. Motion to add new representative plaintiffs

[101] Nordik's motion to add three new representative plaintiffs has been brought, at least in part, as a reaction to Aviva's summary judgment motion. In the event that Aviva were to be successful in having Nordik's claim dismissed, the motion to add plaintiffs forms a backup plan for the class action. Since I have determined that Aviva's motion will not be successful, the motion to add new plaintiffs becomes less critical. Nevertheless, it is before me and needs to be decided in its own right.

[102] The newly proposed plaintiffs and their claims have already been described in part II above. In a motion of this nature, the court does not scrutinize the proposed plaintiffs' claim in depth, but rather satisfies itself that the claim is framed as a proper cause of action and is not vexatious or legally implausible: *Brown v Procom Consultants Group Ltd.*, 2021 ONSC 4185, para 5.

[103] C and C, Hangar9, and RFRK all have recognizable and viable causes of action against Aviva. The new plaintiffs here all raise the same common issues as Nordik raises, and, on the basis of the evidence before me, appear to be equally capable of instructing counsel and representing the rest of the class.

[104] C and C is closely aligned with Nordik and shares many of its attributes. The one significant distinction is that it was not an "essential business" and so the lockdown order unquestionably

applied to it. This distinction makes it even less open to challenge as representative plaintiff than Nordik itself.

[105] The record establishes that in March 2020 there were increasing reports of COVID-19 in the Ottawa area. There is also evidence that a 25-kilometre radius around C and C's shared premises with Nordik would encompass much of the City of Ottawa, including Maplewood Retirement Community where there were numerous reported cases of COVID-19. On May 15, 2020, C and C, together with Nordik, submitted a notice of claim for business interruption losses, which Aviva denied on June 1, 2020.

[106] As for Hangar9 and RFRK, I see no reason not to allow them to join this action as representative plaintiffs. Hangar9 submitted a formal claim for business interruption losses, which Aviva denied on June 16, 2020. A month later, on July 16, 2020, Hangar9 commenced an action against Aviva for coverage under its policy. It subsequently decided to pursue its claim as part of this proposed class action.

[107] As for RFRK, the record establishes that during the first two weeks of March 2020, there was a daily increase in the number of reported cases of COVID-19 in Toronto. A 25-kilometre radius around RFRK's place of business would encompass the entire City of Toronto. RFRK submitted a notice of claim for business interruption losses on March 24, 2020, which Aviva denied on May 22, 2020. On July 7, 2020, RFRK commenced a proposed class action, but subsequently decided to pursue its claim as part of Nordik's class action. As previously indicated, RFRK's proposed class action was stayed as part of the carriage decision.

[108] In addition to its other challenges, Aviva submits that the filing of a proposed class action by Nordik did not toll the limitation period for C and C, Hangar9, and RFRK since Nordik itself does not have a viable claim. If Aviva were correct on that point, C and C would be out of time. Hangar9 and RFRK might still have an argument that their original claims, which were filed in a timely fashion, can still be resurrected. But I need not decide that here, given my determination that Nordik indeed does have a claim which survives a summary judgment motion.

[109] Accordingly, the limitation tolling point is not relevant to the question of whether the three proposed new plaintiffs are qualified to assume that role. That said, the question of whether the limitation period would be tolled if Nordik were eliminated as representative plaintiff will be explored more fully in part V below.

[110] C and C, Hangar9, and RFRK are credible representative plaintiffs with no apparent conflict with other class members. They will be new representative plaintiffs, joining Nordik in that capacity. The style of cause will change to reflect these additions. Otherwise, certification, and the action more generally, will proceed as a matter of course.

V. Aviva's limitation tolling motion

[111] Section 28(1) of the *CPA* provides that, "Any limitation period applicable to a cause of action asserted in a proceeding under this Act is suspended in favour of a class member on the

commencement of the proceeding…" Nordik issued its initial Statement of Claim on July 3, 2020. On that date, the limitation period was tolled for all class members.

[112] As discussed above in part III (b), it is Nordik's view that the issuance of the claim also constituted any notice of claim that insureds were required to bring pursuant to their insurance policies. It is Aviva's view that notice is a fundamental requirement of insurance law, and that the *CPA* is a strictly procedural statute which cannot alter the substantive rights of the parties.

[113] Aviva's limitation tolling motion specifically seeks a declaration that:

> (i) section 28 of the *Class Proceedings Act*, 1992, SO 1992, c 6 (the '*CPA*') does not toll the requirement for insureds to give written notice of their insurance claims to Aviva, as asserted by the plaintiff, Nordik Windows Inc. ('Nordik');
>
> (ii) section 28 of the *CPA* does not toll the limitation period for insureds who have not, as required, given notice of their insurance claim to Aviva; and
>
> (iii) section 28 of the *CPA* is inapplicable and does not operate to toll the limitation period where the proposed representative plaintiff does not have a viable claim or otherwise does not satisfy the requirements of section 5(1)(e) of the *CPA*;

[114] Points (i) and (ii) above address the same question: does a policyholder lose its right to coverage if it does not submit a notice of claim in a timely fashion or at all? As discussed in part II (b) herein, the courts have left this question in a somewhat ambiguous state. The Court of Appeal has twice indicated that an insured has a claim the moment it submits a notice of claim: *Markel*, *supra*, at para 27; *Schmitz*, *supra*, at para 20. But these cases arose in the context of policyholders who submitted a claim and insurers who failed to respond; the court in both instances held that the policyholders' rights commenced the moment the claim was submitted. However, the cases did not address the situation of whether, or under what conditions, a policyholder might have enforceable rights despite not submitting a notice of claim at all.

[115] On the other side of the coin, the Court of Appeal has also confirmed that mentioning a claim in a pleading suffices to toll any limitation period, a logic that would also apply to suspending the requirement of submitting a notice of claim to an insurer: *Coulson*, *supra*, at para 49. The Court has gone so far as to say that once a valid cause of action is asserted in a class action the notice requirement may be satisfied, although, again, the context may make a difference since the pronouncement was made in a secondary market misrepresentation case to the effect that an application for leave to commence an action does not constitute notice: *Sharma v Timminco Limited*, 2012 ONCA 107, at para 18.

[116] In short, all of this case law must be analyzed and the answer worked out with a full factual record at the court's disposal. The failure to give notice may be a technical breach, but it is the context that gives it meaning: *Dams*, *supra*, at para 20. That record will be available to the court in the context of the common issues trial. As already indicated in part III (c) herein, the very question asked by points (i) and (ii) of Aviva's limitation tolling motion is asked by common issue 13.

[117] Aviva's motion, in effect, pre-empts the common issues trial, and for that reason alone should not be answered at this stage. As Justice Strathy stated in *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146, at para 10, the general principle governing class action procedure is that certification motions come before motions which address one, but not all, of the certification issues. Given that the question asked in points (i) and (ii) of Aviva's motion are the same as that asked by one of the common issues, the appropriate procedural approach is to defer those points to the judge hearing the common issues trial.

[118] Point (iii) of Aviva's motion is likewise not to be answered here, but for reasons of mootness rather than deferral. This request for a declaration asks, in effect, whether the removal of Nordik as representative plaintiff will eliminate the tolling of the limitation period for all of the class members, thereby rendering the entire action limitation barred regardless of whether there are new representative plaintiffs waiting in the wings. Counsel for Aviva stresses that this is the position espoused in *Green v. Canadian Imperial Bank of Commerce* (2014), 118 OR (3d) 641, at para 51, where the Court of Appeal indicated that "the assertion of a cause of action must be premised on the existence of a 'right of action'".

[119] It would be a plausible retort by Nordik's counsel to say that RFRK's initial class action, which was stayed with its merger into the Nordik action, can now be resurrected with its own starting date in tow. After all, the RFRK claim was, like Nordik's until now, a proposed class action that, even before certification and from the moment it was launched, tolled the limitation period pursuant to section 28(1) of the *CPA*. If the stay were to be lifted, the NFRK class action would presumably proceed as if it had never detoured off course. The rights that it initially preserved by operation of section 28(1) would, as a matter of logical argument, continue to be preserved.

[120] For better or worse, I do not have to decide that point. It was not argued before me and, given my other conclusions herein, does not arise. Nordik is a proper representative plaintiff, and the tolling effect of its issuing a Statement of Claim in July 2020 is preserved.

[121] While RFRK and the other new plaintiffs will now be added as representative plaintiffs along with Nordik, they will effectively be window dressing. The action will continue with four representative plaintiffs instead of one, but all four will pursue the same cause and embody the same rights for the class.

[122] Having decided Aviva's summary judgment motion in Nordik's favour, there is nothing left to decide on the limitation tolling motion. Nordik, as the original representative plaintiff in this action, is not going anywhere.

VI. Disposition

[123] The action is certified under the *CPA*. Nordik is representative plaintiff; C and C, Hangar9, and RFRK are also added as representative plaintiffs with the style of cause being amended accordingly. Plaintiff's counsel herein are appointed as class counsel.

[124] The class is as defined in paragraph 32 above.

[125] The common issues are as listed in Schedule ‘A’ hereto.

[126] Aviva’s summary judgment and litigation tolling motions are both dismissed.

[127] The parties and counsel are encouraged to discuss costs with each other and to make best efforts to reach an agreement. If they are unable to agree on the appropriate cost award, they may send brief written submissions by email to my assistant – Nordik within 3 weeks of today and Aviva within 3 weeks thereafter.

_____

Date: March 22, 2023 **Morgan J.**

SCHEDULE 'A'

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?

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, do any exclusions apply?

9. Have the defendants breached any duty of good faith to the Class Members, and, if so, does that have any impact on the defendants' ability to rely on any statutory or policy-based limitation periods or other conditions?

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?

12. Is the Class entitled to an award of punitive damages?

13. Is giving notice a necessary prerequisite to commencing a claim or being entitled to coverage under Class Members' policies?

> a. if so, did Aviva anticipatorily breach and/or repudiate the policies, through a blanket denial of coverage or otherwise, such that Class Members are not required to give notice prior to commencing a claim?
>
> b. if not, does commencement of this action satisfy the nice requirement under each Class Member's policy?