

Court File No.: CV-24-00728023-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

NORDIK WINDOWS INC., CASH AND CARRY INC.,
HANGAR9 STUDIO INC. AND REAL FOOD FOR REAL KIDS INC.

Plaintiffs

- and -

~~AVIVA INSURANCE COMPANY OF CANADA, AVIVA GENERAL INSURANCE COMPANY
AND AVIVA CANADA INC.~~

Defendants

Court File No.: CV-24-00729948-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

THE ROYAL CANADIAN LEGION, VICTORY BRANCH #317

Plaintiff

- and -

AVIVA INSURANCE COMPANY OF CANADA

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

MATT McCALLUM,
MATT McCALLUM DETURIST PROFESSIONAL CORPORATION

Plaintiffs

- and -

AVIVA INSURANCE COMPANY OF CANADA

Defendant

CONSOLIDATED STATEMENT OF DEFENCE

1. The defendant, Aviva Insurance Company of Canada (“**Aviva**”), denies each and every allegation, unless expressly admitted herein, in (a) the Fifth Fresh as Amended Statement of Claim issued by Nordik Windows Inc., Cash and Carry Inc., Hangar9 Studio Inc. and Real Food for Real Kids Inc. (the “**Nordik Action**”); (b) the Amended Fresh as Amended Statement of Claim issued by The Royal Canadian Legion, Victory Branch #317 (the “**Legion Action**”); and (c) the Amended Fresh as Amended Statement of Claim commenced by Matt McCallum and Matt McCallum Denturist Professional Corporation (the “**McCallum Action**”, and together with the Nordik Action and the Legion Action, the “**Actions**”). Aviva denies that the plaintiffs and class members in the Actions are entitled to any of the relief claimed.
2. Capitalized terms not defined herein have the meanings ascribed to them in the policies.
3. Aviva denies there is coverage under the commercial property insurance policies and business interruption extensions for the losses alleged in the Actions and puts the plaintiffs and, if and where appropriate, the class members, to the strict proof thereof. Aviva pleads and relies on all the terms, conditions, exclusions and limitations in the policies, which must be read as a whole.

4. Aviva denies there is coverage under the standard supplemental business interruption clause as alleged in the Nordik Action and, with respect to all Actions, denies that there is coverage under the restricted access or negative publicity clauses contained in the standard supplemental business interruption extensions. The Aviva commercial property insurance policies for business customers and the supplemental business interruption extensions at issue were not triggered by the indirect impacts of a global pandemic or by generalized province-wide shutdown orders on Canadian businesses resulting from the global COVID-19 pandemic and do not provide coverage for the alleged pandemic-related losses.

5. Aviva denies having breached any of the contractual obligations it owed its policyholders and puts the plaintiffs to the strict proof thereof. In response to the Nordik Action, Aviva also denies having breached any of the statutory and common law obligations it owed its policyholders and puts the Nordik Action plaintiffs to the strict proof thereof. At all material times, Aviva acted honestly and in good faith in keeping with its duties as an insurer.

No Coverage under the Standard Supplemental Business Interruption Clause

6. The plaintiffs' commercial property insurance policies cover the insured for all risks of direct physical loss of or damage to insured property by insured perils, subject to the policies' terms and exclusions. The policies' base coverage reimburses the insured for the cost of repairing or replacing insured property damaged by insured perils but does not insure business interruption losses.

7. Business interruption coverage is an extension that is supplemental to the commercial property insurance policies' base coverage and operates in conjunction with and is dependent on the base coverage.

8. Business interruption cover is provided as supplemental coverage to Aviva's commercial property insurance policies and indemnifies 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' during the policy period". "Damage" means the "direct physical loss of or damage to property at the 'premises' from an insured peril." Business interruption that is not caused by direct physical loss or damage to property is not covered.

9. A claim for the actual loss of business income is subject to the waiting period, typically 24 hours, and maximum indemnity period, typically 12 months, as set out in the Policy Declarations.

10. Aviva denies that there is business interruption cover under the standard supplemental business interruption clause alleged in the Nordik Action and relies on, among other things, the decisions of the Ontario Superior Court of Justice (Commercial List) and the Court of Appeal for Ontario in *Workman Optometry Professional Corporation et al v. Certas Home and Auto Insurance Company et al*, 2023 ONSC 3356 (CanLII), affirmed 2024 ONCA 479 (CanLII) (the “**Workman Action**”).

11. The business interruption cover under the standard supplemental business interruption clause in the Aviva policies at issue in the Actions is the same or substantially the same as the coverages considered in the Workman Action.

12. As determined in the Workman Action, neither the actual nor suspected presence of COVID-19 at an insured premises (which is not admitted in the Actions) nor the civil authority orders relied on by the plaintiffs constitute “physical loss of or damage to property” within the meaning of the insuring language in the policies.

No Coverage under the Restricted Access Clause

13. There is also no coverage under the “restricted access” clause (the “**RA Clause**”) in the supplemental business interruption extensions for the losses alleged by the plaintiffs.

14. The form of RA Clause generally provides:

- a. **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:**
 - i. by direct physical loss or damage to any property in the vicinity of the "premises" and such loss or damage is directly caused by an insured peril;
 - ii. **(a) by order of civil authority resulting from any of the following occurrences:**
 - (1) food or drink poisoning;
 - (2) **an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities;**
 - (3) defective sanitation or drains; or

(4) murder or suicide.

(b) There is no coverage for loss of "business income" during the first 24 consecutive hours of such interruption by order of civil authority.

- b. This coverage does not apply to loss of "business income" due directly or indirectly to any interruption of "utility services".
- c. This coverage is limited to the time period shown on the "Policy Declarations".

15. The RA Clause has a typical maximum indemnity period of 30 days or as otherwise outlined the Policy Declarations, and there is no coverage for loss of business income during the first 24 consecutive hours of any interruption of the business by order of civil authority restricting ingress to or egress from the premises.

16. There is no coverage under the RA Clause for the losses alleged by the plaintiffs because, among other things:

- (a) the orders of civil authority relied upon by the plaintiffs in the Actions did not restrict ingress to or egress from, or prohibit access to, the plaintiffs' and class members' premises, in whole or in part. At all material times, the plaintiffs' and class members' and others' ingress to and egress from the premises was not restricted;
- (b) certain of the restrictions relied upon by the plaintiffs in the Actions are not orders of civil authority;
- (c) the orders of civil authority relied upon by the plaintiffs in the Actions applied only to deemed non-essential businesses and were inapplicable to many of the class members;
- (d) class members that were classified as essential businesses were not subject to the orders of civil authority and are not entitled to coverage on the grounds that they were unable to follow the advice of public health authorities. If essential businesses closed due to such alleged advice, they failed to mitigate their losses (for example, Nordik Windows Inc.'s alternative pleading at paragraphs 37 to 39 of the Nordik Action that it was unable to manufacture due to advice from public health authorities is both denied and shows a failure to mitigate damages by achieving compliance);

- (e) outbreaks of COVID-19 were not required by law to be reported by the plaintiffs and class members to government authorities and the plaintiffs and class members did not report any outbreaks of COVID-19 to government authorities;
- (f) the orders of civil authority relied upon by the plaintiffs in the Actions did not result from an outbreak of a contagious or infectious disease that was required by law to be reported to government authorities. Rather the provincial orders were made in response to a global pandemic; and
- (g) the intent and purpose of the RA Clause was to provide coverage for local occurrences or events, not global pandemics.

17. In the alternative, if there is coverage under the RA Clause for an order of civil authority, which is denied, the plaintiffs and class members may not claim periods of indemnity for successive orders of civil authority.

No Coverage under the Negative Publicity Clause

18. There is also no coverage under the “negative publicity” clause (the “**NP Clause**”) in the supplemental business interruption extensions for the losses alleged by the plaintiffs.

19. The form of NP Clause generally provides:

- a. **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:**
 - i. poisoning of any person directly caused by the consumption of food or drink provided by the Insured at the "premises";
 - ii. **an outbreak of a contagious or infectious disease within 25 kilometres [or such other distance as specified] of the "premises" that is required by law to be reported to government authorities;**
 - iii. violent acts occurring at the "premises" such as murder, suicide, sexual assault, aggravated assault or robbery;
 - iv. an illegal discharge of a firearm at the "premises"; or
 - v. an escape or release of any substance or odour produced by or originating from air quality or water control equipment that causes bodily injury or sickness.
- b. For the purpose of this coverage only, occurrences listed in a. i. through v. will be deemed loss resulting from "damage".
- c. This coverage is limited to the time period shown on the "Policy Declarations".

20. The NP Clause has a typical maximum indemnity period of 30 days or as otherwise outlined the Policy Declarations.

21. There is no coverage under the NP Clause for the losses alleged by the plaintiffs because, among other things:

- (a) outbreaks of COVID-19 were not required by law to be reported by the plaintiffs and class members to government authorities and the plaintiffs and class members did not report any outbreaks of COVID-19 to government authorities;
- (b) outbreaks of COVID-19 did not result in negative publicity to the plaintiffs' or class members' premises (for example, contrary to paragraphs 35 to 39 (in respect of Cash And Carry Inc.) and paragraphs 53 to 55 (in respect of Real Food for Real Kids Inc.) of the Nordik Action, the NP clause does not provide coverage *en masse* for economic losses caused by a global pandemic that is unrelated to the insureds' businesses);
- (c) the losses alleged by the plaintiffs were not caused by an outbreak(s) of a contagious or infectious disease within the specified radius from the insured premises that was required to be reported to government authorities (for example, the policies in the McCallum Action involve a 1-kilometre radius for the NP clause, and there were no reported COVID-19 cases within 1 kilometre of the insured's business when the orders of civil authority were issued);
- (d) for certain class members, there was no outbreak of a contagious or infectious disease at or within the specified radius of the insured's premises; and
- (e) the intent and purpose of the NP Clause was to provide coverage for local occurrences or events that cause negative publicity to an insured's premises, not coverage for global pandemics.

22. In the alternative, if there is coverage under the NP Clause for an outbreak, which is denied, the plaintiffs and class members may not claim periods of indemnity for successive outbreaks.

Aviva did not Adopt a Company-wide Policy

23. Aviva did not, as alleged, adopt a company-wide policy that its insurance policies did not cover losses relating to the COVID-19 pandemic.

24. Aviva denies, as alleged in the Nordik Action, that it failed to fairly evaluate pandemic-related business interruption claims, that it preemptively and improperly denied coverage for such claims, or that it preemptively or improperly communicated the alleged company-wide policy to brokers or insureds for the purpose of dissuading the making of insurance claims.

25. Aviva properly evaluated all pandemic-related business interruption claims and Aviva accepted and paid out claims for which there was coverage.

The Plaintiffs and Class Members did not Obtain Coverage for Pandemic-related Risks

26. Consistent with the foregoing, the plaintiffs and class members did not solicit, obtain quotes for or purchase coverage for pandemic-related risks from Aviva or any other insurer.

27. Aviva did not charge or receive premiums and insureds did not pay premiums for business interruption losses caused by global pandemics, nor was such coverage contemplated in the assessment of risk and insuring cost in determining and allocating costs and premiums for the commercial property insurance policies and business interruption extensions issued by Aviva.

28. Aviva calculates and sets premiums through actuarial modelling of the cost of paying and administering future claims and considering historical losses, inflation, incurred but not reported losses, and future anticipated claims patterns, including potential catastrophic losses. At no point has the cost of claims caused by or arising from global pandemics been included in Aviva's actuarial modelling and, therefore, such claims have not been factored into the premiums charged by Aviva or paid by Aviva's policyholders.

29. Aviva has also never considered, weighed or factored in pandemic risk (such as that represented by the within claims) in any actuarial or other reports filed with Canadian insurance or financial regulators, nor included pandemic risk in other capital impairment, solvency or risk assessments and reports.

30. Aviva did not market, promote or sell through brokers, or directly to insureds, insurance policies with RA or NP Clauses as providing coverage for business interruption losses caused by global pandemics.

31. The plaintiffs and class members obtained their coverage through commercial insurance brokers who had the obligation to advise them on their insurance needs and available coverage.

32. If the plaintiffs and class members had wished to purchase coverage for pandemic-related risk, such coverage may have been available to them (and their brokers) for purchase in the marketplace, albeit at significantly higher premiums, from insurers other than Aviva (which did not provide pandemic coverage in general commercial property policies). The plaintiffs seek a windfall by seeking the benefit of such coverage, even though they did not obtain it.

In the Alternative, the Exclusions Bar Coverage

33. In any event, the commercial property policies contain express exclusions of coverage for the losses alleged by the plaintiffs.

34. Aviva relies on the exclusions in the commercial property policies including but not limited to: (i) change in texture, finish or contamination, (ii) delay, loss of market, or loss of use or occupancy, and (iii) by-laws and zoning.

35. Aviva also relies on the exclusions in the supplemental business interruption extensions which exclude any loss of "business income" or extra expense for, among other things: (i) idle period, (ii) fines and damages, (iii) cancellation of contract, and (iv) by-laws and zoning.

36. Aviva further relies on the contagious disease exclusion in the commercial property policies and states that, starting with policy renewals as of July 1, 2020 and subsequently for the issuance of new policies after January 1, 2021, all policies included a contagious disease exclusion that confirmed that there is no coverage for any claim, loss or damage that is caused by or arises from, among other things, COVID-19.

Class Member Losses, if any, were Not Caused by Events Covered by the Policies

37. Aviva denies that it is liable to the plaintiffs and class members for any of the alleged losses. Aviva denies that the plaintiffs and class members suffered any losses and puts the plaintiffs and class members to the strict proof thereof.

38. Aviva pleads that if the plaintiffs and class members suffered any losses as alleged in the Actions, which is not admitted but specifically denied, then such losses were caused by events and circumstances for which Aviva is not responsible under the policies or in law, including but not limited to losses resulting from or relating to the generalized impacts and consequences of the COVID-19 pandemic.

Class Members Failed to Mitigate any Losses, which are Excessive and Remote

39. If the plaintiffs and class members suffered any losses for which they have coverage under the policies, which is not admitted but specifically denied, the plaintiffs and class members have failed to take reasonable, prudent, or proper steps to mitigate any losses, and the alleged losses are excessive and/or remote. Aviva puts the plaintiffs and class members to the strict proof thereof.

40. Among other things, the plaintiffs and class members were obliged to mitigate any losses by seeking grants, subsidies and other financial support, including from: the Ontario Trillium Foundation, the Veterans Organizations Emergency Support Fund, the Canada Emergency Wage Subsidy, the Canada Emergency Rent Subsidy, and the Tourism and Hospital Recovery Program (collectively, the "**Subsidies**").

41. Pursuant to the terms of the policies and at common law, amounts received, or claimable, by the plaintiffs and class members from the Subsidies are deductible from any losses. Without limiting the foregoing, the policies' measure of recovery provisions require that recoveries be reduced by the insured's expenses that cease or are reduced during the indemnity period.

42. The measure of recovery provisions are consistent with the fundamental principle of indemnity and ensure that policyholders are indemnified for their actual business income losses, and not indemnified for business expenditures that are unnecessary, discontinued, or saved during the period of business interruption.

43. Amounts received, or claimable, by the plaintiffs and the class members from the Subsidiaries are deductible from any losses under the doctrine of subrogation, which applies in respect of every contract of indemnity.

44. As a further example, Nordik Windows Inc. is not entitled to recovery for losses due to a decision to cease manufacturing, despite being an essential business, due to its retail arm not being an essential business. If it had maintained its production levels it would not have incurred losses.

45. The plaintiffs are also not entitled to losses representing concurrent or overlapping recovery under the RA and NP Clauses.

The Nordik Plaintiffs and Class Members are not Entitled to Punitive Damages

46. There is no basis for the Nordik Action plaintiffs' claim for an award of punitive damages. Aviva acted in accordance with its duty of good faith at all times, including in the assessment of the plaintiffs' and class members' claims.

The Claims of Class Members that did not Timely Submit Insurance Claims are Limitations Barred

47. Any class members that did not submit insurance claims to Aviva within the applicable limitation period, which includes the vast majority of Nordik Action class members, are limitations barred.

48. Pursuant to the terms of the policies, "upon the occurrence of any loss of or damage to the insured property, the Insured shall, if the loss or damage is covered by the contract...immediately give notice thereof in writing to the Insurer; ii. deliver as soon as practicable to the Insurer a proof of loss verified by statutory declaration".

49. The policies also include limitation periods for the commencement of an action. In Ontario, the policies include a one-year limitation period: "Every action or proceeding against the Insurer for the recovery of any claim shall be absolutely barred unless commenced within one year after the loss or damage occurs, unless legislation provides otherwise."

50. The class members that did not give written notice of an insurance claim to Aviva within one year of the loss or damage (if in Ontario), or the applicable limitation period as set out in

the applicable policy, do not have a cause of action against Aviva and any claims are limitations barred.

51. 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, or otherwise toll the limitation period for insureds that have not, as required, given notice of their insurance claim to Aviva.

52. Aviva denies that it anticipatorily breached and/or repudiated the policies as alleged by the Nordik Action plaintiffs and denies that any such breach or repudiation, which is not admitted but expressly denied, waived the requirement for class members to submit an insurance claim to Aviva.

53. Aviva denies that the commencement of the Nordik Action satisfies the notice requirement under the policies.

54. Aviva further denies that any of the plaintiffs and class members are entitled to relief from forfeiture for any alleged non-compliance or imperfect compliance with the terms of the policies, whether pursuant to the *Insurance Act*, RSO 1990, c I.8 (the “**Insurance Act**”), the *Courts of Justice Act*, RSO 1990 c C. 43, applicable legislation in any other province, or otherwise.

55. Aviva pleads and relies on the provisions of the Insurance Act and comparable legislation in other jurisdictions as applicable to the within claims, the *Limitations Act, 2002*, SO 2002, c 24, Sch B and comparable legislation in other jurisdictions as applicable to the within claims, and the CPA.

56. Aviva asks that the Actions be dismissed with costs.

57. Aviva states that the Actions should be tried together in Toronto.

58. Aviva reserves all rights with respect to its defence, including its right to particularize facts and pleadings in a further amended statement of defence to be delivered at a later date. In particular, Aviva reserves the right to particularize its defences in respect of any individual plaintiff or class member in respect of matters requiring individual trials or determinations that will not be addressed by the common issues trial.

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