CITATION: Nordik Windows Inc. v. Aviva Insurance Co., 2026 ONSC 5875
COURT FILE NO.: CV-20-00643386-00CP
DATE: 20261016

2026 ONSC 5875 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: NORDIK WINDOWS INC., CASH AND CARRY INC., HANGAR9 STUDIO INC., and REAL FOOD FOR REAL KIDS IN, Plaintiffs

– and –

AVIVA INSURANCE COMPANY OF CANADA, Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Rahool P. Agarwal, Crawford G. Smith, Michael A. Currie, Nicole J. Kelly, Alexander T. Mulligan, Chris Paliare, Paul Davis, Robert Ben. Stephen Birman, Lucy Jackson, Chris T. Blom, Sean McGarry*, for the Plaintiffs

*Alan D'Silva, Glenn Zacher, Lesley Mercer, Dan Mur*doch, for the Defendant

Peter Thompson, K.C., for Dr. Tracey Thompson (objector)

HEARD: October 13, 2026

SETTLEMENT, DISTRIBUTION, AND FEE APPROVAL

I. Background to the motion

[1] This motion is for approval of a proposed settlement, the Distribution Protocol for implementing the settlement, class counsel fees, and related orders in this certified class action. The claim relates to the Defendant's denial of business interruption coverage for businesses during the COVID-19 pandemic. The action was commenced on July 3, 2020 and certified on March 22, 2023.

[2] The Plaintiffs are four Ontario businesses who purchased business interruption insurance from the Defendant. The insurance policies in issue cover three types of business interruption coverage: Physical Loss coverage for property damage to the insureds' premises, Restricted Access ("RA") coverage for income loss due to mandatory business closures, and Negative Publicity ("NP") coverage for income loss due to an infectious disease outbreak within 25 kilometres of the insured premises.

[3] The class includes purchasers of business interruption policies from the Defendant that were in force from March 1, 2020, to August 31, 2021. It is a national class that, for the purposes of the proposed settlement, includes class members in parallel actions against the Defendant in Quebec [Quebec Superior Court File No. 500-06-001091-202] and British Columbia [B.C.

Supreme Court File No. VLCS-S-209189]. The class is estimated to include some 49,000 policyholders, of which approximately 3,600 class members provided notice of their claims (the "Notice Class Members"). The Defendant has confirmed that of the 3,600 Notice Class Members, 2,162 have RA or NP coverage.

[4] After five years of hard-fought litigation, the action was scheduled to go to a common issues trial in January 2026. In June, July, and August 2025, the parties attended mediation before the Honourable George Strathy where they reached a tentative settlement; and on March 9, 2026, the parties executed a Settlement Agreement to resolve all claims on a national basis.

II. The proposed settlement

[5] Section 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a proposed settlement, the court must find that the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366, at para. 57 (SCJ).

[6] In *Mancinelli v Royal Bank of Canada*, 2016 ONSC 6953, at para. 30, Justice Perell set out a list of factors that may be considered in making this determination:

> (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.

[7] The Settlement Agreement in issue here provides for a payment of $150 million by the Defendant to settle all claims in relation to this action and the Quebec and B.C. actions. It includes a system for notifying class members of their rights under the Settlement Agreement and contains a claims process for class members that is streamlined to limit the demands on class members.

[8] The investigation of the claim was comprehensive. It had gone through a carriage motion, two full certification hearings, an appeal process, discovery, and trial preparation. Class counsel is of the view that the claim has substantial merit. Nevertheless, they have identified four litigation risks which support the settlement. First, the potential burden of establishing that RA and/or NP coverage was triggered for each class member, including the need to demonstrate a local COVID-19 outbreak and/or an applicable closure order from a civil authority, along with the need to account for the differential treatment of essential and nonessential businesses under government closure orders.

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[9] The second risk entailed the challenge of dealing with the variable formula and factors going into quantifying class members' claims, including the policies' definition of measure of recovery, business income, and indemnity period. In addition, there was a challenge in taking account of accountants' fees, government subsidies, grants, scholarships, and the overall economic impact of COVID-19.

[10] The third factor that class counsel had to consider was that only about 5% of class members provided the Defendant with notice of their insurance claim as required under the *Insurance Act*. The Defendant took the position that class members who failed to provide notice of their claim did not have causes of action and, in any case, were time barred.

[11] The fourth risk factor for the class was that the appeal process for this case, as with any complex case, was lengthy and inevitable. Moreover, each class member may then have needed to participate in individual issues trials to quantify damages after appeals, meaning that class members could be waiting many more years for recovery. A settlement obviates the need for any of that, and removes the uncertain bird in the bush in favor of a present and quantifiable bird in the bush.

[12] The Settlement Agreement is a product of protracted arm's length bargaining by experienced counsel. It was achieved in the wake of thorough investigation, and was arrived at with the aid of a highly experienced mediator. It reflects careful consideration of the merits, costs, and risks of continuing litigation. Class counsel advise that out of a total of 49,000 class members, there were only 9 valid objections received, 4 of which were from people who had failed to give notice of their claim and who sought some form of relief from that situation. Of the remaining 5 objectors, 4 did not show up at the hearing to voice the objections themselves.

[13] One objector attended at the hearing: Mr. Peter Thompson, K.C. on behalf of his daughter, class member Dr. Tracey Thompson. Dr. Thompson is a plastic surgeon in Gatineau, Quebec. She, along with roughly 4% of the class, has a 60-day indemnity period written into her business interruption policy. The balance of the class members have a 30-day indemnity period. The Distribution Protocol calls for each class member to receive payment for 30 days of business losses. Mr. Thompson contends that the arrangement should have the flexibility to compensate those with a valid 60-day claim over and above the standard 30 days.

[14] Although Dr. Thompson did give notice of her claim in a timely fashion, Mr. Thompson also submits that the question of whether it was necessary for all insureds to serve notice of their claim is a certified common issue and so cannot be eliminated by the settlement and thereby remain unanswered. Mr. Thompson also makes a number of other points about what class members truly deserve under their insurance policies with the Defendants, including questioning why class counsel did not demand disclosure by the Defendant of its regulatorily required reserves and insist on payment to class members up to the maximum of that reserve.

[15] Some of Mr. Thompson's arguments are easily answered – for example, a settlement most certainly can leaved the certified common issues unanswered. The whole point of a pre-trial

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settlement is to obviate the need for a trial, while will mean that all of the trial questions will remain unanswered.

[16] On the other hand, Mr. Thompson also makes a number of strong arguments regarding the class members' claims. Mr. Thompson has had a lengthy career as an insurance lawyer, and it shows in the detailed and knowledgeable way he has parsed the precise terms of the insurance policies in issue and has factored in the Defendants' regulatory obligations. I commend him for taking the time and going to the effort of calling the court's attention to matters that require due consideration. Class counsel advise that they have engaged with him extensively over the past year and his input has added value to their dealings with the settlement

[17] What is missing from Mr. Thompson's analysis, however, is an acknowledgment that a settlement is by its very nature a compromise. Class counsel team member Robert Ben explains in a supporting affidavit the fundamental compromise built into the present settlement proposal:

> The $150 million settlement amount represents a substantial proportion of the representative Plaintiffs' valuation for the Notice Class while eliminating the risk that Aviva would succeed one or more of its coverage, limitations, causation, subsidy, indemnity-period, notice, or damages defenses…
>
> In class counsel's view, avoiding the uncertainty, delay, and expense of a six-week common issues trial, appeals, and individual issues determinations represents a highly favourable result for the class.

[18] As the Federal Court has succinctly stated, "Settlements are not perfect; compromise is not easy": *McLean v. Canada*, 2019 FC 1075, at para. 125. In fact, this settlement proposal represents a context in which one can apply the aphorism that 'perfect is the enemy of good'. This is particularly the case given the limitations of the Court's jurisdiction in a settlement approval motion – to either approve the settlement or send the parties back to the negotiating table, but not to impose settlement terms of its own. Seen in this light, several of the points made by Mr. Thompson at the hearing could, if adopted, undermine the settlement, but they could not improve it: *Kidd v. The Canada Life Assurance Company* (2013), 115 OR (3d) 256, at para. 3 (SCJ).

[19] In terms of Mr. Thompson's specific objection to the provision in the Distribution Protocol limiting each class member's recovery to 30 days of lost business income – a limitation which he refers to as a "confiscation" since Dr. Thompson's policy insures her for 60 days of lost business income – it must be recalled that a class action is a collective enterprise. A claim with a class of 49,000 is not litigated, or settled, as 49,000 individual claims simply being heard together for scheduling convenience. There is a collective element to the claim that cannot be overlooked: *Carcillo v. Canadian Hockey League*, 2023 ONSC 886, at para. 231.

[20] The representative Plaintiffs and class counsel have a duty to the class as a whole, not to each and every member individually, and their task in negotiation is to secure the best deal for the class as a whole. Inevitably, it is an exercise in which some claimants will fall short of full recovery so that all of the claimants can optimize their recovery to the extent possible. Those that consider

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the individual sacrifice to be more than they care to contribute to the greater good have the choice of opting out.

[21] I am advised that Dr. Thompson's losses during the first 60 days of the class period were in the range of $500,000. That is a level of claim that would conceivably be cost effective for her to opt out of the class action and to litigate on her own. However, she did not do so; she has chosen to remain in the class. She will therefore experience two things at once as a participant in the proposed settlement: she will recover 30 days' worth of lost business income without having to risk a trial, and she will contribute to the maximization of the class's recovery as a whole by settling for 30 days as opposed to holding out for 60 days.

[22] As indicated, Mr. Thompson has voiced some thoughtful legal arguments in objecting to the settlement. I take them seriously and have considered them carefully. But despite the cogency of some of his comments, on the balance they do not represent a counterweight to the beneficial aspects of the Settlement Agreement. In fact, his strongest arguments seek additional benefits for the class that, absent a trial, cannot be achieved without the Defendant's agreement; and after many months of negotiated give-and-take, it seems unlikely that the Defendants will be in such a giving mood if the settlement implodes because the class demands more.

[23] The agreement as negotiated by the representative Plaintiffs is fair, reasonable, and in the best interests of the class.

III. **Representative Plaintiffs' Honorarium**

[24] The Plaintiffs requests honoraria in the amount of $15,000 for each of the representative Plaintiffs, to be paid from the settlement funds.

[25] As class counsel explains it, each of the four Plaintiffs swore affidavits for the successive motions – carriage, two certifications, and summary judgment. They were each cross-examined multiple times, and were also examined for discovery. Their participation entailed a serious commitment of time and energy.

[26] The representative Plaintiffs were kept fully informed about the progress of the litigation through comprehensive status reports received from class counsel, which were followed up with extensive discussions. I am advised that they each spoke with class counsel many times, asked probing questions, received advice, and provided well informed instructions at every step of the process.

[27] In all, each of the representative Plaintiffs made a significant contribution to the result achieved on behalf of the class. The requested honoraria are in the range of previous honoraria paid to representative Plaintiffs for their efforts. The payments serve as recognition for the Plaintiffs' contribution to the class. It also may encourage others to step forward to fulfill the role of representative Plaintiff.

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[28] In the circumstances, the proposed honoraria are appropriate and should be paid to the representative Plaintiffs from the settlement funds.

IV. Distribution Protocol

[29] The Settlement Administrator, BDO Canada LLP, worked with the representative Plaintiffs and class counsel in fashioning a fair and workable Distribution Protocol for the settlement funds. BDO and class counsel are highly experienced and knowledgeable about distribution protocols and plans of allocation in Canadian class actions.

[30] The Distribution Protocol will achieve a number of important objectives. These include implementing a fair distribution of the settlement funds among eligible class members, and ensuring that the funds are administered in an efficient and effective manner. Class counsel point out that the Distribution Protocol also includes a number of built-in safeguards: a deficiency process allowing class members to cure incomplete claims; an appeal process for those who dispute BDO's calculations; and a final report to class counsel summarizing the administration.

[31] Like the settlement overall, the Distribution Protocol must be fair, reasonable, and in the best interests of the class: *Sheridan Chevrolet v. Valeo S.A.*, 2023 ONSC 1453, at para 9.

[32] I have no reason to doubt that the Distribution Protocol presented here will distribute the settlement funds among eligible class members in a manner consistent with the objectives of class proceedings.

V. Class counsel fees

[33] Class counsel seeks approval of legal fees of $36,000,000 plus HST of $4,680,000, for a total of $40,680,000. This amount is inclusive of $259,068.20 in unreimbursed disbursements and approximately $420,000 for Quebec class counsel fees and disbursements. It also includes the approximately $1.036 million in interlocutory costs that have been awarded to the representative Plaintiffs in the course of this proceeding.

[34] In *Smith v. National Money Mart Company*, 2011 ONCA 233, at para 80, the Court of Appeal confirmed the factors to take into account in determining class counsel fees:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the [page60]class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

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[35] The fees sought here represent 24% of the total settlement amount of $150 million before taxes, or 27% after taxes. This is less than the 27.5% plus HST rate provided for in the retainer between the representative Plaintiffs and class counsel. As in *McKay v. Rowe*, 2024 ONSC 1378, at para 62, "This is a voluntary reduction by class counsel and does not reflect a reduction of the risks, time involved, complexities and result achieved."

[36] Class counsel's requested fee is well within the 15% to 33% contingency fee range that Ontario courts have found presumptively valid: *David v. Loblaw*, 2025 ONSC 2792, at para.42; *Rabbat v. Nadon*, 2025 ONSC 5187, at para. 79. As Justice Strathy observed in *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105, at paras. 66-67:

> Class counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one…
>
> There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee.

[37] Not counting the time for preparing and arguing the present motion, class counsel has invested a total of 12,881.80 hours in this litigation. Their records show that that represents $8,114,554.00 in time value (exclusive of HST). There will doubtless be another several hundred thousand dollars' worth of legal time from this motion to the conclusion of the claims process. Quebec class counsel has also invested approximately $420,000 in fees and disbursements in prosecuting the parallel Quebec class action. Class counsel calculate that the fee being requested here represents a multiplier of approximately 3.9x of the current and anticipated fees.

[38] "The fee of class counsel…should not only reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation": *Abdulrahim v. Air France***,** 2011 ONSC 512, at para. 9. Given the complexity and duration of this litigation, the risks associated with it, and the settlement achieved for the class, the multiplier of 3.9 is fair and reasonable. It is comparable to other class proceedings that have settled on the eve of trial.

VI. Class Proceeding Fund

[39] The Class Proceeding Fund ("CPF") provided an indemnity to the representative Plaintiffs for any adverse costs awarded against them.

[40] In accordance with the CPF's policies and section 10 of O. Reg 771/92, the CPF is entitled to payment of a levy representing 10% of the net settlement amount after payment of legal costs as well as disbursements in the amount of $1,621,641.05. The CPF levy is estimated to come in at $10.2 million. The precise amount of the CPF levy will be finalized at the conclusion of the settlement administration.

[41] CPF support has become a well recognized feature of class action litigation in Ontario, providing coverage for disbursements and adverse costs awards to ensure that representative

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plaintiffs, and often their counsel, do not have to go out of pocket for those expenses: *Dugal v. Manulife Financial Corp*., 2011 ONSC 1785, at para 28. The CPF's financial arrangement with litigants – including its 10% levy on settlements and awards – is the standard against which other third-party funding arrangements are measured: see *Trueman v. Rogers Communications Canada Inc*., 2024 ONSC 5334, at para. 7; *David v. Loblaw*, 2018 ONSC 6469, at para. 13.

[42] The CPF's role in the funding of a case like this is a relatively discreet one. It is that way by design. The CPF is not built to be the designated hitter in the case funding lineup, and it does not exactly swing for the fences on behalf of a plaintiff and class. It is more of a utility infielder, filling gaps in the plaintiff's and class's roster with targeted contributions where necessary. In doing so here, it has not carried the weight of risk on its shoulders that class counsel have carried, but it has done its part for the access to justice goal that class actions embody.

VII. Disposition

[43] The Settlement Agreement, Distribution Protocol, counsel fees, and related orders are hereby approved. There will be Orders to go as submitted by class counsel.

Morgan J.

Date: October 16, 2026

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