

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

NORDIK WINDOWS INC.

and

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

Proceedings under the *Class Proceedings Act, 1992*

Order directing a Rehearing of Certification Motion

This Order directing a re-hearing of this certification motion is subject to the further Direction or Order of the Divisional Court which may vary or vitiate any or all of the following:

1. In this Order I track the language, as set out in large part, in my email to counsel dated December 15, 2021. I refer to the parties as P and D.
2. I began this email by noting that “A certification motion can sometimes become difficult and bumpy but it must never be unfair or seen to be so.”
3. I then advised counsel that “there may well be a genuine *perception* of unfairness relating to this certification because of statements that D says I made during the hearing of the motion.” I set out my concern as follows.
4. P attached D’s leave to appeal factum to their cost submission. D’s leave to appeal factum and related affidavit referred to statements that I had made during the certification hearing, in the context of a discussion about s.5(1)(e), about the judge being a fiduciary or quasi-fiduciary for the class.
5. I do not remember saying this and I was initially of the view that I would never have said any such thing. I know that in the U.S. judges often refer to themselves as fiduciaries or quasi-fiduciaries to absent class members (and thus act in their best interests) on settlement approval hearings, but never on certification motions where no class yet exists and the court’s obligation is to maintain a level playing field. As an experienced class action judge,

I fully understand that if the impugned statements about being a “fiduciary” were made by me in the context of a certification hearing they were not only wrong in law but could well have created a perception of unfairness.

6. After an exchange of correspondence with counsel, I concluded that I may well have made these statements during the course of this particular certification hearing. They were made inadvertently and in error, yes, but it appears that they were made nonetheless.
7. If this was D’s only complaint about procedural unfairness, I would have been content to leave it to Div. Ct. decide whether the erroneous statements alone were enough to raise any perception concerns. However, when coupled with D’s other complaints about procedural unfairness (even if they are all without merit) I am inclined to conclude that the overall risk of perceived unfairness may be real and that in the interests of justice the Nordik Windows certification motion should be re-heard.
8. I therefore order and direct that the Nordik Windows certification decisions dated July 15 and September 10, 2021 be set aside out of an abundance of caution and that the Nordik Windows certification motion be re-heard by Justice Glustein or by a judge that he appoints as soon as counsel can arrange.
9. To be clear, this order directing a rehearing is limited to the Nordik Windows motion for certification. It does not affect or apply to the two Lerner Actions.
10. A word about my jurisdiction to make this Order. I am not *functus* in the Nordik Windows matter. No final certification order has yet been issued. I therefore have jurisdiction, both inherent and also under s. 12 of the *Class Proceedings Act*, to issue this Order in the interests of justice and here more specifically to “ensure [the] fair and expeditious determination” of this certification motion.

Order to go accordingly. I thank counsel for their input and assistance.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Order is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Order may submit a formal Order for original signing, entry and filing when the Court returns to regular operations.

DATE: December 20, 2021