



**ONTARIO
SUPERIOR COURT OF JUSTICE**

E N :

Electronically issued : 08-Jun-2020
Délivré par voie électronique : 08-Jun-2020
London

MATT McCALLUM,
..... CALLUM DENTURIST PROFESSIONAL CORPORATION

Plaintiffs

- and -

AVIVA INSURANCE COMPANY OF CANADA

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiffs' lawyer or, where the plaintiffs does not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 8, 2020

Issued by _____
Local registrar

Address of court office 80 Dundas Street
London ON N6A 6A3

TO: **Aviva Insurance Company of Canada**
10 Aviva Way
Suite #100
Markham, ON L6G 0G1

CLAIM

1. The plaintiffs claim on their own behalf and on behalf of the other members of the Class as described below:

- (a) an order pursuant to the provisions of the *Class Proceeding Act*, 1992 S.O. 1992, c. 6, certifying this action as a class proceeding and appointing the plaintiffs as representative plaintiffs of a class of persons (hereinafter the “Class”) described as follows:

“All persons, natural or corporate, carrying on operations usual to a dentist who were insured by Aviva Insurance Company of Canada (“Aviva”) under a Commercial Insurance Policy issued by Aviva on behalf of the Denturist Association of Ontario, pursuant to the *Denturists and Hearing Aid Specialists Program*, bearing Policy # 81278157, whose businesses were restricted as a result of a mandatory Closure Order made by the Province of Ontario on March 23, 2020, and were denied coverage for Business Income-Actual Loss Sustained (Form 402014-02)”

- (b) a declaration that the loss of business income caused by the mandatory Closure Order (the “Closure Order”) are covered under the Business Income – Actual Loss Sustained (Form 402014-02) issued by the Defendant to Class members;
- (c) payment to the plaintiffs and Class members in accordance with the insurance policy issued by the defendant;
- (d) a declaration that the defendant breached its contract with the plaintiffs and Class members in denying coverage;
- (e) damages for breach of contract in the amount of \$20,000,000.00, including loss of business income and accountants’ fees;
- (f) interest on the aforesaid sum in accordance with the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, or at common law, on a compounded basis or otherwise;

- (g) the costs of this action on a full indemnity basis and, pursuant to s. 26(g) of the *Class Proceeding Act, 1992*, the costs associated with publication of any and all court-ordered notice to the Class and/or costs associated with the administration of any court approved plan of distribution redirecting amounts recovered in the action to Class members; and,
- (h) such further and other relief as the plaintiffs may request and this Honourable Court may deem just and appropriate.

The Parties

2. The plaintiff, Matt McCallum, carries on operations usual to a denturist at the insured premises located at 1221 Dundas Street, Unit #2, London, Ontario, under the business name McCallum Denture Clinic & Implant Solutions, through a professional corporation styled as Matt McCallum Denturist Professional Corporation (hereinafter referred to as the “plaintiffs” or “McCallum”).

3. The defendant, Aviva Insurance Company of Canada (hereinafter “Aviva”), is a corporation having its headquarters in the province of Ontario and carrying on business throughout Canada as property and casualty insurers. At all material times, the plaintiffs and Class members were insured pursuant to a valid policy of insurance issued by Aviva.

The Insurance Policy

4. Specifically, the plaintiffs and Class members were insured pursuant to an insurance policy program underwritten by Aviva as the *Denturists and Hearing Aid Specialists Program*, bearing policy number 81278157, for the policy period starting on January 15, 2020 (“the “Policy”). At all material times, the plaintiffs were insured and were entitled to make a claim under the policy.

5. The Policy provides various coverages for losses suffered during the policy period. The Policy covers, among other things, property damage issues,

general liability and business income losses. The Policy expressly provides for loss of business income coverage, including Restricted Access coverage and accountants fees.

6. The Restricted Access provision provides:

This Form insures the actual loss of “business income” sustained while access to the “premises” is restricted in whole or in part by: ...

- (b) order of civil authority resulting from any of the following occurrences, subject to the waiting period of 24 hours: ...
 - (ii) an outbreak of a contagious or infectious disease that is required by law to be reported to government authorities.

Loss of Business Income / Accountants’ Fees

7. The plaintiffs and Class members understood the insurance they purchased from Aviva included a form of loss of business income coverage triggered by an outbreak of a contagious or infectious disease. The plaintiffs and Class members were insured for losses incurred for a maximum period of four weeks while access to their premises was restricted, due to a forced shut down of their operations, caused by the Closure Order. Further, the plaintiffs and Class members were insured for accountants’ fees for producing particulars or details of their loss under the coverage.

8. On March 17, 2020, the province of Ontario declared a provincial state of emergency to help contain the spread of the COVID-19 outbreak. The province declared that the outbreak of COVID-19, a communicable disease, constituted a danger of major proportions that could result in serious harm to persons. Similar emergency declarations were made across Canada.

9. Diseases of public health significance and communicable diseases, including COVID-19, must be reported to government authorities.

10. On March 23, 2020, pursuant to the Closure Order, the province of Ontario ordered the mandatory closure of all places of non-essential business as of March 24, 2020 to help protect the health and safety of the people of Ontario in response to the COVID-19 outbreak. Under the Closure Order, all denturist places of business were ordered to close (except to the extent that such places of non-essential business provided emergency or urgent services). This Order was subsequently extended.

11. As a result of the outbreak of COVID-19, many businesses, including but not limited to denturists, were declared by the government as non-essential and had to close or restrict their business.

12. The plaintiffs' and Class members' insured properties were affected. On or around March 24, 2020, in accordance with the government's orders due to the COVID-19 outbreak, the plaintiffs and Class members closed their doors to their places of business. Access to and from denturists' places of business was completely restricted by the government ordered shutdown. Denturists could not provide services except for emergency or urgent care. Customers were restricted from attending the premises. As a result, the plaintiffs and Class members sustained a loss of business income.

Denial of Coverage

13. The mandatory shutdown occurred on or about March 24, 2020, such that the maximum four week coverage period has now expired. The plaintiffs subsequently presented a claim to Aviva for loss of business income insurance, in accordance with the Policy.

14. Aviva has denied coverage to the plaintiffs, despite the fact that the plaintiffs are covered for this type of loss. On May 15, 2020, Aviva sent a letter to the plaintiffs setting out the basis of its denial of coverage. Aviva is interpreting the coverage to apply only to outbreaks that occurred "at or within the applicable area of the insured premises". Aviva further stated that the Restricted Access

coverage “does not provide cover for global pandemics such as COVID-19.” Aviva sent an identical letter to all Class members, relying upon the same reasons for its blanket denial of coverage.

Breach of Contract

15. The plaintiffs pleads that the defendant is contractually obligated to compensate the plaintiffs and Class members for any loss or damages referred to in the Policy, and that by failing to do so, the defendant has breached the contractual obligation owed to the plaintiffs and Class members under the Policy.

16. The plaintiffs and Class members paid premiums for loss of business income insurance in the expectation that the defendant would honour its contractual obligations in good faith. The Closure Order made, due to the COVID-19 outbreak, resulted in the mandatory restriction of access to their business premises. The plaintiffs and Class members have suffered an ongoing loss of business income.

17. The defendant has failed to honour its contractual obligations and has failed to deliver the peace of mind that the plaintiffs and Class members relied upon when they paid for insurance.

Damages

18. As a result of the breach of contract by the defendant, the plaintiffs and Class members have suffered and will continue to suffer damages, including loss of business income and accountants' fees for producing particulars or details of their losses.

19. The plaintiffs are entitled to claim damages on behalf of all Class members.

Certification

20. The plaintiffs plead that the within action is amendable to certification as a class proceeding in accordance with s. 5 of the *Class Proceedings Act, 1992, supra*. Without limiting the generality of the foregoing:

- (a) the statement of claim herein discloses a cause of action;
- (b) there is an identifiable class or subclass of two or more persons that would be represented by the representative plaintiffs;
- (c) the claims of the Class members raise common issues of fact and/or law;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) the plaintiffs would fairly and adequately represent the interests of the class or subclass as representative plaintiffs, does not have an interest in conflict with other Class members in respect of the common issues, and in due course will produce a plan for advancing the proceeding on behalf of the Class (including procedures for court ordered notice).

21. The plaintiffs plead that the within action meets all of the requirements of a class proceeding in accordance with *Class Proceeding Act, 1992, supra*.

22. The plaintiffs propose that this action be tried in the City of London.

June 8, 2020

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McCallum Aviva
 and
Plaintiffs Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

STATEMENT OF CLAIM

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