

Amended on the 05th day of February, 2021  
pursuant to Rule 26.02(a).

Court File No.: CV-20-0000981-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

MATT McCALLUM,  
MATT McCALLUM DENTURIST PROFESSIONAL CORPORATION

Plaintiffs

- and -

AVIVA INSURANCE COMPANY OF CANADA

Defendant

**FRESH AS AMENDED 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: February , 2021

Issued by \_\_\_\_\_  
Local registrar

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Lawyers for the Defendant

## 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 (“Denturist Program”)*, bearing Policy 81278157, which included “Restricted Access” coverage and/or “Negative Publicity” coverage under Business Income - Actual Loss Sustained (Broad Form Perils) (Form 402014-02), and which sustained loss of business income:

- a) while access to its premises was restricted in whole or in part (“Restricted Access”) by the mandatory closure order made by the Province of Ontario on March 23, 2020 (the “Closure Order”), and/or
- b) while access to its premises was restricted in whole or in part by any subsequent order of civil authority, and/or
- c) as a direct result of the outbreak of COVID-19 within 1 kilometre of its premises.
- (b) a declaration that the loss of business income caused by:
- (i) Restricted Access due to the Closure Order; and/or
- (ii) Restricted Access due any subsequent order of civil authority;

are covered under the Business Income – Actual Loss Sustained (Broad Form Perils) (Form 402014-02) issued by the Defendant to Class Members;

- (c) a declaration that the actual loss of business income sustained by the Plaintiffs and Class Members as a direct result of Negative Publicity due to an outbreak of a contagious or infectious disease, being COVID-19, within 1 kilometre of its premises that is required by law to be reported to government authorities, are covered under the Business Income – Actual Loss Sustained (Broad Form Perils) (Form 402014-02) issued by the Defendant to Class Members;
- (d) payment to the Plaintiffs and Class Members in accordance with the insurance policy issued by the Defendant;
- (e) a declaration that the Defendant breached its contract with the Plaintiffs and Class Members in denying coverage;
- (f) a declaration that any applicable limitation periods, whether policy-based or statute-based, including under the *Insurance Act*, R.S.O. 1990, c. I.8, are of no force or effect vis-à-vis the Plaintiff and Class Members, and/or are tolled pursuant to section 28 of the *Class Proceedings Act, 1992*;
- (g) damages for breach of contract in the amount of \$40,000,000.00, including loss of business income and accountants' fees;
- (h) relief from forfeiture pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8, and similar legislation as amended, should the Plaintiffs or Class Members be found to have had imperfect compliance with the terms of the Policy;

- (i) in the alternative, relief from forfeiture pursuant to and/or the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and similar legislation as amended;
- (j) 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;
- (k) 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,
- (l) 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 and Class Members 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 supplemental Restricted Access coverage, supplemental Negative Publicity coverage, and Accountants’ Fees.

6. The supplemental Restricted Access coverage 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.

7. The supplemental Negative Publicity coverage provides:

This coverage is subject to time and distance limitations. This Form insures the actual loss of "business income" sustained as a direct result of the following occurrences:

...

(b) an outbreak of a contagious or infectious disease within 1 kilometre of the "premises" that is required by law to be reported to government authorities;

### **Loss of Business Income / Accountants' Fees**

8. The Plaintiffs and Class Members understood the insurance they purchased from Aviva included multiple forms of loss of business income coverage triggered by an outbreak of a contagious or infectious disease. The Plaintiffs and Class Members understood that coverage under the Policy would be triggered in one or more of the following circumstances:

- (a) Under the Restricted Access coverage, the actual loss of business income sustained while access to the premises was restricted in whole or in part by order of civil authority, including the Closure Order, resulting from an outbreak of a contagious or infectious disease, being COVID-19, that is required by law to be reported to government authorities; and/or
- (b) Under the Restricted Access coverage, the actual loss of business income sustained while access to the premises was restricted in whole or in part by any subsequent order of civil authority, resulting from an outbreak of a contagious or infectious disease, being COVID-19, that is required by law to be reported to government authorities; and/or
- (c) Under the Negative Publicity coverage, the actual loss of business income sustained as a direct result of an outbreak of a contagious or infectious disease, being COVID-19, within 1 kilometre of their premises that is required by law to be reported to government authorities.

9. Further, the Plaintiffs and Class Members were insured for accountants' fees for producing particulars or details of their loss under the coverage.

10. 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 by Provinces and Territories across Canada.

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

12. On March 23, 2020, by way of 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. The Closure Order was subsequently extended.

13. The Plaintiffs' and Class Members' insured properties were impacted. As a result of the Closure Order, the Plaintiffs' and Class Members' access to their premises was restricted and they could not provide services except for provision of emergency or urgent care. Customers were restricted from accessing the Plaintiffs' and Class Members' premises to obtain denturist services. As a result, the Plaintiffs and Class Members sustained a loss of business income.

14. After the Closure Order expired or was lifted, Canada experienced a second wave of the COVID-19 outbreak, and the Plaintiffs and Class Members experienced additional loss of business income. The Plaintiffs and Class Members have sustained a loss of business income as a direct result of an outbreak of a contagious or infectious disease, being COVID-19, within 1 kilometre of its premises that is required by law to be reported to government authorities.

15. Additionally, beginning in the Summer of 2020, subsequent orders were made by civil authorities which restricted access to the Plaintiffs' and Class Members' premises in whole or in part. As a result of the subsequent orders of civil authority, the Plaintiffs and Class Members sustained a loss of business income.



### **Denial of Coverage**

16. The Plaintiffs presented a claim to Aviva for loss of business income insurance, in accordance with the Policy.

17. Aviva 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 outlining the reasoning behind their denial of coverage.

18. The denial has been made on the basis of contractual interpretation, and not based on factors relating to the eligibility of any individual claimant. The Plaintiffs and Class Members were insured pursuant to an identical Policy, with identical language. The Plaintiffs and Class Members actual losses of business income were sustained as a result of the Closure Order, a subsequent closure order, and/or an outbreak of COVID-19 within 1 kilometre of their premises.

### **Breach of Contract**

19. The Plaintiffs plead 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.

20. The Plaintiffs and Class Members paid premiums for loss of business income insurance including supplemental Restricted Access coverage and supplemental Negative Publicity coverage in the expectation that the Defendant would honour its contractual obligations in good faith. The Plaintiffs and Class Members have sustained an ongoing loss of business income.

21. By refusing to honour its contractual obligations the Defendant has failed to deliver the peace of mind that the Plaintiffs and Class Members relied upon when they paid for insurance.

## **Damages**

22. 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.

23. The Plaintiffs are entitled to claim damages on behalf of all Class Members.

## **Relief from Forfeiture**

24. In light of Aviva's blanket denial of coverage, imperfect compliance or non-compliance by the Plaintiffs or any of the Class Members with any post-loss requirements in the Policy, including but not limited to providing the Defendant with notice of the loss and/or submitting a proof of loss, was reasonable. Any lack of compliance concerned terms and conditions of the Policy that were not condition precedents to coverage, and did not materially prejudice the Defendant. The Plaintiff and Class Members should be granted relief from forfeiture, if necessary.

## **Certification**

25. 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*. 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 as it is superior to all reasonably available means of determining the entitlement of the Class Members to relief and the questions of fact or law common to the Class Members predominate over any questions affecting only individual Class Members; and
- (e) the Plaintiffs would fairly and adequately represent the interests of the class 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).

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

27. The Plaintiffs plead and rely upon the following statutes:

- (a) *Class Proceeding Act, 1992*, S.O. 1992, c. 6;
- (b) *Insurance Act*, R.S.O. 1990, c. I.8;
- (c) *Courts of Justice Act*, R.S.O. 1990, c. C.43.

28. The Plaintiffs propose that this action be tried in the City of London.

February 2, 2021

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Proceeding commenced at London

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