



Court File No. **VLC-S-S-206399**

No.
Vancouver Registry

In the Supreme Court of British Columbia

Between

Dr. Amer A. Khakwany Inc.

PLAINTIFF

and

Intact Insurance Company

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

THE PLAINTIFF'S CLAIM

Part 1: STATEMENT OF FACTS

Overview

1. This proposed class action arises out of the Defendant's unlawful denial of insurance coverage for business income losses.
2. The Defendant provided an "all-risks" insurance policy to the Plaintiff and class members for loss of business income. The standard-form policy covers loss of income arising from an interruption or interference with the Plaintiff's and class members' business. Such coverage arises where: a) there is direct physical loss or damage to the Plaintiff's and class members' property, or b) such loss or damage occurs at neighbouring premises so as to prevent or hinder the Plaintiffs' use or access to their property, or c) the Plaintiff's and class members' access to their property has been prohibited by order of Civil Authority due to direct physical loss or damage to neighbouring premises.
3. Such "all-risks" commercial insurance contracts provide peace of mind to business owners, including the Plaintiff and class members, because insurers will cover business losses if the unforeseen occurs. Coverage include all risks of physical loss or damage. These broad policies can only be narrowed by specific exclusions and conditions, such as a virus or pandemic exclusion. The policies at issue in this case did not include any such exclusions.
4. An unforeseen event occurred in early 2020: COVID-19 spread throughout the world, including Canada, causing a global pandemic.
5. On March 17, 2020, the Provincial Health Officer gave notice under s 52(2) of the *Public Health Act*, SBC 2008, c 28 that there was an outbreak of COVID-19 in the province, and that this

constituted a “regional event” as defined in s 51 of the *Public Health Act* (the “Emergency Order”). Similar orders were made by health officers in other Canadian provinces.

6. Pursuant to this Emergency Order, and subsequent orders issued by the Provincial Health Officer, many businesses in British Columbia, including the Plaintiff’s and class members’ businesses, were ordered closed. Similar orders made in other provinces also required businesses to close.

7. The Provincial Health Officer, and her counterparts in other provinces, are Civil Authorities within the meaning of the Defendant’s insurance policies, and the Emergency Order, and its counterparts in other provinces, constitute orders by the Civil Authority within the meaning of the Defendant’s insurance policies. These orders to close businesses were an interruption of the businesses of the Plaintiff and class members which are covered under the Defendant’s insurance policies.

8. The Plaintiffs and class members were impacted by the Emergency Order as their property could spread the virus. But, when the Plaintiffs and class members shuttered their businesses, they did so with peace of mind – they had purchased an “all-risks” insurance policy which did not exclude viruses or pandemics. Rather, it specifically insured the peril impacting their businesses.

9. The Plaintiff sought the money he was owed under their insurance policy. In breach of contract, the Defendant denied his claim for recovery.

10. Through this suit, the Plaintiff and class members seek to hold the Defendant accountable for its unlawful conduct and to recover damages.

The Parties and the Proposed Class

11. The Plaintiff Dr. Amer A. Khakwany Inc. (“Dr. Khakwany”) is a British Columbia professional corporation that operates a dentistry practice in Vancouver under the name Tinseltown Dental Clinic, located at 80 Keefer Place, Vancouver, British Columbia, V6B 0C9.

12. The Defendant, Intact Insurance Company, is a company licensed under the *Insurance Act*, RSBC 2012, c 1 to sell insurance in the province of British Columbia and elsewhere in Canada with a corporate office at 999 West Hastings Street, Vancouver, British Columbia.

13. The Plaintiff brings this claim on behalf of a proposed class as follows:

“All persons in Canada, excluding Quebec, who had insurance policies with the Defendant that included business interruption insurance with coverage during the Class Period.”

The “Class Period” commences on March 17, 2020 and continues until a date to be fixed by the Court.

The Insurance Policies

14. Dr. Khakwany bought a commercial insurance policy from the Defendant with policy number 5XL014953 with a period of coverage extending from March 14, 2020 to March 14, 2021 (the “Policy”). The policy covers his dental office location in Vancouver. The policy includes business interruption insurance as Defendant’s form EP21.

15. The Plaintiff paid his premiums owed under the Policy regularly and as required.

Denial of Coverage

16. Dr. Khakwany notified the Defendant, through his insurance broker, on March 17, 2020, that his business had closed due to COVID-19, and that he wished to assert a claim for loss of business income under his policy. His claim was denied by the Defendant that same day.

17. Dr. Khakwany again followed up with his broker on April 22, 2020, hoping that the Defendant would reconsider its position. He has had no response from Defendant to this second communication.

COVID-19 in Canada

18. In December 2019, the novel coronavirus COVID-19 had become a public health concern in China. COVID-19 is a highly communicable disease characterized by delayed symptom onset and is capable by transmission by asymptomatic carriers. The virus may be present and live on physical premises and tangible property for days and still be capable of transmission. It is nearly impossible to tell whether the virus is living on property, rendering common-area property unsafe and unusable. There is no vaccine for COVID-19.

19. In January 2020, the virus had spread to different countries including South Korea, the United States and Canada. The first COVID-19 case identified in British Columbia was reported on January 28, 2020.

20. In order to prevent the spread of the virus, provincial governments across Canada have issued orders since March 17, 2020 requiring many businesses to temporarily close or restrict their operations.

The Terms of the Policies

21. The Policy covers “all risks”, and includes extended coverage for business interruption. There are no exclusions under the Policy for “viruses” or “pandemics”.

22. The Policy states:

“3. Insured Perils:

This form, except as otherwise provided, insures against all risks of direct physical loss or damage to the insured property.”

23. Regarding business interruption, the Policy states:

“1. Contingent Loss of Income – Contributing/Recipient Property:

This Form is extended to cover loss of business income resulting from the necessary interruption of or interference with the business of the Insured caused by direct physical loss or direct physical damage by an insured peril occurring during the term of the policy to property situated:

1.1. at the premises of a recipient property, being property to which the Insured's products are being shipped, which wholly or partially prevents the acceptance of products produced or sold by the Insured; or

1.2. at the premises of a contributing property, being a supplier(s) of materials to the Insured, which wholly or partially prevents the delivery of materials to the Insured, excluding:

1.2.1. public utility suppliers such as electricity or gas; or

1.2.2. cable, satellite or other communications suppliers;

1.3. at the premises of the provider of internet access services to the Insured, which wholly prevents the transmission of data.

This Extension applies only to contributing/recipient properties situated in Canada or in the United States of America.

2. Contingent Loss of Income – Neighbouring premises:

“This Form is extended to cover loss of business income resulting from interruption of or interference with the business in consequence of direct physical loss or direct physical damage by an insured peril to property on the same premises, or in neighbouring premises to the Insured, that prevents or hinders the use of or access to the premises or property of the Insured, whether the Insured's premises or property are damaged or not. The amount payable under this Extension shall be the highest of the amount of insurance stated in the Summary of coverages or the amount of loss of income incurred for the number of days specified in this Summary of coverages.”

24. The Policy further specifies that it covers business interruption imposed by civil authority:

“1. Interruption by Civil Authority

This Form is extended to cover loss of business income during the period of time, not exceeding 30 days, while access to the premises is prohibited by order of civil authority, but only when such order is given as a direct result of direct physical loss of or damage to neighbouring premises by an insured peril.”

25. “Physical loss” and “damage” are not defined in the Policy. Nevertheless, the Policy contains a definition section which defines “Property Damage” as:

“28: Property damage means:

28.1 Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it, or

28.2 Loss of use of tangible property that is not physically injured. All such use shall be deemed to occur at the time of the occurrence that caused it.”

26. Taken together, the Policy covers lost business income resulting from the necessary interruption of or interference with the business of the Insured caused by the loss of use of tangible property, whether that property is physically injured or not. The Policy also separately includes interruption or interference orders made by a civil authority given as a direct result of property being unusable.

27. The Defendant's policy wording regarding business interruption, property damage and civil authority claims are materially the same for all class members.

Closure of the Plaintiff's Businesses

28. Dr. Khakwany closed his dental practice on March 17, 2020, following direction of the College of Dental Surgeons of British Columbia and the issuance of the Emergency Order.

29. Further direction was issued to regulated health professionals by the Provincial Health Officer on March 23, 2020, including to Dr. Khakwany, requiring that all non-essential and elective services be reduced to minimal levels. Dr. Khakwany's business remained closed in response to this direction by the Civil Authority.

30. The restrictions imposed by the Provincial Health Officer on regulated health professionals who perform non-essential or elective services, including the restrictions on Dr. Khakwany, were lifted, effective May 19, 2020, by letter issued by the Provincial Health Officer, dated May 15, 2020.

31. It nevertheless took time thereafter for Dr. Khakwany to receive appropriate direction from his College regarding the re-opening of his practice, and to obtain necessary supplies, including personal protective equipment, to safely do so. It was not until June 17, 2020 that Dr. Khakwany was again able to open his practice.

32. During his three months of business closure, Dr. Khakwany suffered loss of business income and profits. He also incurred extra expenses to re-open his business. He seeks recovery of all these losses in accordance with the terms of his policy with the Defendant.

33. Other class members have similarly suffered loss of revenue and profits and extra expenses due to business closures and restrictions as a result of property damage caused by COVID 19, whether to their property, or to neighbouring premises, and as result of orders by Civil Authority.

Part 2: RELIEF SOUGHT

34. An order certifying this action as a class proceeding;

35. General damages for breach of contract;

36. Punitive damages;

37. Pre and post judgment interest;

38. Costs of this proceeding; and

39. Such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

Breach of the Contract

40. On a plain meaning interpretation of the Policies, the business interruption losses sustained by the Plaintiffs and class members are insured perils because they are not specifically excluded and constitute property damage as defined in the policies. The losses are the exact type of losses covered within the meaning of the policies.

41. First, the *presence* of COVID-19 at the Plaintiffs' businesses or at neighbouring businesses is an insured peril because it is direct physical damage. The Plaintiffs' tangible property was damaged as a result of the presence of a deadly, communicable virus. The property was in an altered state. It was physically injured because the virus changed it in a harmful way. The property is damaged as it is unsafe to use.

42. Second, the *risk* of COVID-19 at the Plaintiffs' business or a neighbouring business is an insured peril because it presents a risk of direct physical damage rendering property unfit for use. Property and equipment cannot be used for their respective intended purposes without substantial risk. The property is unsafe to use.

43. Third, denial of use and enjoyment of property is itself a recoverable loss under the Policy. The Policy covers not just the actual of property, but also the interruption or loss of its use.

44. The Plaintiff and class members lost access to the premises as a necessary result of the Civil Authority mandated shutdown. The government imposed the shutdown for two concurrent reasons: (1) due to physical injury to properties – the actual presence of COVID-19 living on the tangible properties; and (2) due to the risks of direct physical loss of or damage to the properties – the risk that COVID-19 could be transmitted and live on tangible properties. The government made a declaration of uninhabitability due to direct physical injury. As noted above, these risks are “insured perils” as defined in the Policies.

45. Overall, the business losses claimed by the Plaintiff are covered under the Policy, whether COVID-19 was physically present on the property or only may have been present on the property.

46. The Plaintiff is entitled compensation under the Policy. The Plaintiff upheld his obligations under the Policy – he is in good standing, made payments on time, and made a claim with the Defendant in accordance with the terms of the Policy.

47. By denying claims properly owed to the Plaintiffs and Class Members, the Defendant is breaching the insurance contracts. The Defendant are failing to perform their control duty to compensate the Plaintiff and Class Members under the terms of the Policies. The Defendant has done this in a bad faith attempt to illegally retain as much profits as it can.

48. The Policy must be interpreted in accordance with the principles of *contra proferentum*. The Defendant drafted the Policy. If there are ambiguities in the Policy, then such ambiguities are resolved in favour of the Plaintiff.

49. COVID-19 already existed in the world at the time that the parties concluded their insurance contact with the Policy commencing on March 14, 2020. If the Defendant had wanted

to exclude coverage for property damage due to COVID-19 from the Policy then it could have done so before issuing the Policy.

50. Other infectious diseases such the SARS pandemic in 2003 had previously caused harm and disruption to businesses in Canada. Again, the Defendant had wanted to exclude coverage for business interruption due to pandemics then it could have done so before issuing the Policy.

51. From the Plaintiff's perspective, plainly he understood that he had coverage for the losses that he suffered and he immediately contacted his insurance broker on March 17, 2020, as soon as the Emergency Order went into effect, to assert a claim.

52. The Defendant is in breach of its contractual undertakings in an identical manner against to all Class Members. The business interruption portions of the Policy quoted above are the identical, or materially similar, in all of the insurance policies with class members at issue in this action.

Punitive Damages

53. The Defendant's misconduct, as described above, is oppressive and high-handed, and departs to a marked degree from ordinary standards of decent behaviour. The Defendant's actions are part of a pattern of willful disregard for the insureds' rights. Many businesses will not survive the economic impacts of COVID-19 and the economic shutdown. The Defendant is taking advantage of the Plaintiffs and class members when they were suffering extreme business income loss.

54. The Defendant owed a duty of utmost good faith to the Plaintiff and to class members. This included a duty to assist them with reasonable claims, and to properly investigate such claims. The Plaintiff's claim was immediately denied by the Defendant on March 17, 2020, the very same day of the Emergency Order, without any investigation by the Defendant. This was a reflexive denial by the Defendant of the claims made by the Plaintiff and class members without a proper basis.

55. The Defendant's actions offend the moral standards of the community and warrant the condemnation of the Court such that an award of punitive damages should be made against them.

Suspension of Limitation Periods

56. The Plaintiffs plead on their behalf and the behalf of class members that limitation periods have been temporarily suspended in the province due to COVID-19 pursuant to Order of the Minister of Public Safety and the Solicitor General, Ministerial Order, dated March 26, 2020, made under the *Emergency Program Act*, R.S.B.C., c.111, s.10.

Jurisdiction

57. Pursuant to section 9 of the *Insurance Act*, RSBC 2012, c. 1, the insurance contracts at issue are deemed to have been made in British Columbia because the Plaintiff is domiciled in British Columbia and because the subject matter property is located in British Columbia.

Plaintiff's address for service:

Klein Lawyers LLP
1385 W 8th Ave #400
Vancouver, BC V6H 3V9

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street
Vancouver, BC
V6Z 2E1

Date: June 19, 2020



Signature of lawyer for plaintiff

Douglas Lennox and Darren S. Sall

Counsel for the Plaintiff

Klein Lawyers LLP

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is a claim for damages arising out of the Defendant's abusive franchise employment clauses.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Class Proceedings Act, RSBC 1996, c. 50

Court Order Interest Act, RSBC 1996, c. 79

Emergency Program Act, RSBC 1996, c.111

Public Health Act, S.B.C. 2008, c.28

Insurance Act, RSBC 2012, c. 1

Act(s):

Class Proceedings Act, RSBC 1996, c. 50

Court Order Interest Act, RSBC 1996, c. 79

Emergency Program Act, RSBC 1996, c.111

Public Health Act, S.B.C. 2008, c.28

Insurance Act, RSBC 2012, c. 1