



Amended pursuant to Rule 6(1)(a)  
Original filed on June 5, 2020

ACTION NO. S-205979  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**KAYLA KYLE-MOFFAT**

PLAINTIFF

AND:

**NOVEX INSURANCE COMPANY AND, IN FRENCH, NOVEX COMPAGNIE D'ASSURANCE, INTACT  
INSURANCE COMPANY AND, IN FRENCH, INTACT COMPAGNIE D'ASSURANCE AND LACKNER  
MCLENNAN INSURANCE LTD.**

DEFENDANTS

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

**AMENDED 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 were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

## CLAIM OF THE PLAINTIFF

### Part 1: STATEMENT OF FACTS

#### Parties and Overview

1. This action concerns business interruption insurance coverage.
2. The Plaintiff, Kayla Kyle-Moffat (the "Plaintiff"), has an address for service of Suite 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia. The Plaintiff is a registered massage therapist and was insured with NOVEX INSURANCE COMPANY pursuant to a policy of insurance identified as Policy 551932700 (the "Policy") that provides, *inter alia*, for the payment of compensation for business interruption.
3. The Plaintiff brings this action on her own behalf and on behalf of all persons resident in Canada who were insured with the Defendants Novex pursuant to the Policy, or other policies issued by the Defendant Novex with identical or similar provisions for business interruption, to be further defined in the Plaintiff's application for class certification.

#### Defendants

4. The Defendant, NOVEX INSURANCE COMPANY AND, IN FRENCH, NOVEX COMPAGNIE D'ASSURANCE, (hereinafter "Novex") is duly registered under the *Business Corporations Act*, SBC 2002, c. 57 and amendments thereto as an extraprovincial company pursuant to the laws of the Province of British Columbia and has its attorney's office at 1100-999 West Hastings Street, Vancouver, in the Province of British Columbia.
5. The Defendant, INTACT INSURANCE COMPANY AND, IN FRENCH, INTACT COMPAGNIE D'ASSURANCE (hereinafter "Intact") is duly registered under the *Business Corporations Act*, SBC 2002, c. 57 and amendments thereto as an extraprovincial company pursuant to the laws of the Province of British Columbia and has its attorney's office at 1100-999 West Hastings Street, Vancouver, in the Province of British Columbia.
6. At all material times each of Novex and Intact (hereinafter the "Insurers") were the agent, servant, employee, partner, alter ego, aider and abettor, co-conspirator and/or joint venturer of each other and were at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy,

and/or joint venture, and each of Novex and Intact has ratified and approved each other's acts.

7. The Defendant, LACKNER MCLENNAN INSURANCE LTD. (hereinafter "Lackner") is duly registered under the *Business Corporations Act*, SBC 2002, c. 57 and amendments thereto as an extraprovincial Company pursuant to the laws of the Province of British Columbia and has its attorney's office at 400-725 Granville Street, Vancouver, in the Province of British Columbia.
8. At all material times Intact and Novex were insurance companies engaged in the business of insurance in British Columbia and Canada.
9. At all material times Lackner was an insurance broker engaged in the business of insurance agency in British Columbia and Canada.

#### **Purchase of the Policy**

10. Lackner markets itself as an insurance broker for treatment providers, including massage therapists.
11. Lackner's website makes the following representations:
  - *Lackner McLennan is the largest insurance provider for Registered Massage Therapists in Ontario and NOW in British Columbia;*
  - *For over 25 years we have provided Massage Therapists with Professional and Commercial General Liability insurance.;*
  - *Our years of experience here at Lackner McLennan have helped us to create the best insurance policy available for Massage Therapists.;* and
  - *We know you work hard and we want you to know we work just as hard to protect you and your business as a Massage Therapists.*
12. The Plaintiff and Class Members relied on the above representations and sought assistance from Lackner in purchasing insurance for their businesses.
13. At all material times Lackner undertook the responsibility for ensuring that the Plaintiff and Class Members had full and adequate insurance coverage in place.
14. Lackner did not give prospective clients the opportunity to have a "know your client" meeting to discuss the requirements of insurance for their business. Accordingly, the Plaintiff and Class Members were not asked to, and did not provide Lackner with specific

instructions pertaining to their insurance coverage but instead relied on Lackner to use its expertise to ensure that the insurance coverage they purchased would adequately protect them and their businesses.

15. At all material times, the Plaintiff and Class Members relied on Lackner to make sufficient inquires and investigations to inform itself about their business and ensure that they purchased adequate coverage.
16. At all material times the Plaintiff and Class Members relied on Lackner's representations and expertise to ascertain the foreseeable risks and other relevant information required to determine the appropriate extent of coverage that they would require.
17. Relying on Lackner's representations and expertise, the Plaintiff and Class Members purchased the Policy, recommended by Lackner, and paid a premium for the Policy, which resulted in Lackner being paid a commission.
18. Massage therapists and other health professions and personal service businesses require personal contact between service providers and clients. Lackner knew, or ought to have known, that such businesses would be adversely affected by pandemics, quarantines, and orders of civil authorities relating to social distancing.
19. In reference to the Policy, Lackner's website makes the following representations:

*All RMTs get \$10,000 in coverage for loss or damage to:*

- *Contents at your clinic*
- *Contents in transit, at your home or patients home*
- *Loss of income because your clinic is unusable*
- *Loss or damage to your patient records*
- *Theft of cash, cheques or your deposit*
- *PLUS 14 additional coverages*

20. At all times it was foreseeable that if Lackner failed to obtain adequate coverage for the Plaintiff and Class Members, it would cause the Plaintiff and Class Members, mental, emotional, and/or financial distress.

**The Policy**

21. The "Summary of Coverages" section of the Policy provides for Business Interruption Coverage for loss of Profits up to \$10,000.

22. The Policy states the following:

**B. BUSINESS INTERRUPTION**

**ITEM 19 - PROFITS**

**INSURING AGREEMENT**

**(1) Indemnity Agreement**

*This Item insures only against loss directly resulting from necessary interruption of business caused by destruction or damage at the "premises" described in the "Declaration Page(s)" by the perils insured against under the Commercial Building and Contents Broad Form (BF02N).*

*(2) The Insurance under this Item is limited to \$5,000 in the aggregate for loss sustained of "gross profit" due to:*

*(a) reduction in turnover; and*

*(b) increase in cost of working; and the amount payable as indemnity thereunder shall be:*

*(a) IN RESPECT OF REDUCTION IN TURNOVER:*

*The sum produced by applying the "rate of gross profit" to the amount by which the "turnover" during the "indemnity period" shall, in consequence of the loss, destruction or damage by a peril insured against, fall short of the "standard turnover";*

*(b) IN RESPECT OF INCREASE IN COST OF WORKING:*

*The additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in "turnover" which, but for that expenditure would have taken place during the "indemnity period" in consequence of the loss, destruction or damage by a peril insured against, but not exceeding the sum produced by applying the "rate of gross profit" to the amount of the reduction thereby avoided; less any sum saved during the Indemnity Period in respect of such of the Standing Charges as may cease or be reduced in consequence of loss, destruction or damage caused by the perils insured against.*

*EXPENSES TO REDUCE LOSS:*

*This Item also insures such expenses as are necessarily incurred for the purpose of reducing loss under this Insurance (except expense incurred to extinguish a fire), but in no event shall the aggregate of such expenses exceed the amount by which the loss under this Item is thereby reduced.*

*If, during the "indemnity period", goods are sold or services rendered elsewhere than at the "premises" for the benefit of the business, either by the Insured or by others on his behalf, the money paid or payable in respect of such sales or services shall be brought into account in arriving at the "turnover" during the "indemnity period".*

*On the happening of any destruction or damage by a peril insured against in consequence of which a claim is made or may be made under this Item, the Insured shall with due diligence do and concur in doing and permit to be done all things which would be reasonably practicable to minimize or check any interruption of or interference with the business or to avoid or diminish the loss.*

**ADDITIONAL EXCLUSION**

*The Insurer shall not be liable under this Item for loss due to fines or damages for breach of contract, for late or non-completion of orders, or for any penalties of whatever nature.*

23. At all material times, the Plaintiff and Class Members understood that the Policy would offer coverage if they were forced to close their businesses due to fortuitous or unforeseen reasons that were beyond their control.
24. The Policy was intended to provide "peace of mind" to insureds, including the Plaintiff, so that it was always within the reasonable contemplation of the Defendants that breach of the contract would likely cause financial and/or mental distress to the insureds.
25. It was an implied term of The Policy that the Defendants owed a duty to the Plaintiff of good faith and fair dealing in the performance of their obligations pursuant to The Policy and in its administration of the Plaintiff's claim, including:

- (a) a duty to be fair, objective and even-handed in its investigation and evaluation of the Plaintiff's claim;
- (b) a duty to conduct an adequate and reasonable investigation of the Plaintiff's claim;
- (c) a duty to provide properly trained personnel to review and assess the Plaintiff's claim under The Policy;
- (d) a duty to establish proper guidelines and procedures for its employees to follow for the reasonable and objective assessment of the Plaintiff's claim;
- (e) a duty to respond to the Plaintiff's claim in a fair and objective manner rather than in a manner which assumed the Plaintiff was adverse in interest;
- (f) a duty to pay to the Plaintiff the amounts due and owing under The Policy in a timely manner;
- (g) a duty to provide the Plaintiff with all of the information and documents upon which the Defendants relied in support of its denial of the claim;
- (h) a duty to provide for procedural fairness in its appeal process; and
- (i) to be fair, objective and even-handed in its investigation and evaluation of the Plaintiff's claim.

**Business Interruption**

26. On or about March 21, 2020, as part of the Province of British Columbia's efforts to contain the spread of the infectious agent SARS-CoV-2, which has caused cases and outbreaks of a serious illness known as COVID-19 ("Covid-19") in British Columbia, Provincial Health Officer, Dr. Bonnie Henry, issued an oral order that personal service establishments must close until further notice, as follows:

You must close all personal service establishments, including in-home establishments and mobile establishments, and must not provide personal services to clients or customers in any location, including the residence of a client or customer.

(the "March 21 Order").

27. Further on March 21, 2020, the College of Massage Therapists of British Columbia (hereinafter the "College") wrote to its members, including the Plaintiff, as follows:

In her news briefing on March 21, 2020, British Columbia's Provincial Health Officer, Dr. Bonnie Henry, ordered that personal services businesses involving close physical contact must close effective immediately. CMTBC immediately sought clarification as to whether this order applied to CMTBC registrants.

Dr. Henry clarified directly to CMTBC that her order applies to "RMTs working in the community". Effectively, that means **all BC RMTs must immediately cease practice as of today, March 21, 2020**. Any upcoming appointments must be cancelled, and no massage therapy treatment can be delivered **until further notice**.

RMTs are encouraged to communicate this order to any and all fellow registrants with whom they are in contact.

28. On or about that same date, the City of Vancouver mandated \$50,000 fines to any business which continued operations without maintaining social distancing (the "City of Vancouver Order").
29. Massage therapy is not a treatment modality that can be performed while social distancing.
30. On or about the same dates as indicated above, other provinces, territories, municipalities, and self-governing professions throughout Canada undertook similar measures requiring massage therapists and other professions and businesses that could not provide for necessary social distancing to immediately cease practice, further particulars of which will be provided in the Plaintiff's application for certification.
31. As a result of Covid-19 and the Orders referenced above, the Plaintiff and Class Members were forced to close their businesses.
32. As a result of the closure and resulting business interruption, the Plaintiff and Class Members have suffered loss of profits in excess of the \$10,000 provided for under the Policy.



33. Covid-19 and the resulting orders to close business were fortuitous unforeseen circumstances, beyond the control of the Plaintiff and Class Members, and resulted in the Plaintiff and Class Members sustaining "damage" as defined in the Policy.

**Denial of Coverage**

34. The Plaintiff and Class members expected that as their agent, Lackner would assist them in good faith in making a claim for business interruption coverage under the Policy.

35. When the Plaintiff advised Lackner that they intended to make business interruption loss claims, they were told that there would be no coverage and Lackner wrongly refused to assist the Plaintiff with making a claim under the Policy.

36. The Plaintiff has demanded payment of business interruption loss benefits under the Policy, and the Defendant Insurers have refused and/or neglected to make payments.

37. The Insurers wrongfully and in breach of the Policy refused and/or neglected to pay insurance benefits to the Plaintiff and have advised that they will not be making payments to the Class Members for business interruption loss claims arising from closures resulting or related to Covid-19.

38. To date, and despite demand, the Insurers have wrongly denied the Plaintiff and Class Members entitlement to proceeds of the Policy without any reasonable justification under the said Policy.

39. The Insurers acted in a harsh and arbitrary manner towards the Plaintiff in denying benefits under the Policy.

40. Lackner acted in an inappropriate and harsh manner toward the Plaintiff in discouraging her from applying for the business interruption coverage under the Policy and refusing to assist her do so.

41. Further or in the alternative, the Defendants have acted in bad faith, or with a lack of good faith.

42. The particulars of the bad faith of the Insurers include:

(a) breaching the *Insurance Act*, RSBC 1996, c. 226, and amendments thereto;

(b) refusing to pay benefits;

(c) failing to properly investigate the Plaintiff's and Class Members' circumstances;

43. The particulars of Lackner are as follows:
- (a) breaching the *Insurance Act*, RSBC 1996, c. 226, and amendments thereto; and
  - (b) refusing to assist with the application for benefits.
44. The Plaintiff's claim for punitive damages as against the Insurers is based upon the allegations of bad faith as set out herein, and is further based on the Insurers' conduct in denying the Plaintiff and Class Members benefits to which they are and were entitled when it knew or ought to have known that such denial of benefits would create hardship for the Plaintiff and Class Members.
45. Further, the Plaintiff and Class members say that the Insurers' failure, refusal, or neglect to pay benefits occurred as a result of deliberate or reckless corporate strategy to deny the Plaintiff's and Class Members' claims improperly and the particulars of the conduct which the Plaintiff says should result in an award of punitive damages are as set out in paragraph 44.
46. The Plaintiff's and Class Members' claim for punitive damages as against Lackner is based upon the allegations of bad faith as set out herein, and is further based on Lackner's conduct in advising the Plaintiff that she was not entitled to coverage under the Policy, when Lackner ought to have been assisting the Plaintiff in making her claims pursuant to the client-broker relationship.
47. Further, the Plaintiff says that Lackner's failure, refusal, or neglect to assist the Plaintiff with making their claims occurred as a result of deliberate or reckless corporate strategy or conspiracy with the Insurers to improperly discourage Plaintiff and Class Members from making claims, and the particulars of the conduct which the Plaintiff says should result in an award of punitive damages are as set out in paragraph 44.

## **Part 2: RELIEF SOUGHT**

48. The Plaintiff claims, on her own behalf, and on behalf of a class of similarly situated persons resident in Canada, as follows:
- (a) An order certifying this action as a class proceeding and appointing the Plaintiff as the representative Plaintiff under the *Class Proceedings Act*;
  - (b) A declaration that the denial of the Plaintiff's and Class Members' business interruption entitlement was contrary to the terms of the Policy;

- (c) An order that the Insurers pay the Plaintiff and Class Members the full amount of business interruption compensation available under the Policy;
- (d) General damages;
- (e) Special damages;
- (f) Punitive damages;
- (g) Costs;
- (h) Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and
- (i) Such further and other relief this Honourable Court may deem just.

### Part 3: LEGAL BASIS

49. Lackner owed a duty to the Plaintiff and Class Members to inform itself about their business in order to assess the foreseeable risks and insure the Plaintiff against them. It also owed a duty to the Plaintiff and Class Members to ensure that the insurance policy it recommended would provide full and adequate coverage.

50. Lackner was negligent in fulfilling its duty of care to the Plaintiff and Class members. Particulars of Lackner's negligence are as follows:

- (a) It failed to properly investigate and inform itself of the Plaintiff's business and insurance needs prior to selling the Policy;
- (b) It failed to ensure the Policy it was selling to the Plaintiff and Class Members would provide adequate coverage to them;
- (c) It failed to clarify any misleading representations on its website; and
- (d) It failed to assist the Plaintiff with making their claims in a timely manner when advised of their intention to do so.

51. Further, or in the alternative, Lackner breached its contract with the Plaintiff and Class Members by failing to inquire or consider their business needs, by failing to provide appropriate and necessary insurance coverage, and by failing to assist the Plaintiff and Class Members with claims against the Insurers.

52. Further, or in the alternative, the statements made by Lackner to the effect that *All RMTs get \$10,000 in coverage for loss or damage to...Loss of income because your clinic is unusable*" constitute a negligent or fraudulent misrepresentation and entitle the Plaintiff and Class Members to damages.

53. Further, or in the alternative, the relationship between the Plaintiff and Class Members and Lackner constituted a "consumer transaction" pursuant to s. 1 of the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 ("*BPCPA*") and the statements made by Lackner relating to the Policy referenced above constituted a "deceptive act or practice" pursuant to s. 4 of the *BPCPA*. With respect to Lackner, the Plaintiff also relies on consumer protection legislation in other Provinces and Territories further particulars of which will be provided in the Plaintiff's application for certification.
54. The Defendant Insurers knew, or ought to have known, of the business interruption and entitlement of the Plaintiff and Class Members to the said benefits but refused to honour their obligation and duty to make payment pursuant to the *Insurance Act*, supra, and the Regulations made thereto.
55. The Defendant Insurers failed to pay benefits contractually due to the Plaintiff pursuant to the Policy.
56. Further, or in the alternative, if exclusions are applicable to business interruption coverage in the Policy, such exclusions are unjust and/or unreasonable and are not binding upon the Plaintiff and Class Members pursuant to s. 32 of the *Insurance Act*, RSBC 2012, c. 1, and amendments thereto.
57. The Defendants' handling of the claims and failure to pay benefits constitutes a breach of its duty of good faith and fair dealing.
58. Further, and in the alternative, the Plaintiff waives any tort pleaded above, and plead that they and the Class Members are entitled to claim and recover based on equitable and restitutionary principles.
59. The Plaintiff relies on the following enactments:
- (a) *Insurance Act*, RSBC 2012, c. 1, and amendments thereto;
  - (b) *Negligence Act*, RSBC 1996, c. 333 and amendments thereto;
  - (c) *Business Practices and Consumer Protection Act*, SBC 2004, c. 2; and
  - (d) *Court Order Interest Act*, RSBC 1996, c. 79, and amendments thereto.

### **Jurisdiction**

60. The Plaintiff relies on ss. 13, 7 and 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 and pleads that there is a real and substantial connection between the subject matter of this action and the Province of British Columbia for the following reasons:

- (a) The Defendants marketed and sold the Policy in British Columbia;
- (b) The Plaintiff reside in British Columbia; and
- (c) The Plaintiff' damages were sustained in British Columbia.

Form 11 (Rule 4-5 (2))

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION  
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiff claims the right to serve this pleading/petition on the Defendants outside British Columbia on the ground that:

The Plaintiff has at all material times been residents of British Columbia and have suffered loss in British Columbia. The Policy is a contract of insurance entered into in British Columbia. The Supreme Court of British Columbia has jurisdiction with respect to this matter and the Plaintiff plead the *Court Jurisdiction and Proceedings Transfer Act, 2003, SBC Chapter 28* and amendments thereto.

Plaintiff' address for service:	<b>RICE HARBUT ELLIOTT LLP</b> Barristers and Solicitors 820 - 980 Howe Street Vancouver, BC V6Z 0C8
Fax number address for service (if any):	(604) 682-0587
E-mail address for service (if any):	Nil
Place of trial:	Vancouver
The address of the registry is:	800 Smithe Street, Vancouver

Date: 11/AUG/2020

\_\_\_\_\_  
Counsel for the Plaintiff,  
Anthony Leoni

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**

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

A claim for, *inter alia*, negligence and breach of contract on the part of insurance brokers and breach of contract against insurers for wrongful refusal to pay business interruption coverage purchased by the Plaintiff and a class of similarly situated persons resident in Canada.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- X 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
- X a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

[Check all boxes below that apply to this case]

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

**Part 4:**

[If an enactment is being relied on, specify. Do not list more than 3 enactments.]

1. *Class Proceedings Act*, R.S.B.C. 1996, c. 50
2. *Insurance Act*, RSBC 2012, c. 1
3. *Negligence Act*, RSBC 1996, c. 333