

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-06-001091-202

SUPERIOR COURT
(Class Actions)

9391-2186 QUÉBEC INC. DBA RESTAURANT L'ACADÉMIE CRESCENT, a legal person having a principal establishment at 2100 Crescent Street, City and District of Montréal, Province of Québec, H3G 2B8

Applicant

vs.

AVIVA INSURANCE COMPANY OF CANADA, legal person having a principal establishment at 630 René-Lévesque Blvd. West, suite 900, in the City and District of Montreal, Province of Québec, H3B 1S6

-and-

EVEREST INSURANCE COMPANY OF CANADA, legal person having a principal establishment at 3 Place Ville-Marie, suite 400, in the City and District of Montreal, Province of Québec, H3B 2E3

-and-

SOVEREIGN INSURANCE (LA SOUVERAINE COMPAGNIE D'ASSURANCE GÉNÉRALE), legal person having a principal establishment at 2001 McGill College Avenue, suite 1750, in the City and District of Montreal, Province of Québec, H3A 1G1

-and-

HDI GLOBAL SPECIALTY SE, legal person having a principal establishment at 220 St Bay, suite 400, Toronto, Province of Ontario, M5J 2W4

Defendants

APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE PLAINTIFF
(Art. 571 and following C.C.P.)

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR APPLICANT STATES:

1. The Applicant is a well-known restaurant carrying on business under the firm name and style Restaurant L'Académie Crescent with 10-25 employees, the whole as appears from an extract of the CIDREQ disclosed herewith as **Exhibit P-1**;
2. The Applicant also operates two other L'Académie restaurants in the greater Montreal area;
3. The Defendants, Aviva Insurance Company of Canada, Everest Insurance Company of Canada, Sovereign Insurance and HDI Global Specialty SE (hereinafter the "**Insurers**" or alternatively the "**Defendants**"), are insurance companies authorized to conduct business in the Province of Quebec, the whole as appears from the extracts of the CIDREQ disclosed herewith, *en liasse*, as **Exhibit P-2**;
4. The Applicant subscribed to an all-risk commercial insurance policy with the Insurers, as appears from the commercial insurance policy disclosed herewith as **Exhibit P-3 (Policy)**;
5. Pursuant to the Policy, the Insurers have agreed, severally and not jointly, each for its proportion shown in the Policy, to indemnify the Applicant in accordance with the Terms and Conditions of the Policy, including all endorsements;
6. The Policy contains business interruption insurance, as appears from the section "*Business Income-Actual Loss Sustained (Broad Form Perils)*" (Form 402014-02) (hereafter referred to as the "**Broad Form Perils**");
7. Notably, Broad Form Perils provides, inter alia, as follows:

1 Indemnity Agreement

In the event that the business shall be interrupted as a direct result of "damage", the Insurer shall pay to the Insured the actual loss of "business income" sustained during the "indemnity period" in consequence thereof, in accordance with the terms and conditions of this Form.

(...)

3 Perils Insured

The perils insured against are all risks except as otherwise excluded in this Form.

(...)

8. There is no exclusion clause in the Broad Form Perils, part of the Policy P-3, or anywhere else in the all-risk insurance policy (Exhibit P-3), which could exclude as a covered risk the business interruption loss sustained by Applicant and resulting from a pandemic or a health crisis causing the complete shut-down of all economic activities in the province of Québec, including those of the Applicant and class members;
9. Furthermore, Section 9 of the Broad Form Perils specifically covers for loss sustained while access to the premises is restricted because of an outbreak of a contagious or infectious disease;

9 Restricted Access

...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 by government authorities.

This coverage is limited to the time period not exceeding 4 consecutive weeks while access to the "premises" is restricted.

10. Beginning in March of 2020, there was a global health pandemic resulting from the novel coronavirus ("**COVID-19**");
11. As a result of COVID-19, many retail businesses in the province of Québec, including but not limited to restaurants and bars, were declared non-essential services by the Québec government and had to close;
12. The Quebec government considered that restaurant and bars premises presented a substantial risk for patrons, staff and the public, since the virus may be present on the premises, or could be brought into the premises and easily spread among the various people who attend at the premises, either as patrons or staff;
13. The Applicant's insured property and business were directly impacted by the crisis and ensuing governmental orders. On or around Monday, March 23, 2020, in accordance with the government's order to combat COVID-19, the Applicant had to close its restaurant and remained closed until June 22, 2020 the whole as appears from the March 16, 2020 decree issued by the government of Québec and the Ministerial Order 2020-008 of the Minister of Health and Social Services dated March 22, 2020 and disclosed as **Exhibit P-4, en liasse**;



14. The Applicant communicated with the Insurers to make a claim under the Policy for business interruption insurance. A copy of the claim to the Insurers is communicated herewith as **Exhibit P-5**;
15. The Insurers have notified the Applicant that they would not indemnify the Applicant for its business interruption losses, despite the fact that the Applicant is covered for this type of loss under the Policy, the whole as appears from the July 30, 2020 letter of denial unilaterally issued by Insurers and disclosed as **Exhibit P-6**;
16. In particular, relying on the definition of “damage” at article 23(g) of the Policy, the Insurers allege that they are entitled to deny in its totality the Applicant’s insurance claim, Exhibit P-6);
17. Insurers take the position that:
 1. Your property insurance policy covers certain types of losses or direct material damages caused to the covered property, subject to certain exclusions;
 2. Your insurance policy contains a protection against loss of business revenues when losses are of a direct consequence of a material damage caused to the covered property, by the fulfillment of a covered peril;
 3. Your insurance policy also contains a protection extension covering expenses related to Restricted access by civil authorities, which applies under certain circumstances such as an order from a civil authority that prevents access to your insured property, but only when such order results from direct material damage to neighboring properties.

Since the Covid-19 virus does not constitute a loss or direct material damage to your property or neighboring properties, the protections outlined in Paragraph 1, 2 and 3 above do not apply.

(Exhibit P-6);
18. The Applicant paid for business interruption insurance in the expectation that the Insurers would honor their contractual obligations in good faith if and when an unforeseen and unintentional occurrence were to take place resulting in an interruption of business causing business interruption losses. As a result of the COVID-19 crisis and the Quebec Government’s decision to order the closure of all restaurants and bars (save and except, where possible, for take-out services), an unforeseen and unintentional occurrence has caused the interruption of the Applicant’s business, as well as that of all other Class members;

19. The Defendants' grounds to deny altogether any and all coverage under the Policy are fallacious, wrong, abusive and run contrary to the rules of contractual interpretation applying to an insurance contract in the province of Québec;
20. The Applicant has an insurable interest, it has sustained a loss covered under the Policy, the Policy is in force, the Applicant has made a claim with the Defendants in accordance with the terms of the Policy and Applicant is entitled to the fullest extent permitted to benefit promptly from the protection afforded by the Policy;
21. The business interruption losses sustained by the Applicant are an insured peril since a) it is not excluded and b) Defendants' justification to avoid coverage is unfounded in fact and in law since Applicant's insured premises and business activities did sustain a loss or damage within the meaning of the Policy;
22. The Applicant is entitled to claim the benefit of coverage under the Policy for Business Interruption Insurance for itself and for the following group:

Class:

All businesses engaged in the operation of a restaurant and or bar, in the province of Quebec, who were forced to close their business operations or limit their operations to take-out and delivery services as a result of COVID-19 and ensuing governmental order, who sustained a loss as a result and who were denied coverage for Business Interruption Insurance by the Defendants or who have yet to file a claim for Business Interruption Insurance with the Defendants as a result of a pre-emptive blanket denial of coverage by insurers, including the defendants.

(hereinafter referred to as the "**Class**");

I. **CONDITIONS REQUIRED TO AUTHORIZE THIS CLASS ACTION AND TO APPOINT THE APPLICANT WITH STATUS OF REPRESENTATIVE PLAINTIFF (ARTICLE 575 C.C.P.):**

A) **THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT:**
Applicant's direct cause of action against Insurers

23. Applicant's Policy with Insurers, Exhibit P-3, is in good standing as it has always paid its premiums;
24. Pursuant to the Policy and in exchange for the premiums it received from the Applicant, Insurers agreed to confer on the Applicant coverage for Business Interruption losses caused by an insured peril;
25. Specifically, the Applicant is insured for loss of business income by the Broad Form Perils endorsement (Exhibit P-3);

26. Following the orders made by the Government, the Applicant was forced to close its restaurant as of March 23, 2020 due to COVID-19 pandemic;
27. Nowhere in the Policy do the Insurers expressly exclude business interruption losses resulting from a pandemic or from a global shutdown ordered by the Government;
28. In addition, section 9(b)(ii) of the Broad Form Perils provides for insurance coverage when access to the insured premises is restricted in whole or in part due to a pandemic (Exhibit P-6).
29. Insurers nonetheless refused to indemnify the Applicant for Business Interruption losses;
30. Insurers' denial does not address the coverage provided in section 9(b)(ii) of the Broad Form Perils;
31. The Applicant is aware that many other owners of restaurants holding a policy containing similar business interruption coverage and language have been told by their insurer that coverage was denied (Exhibit P-6);
32. The Applicant alone has suffered a quantifiable loss due to its business being closed as of March 23, 2020, and this loss is covered by the Policy (Exhibit P-3);
33. The Applicant is entitled to demand compensation in an amount calculated in accordance with section 5 of the Policy;
34. In the alternative, the Applicant is entitled to claim an amount equivalent to four consecutive weeks of business interruption while access to the premises was restricted by the governmental decrees, namely from March 23, 2020 to April 13, 2020, the whole pursuant to the terms of section 9 of the Broad Form Perils;
35. As a result of the Quebec Government's decision to shut down the Applicant's restaurant until June 22, 2020, the Applicant has suffered a total business interruption, resulting in a very significant business interruption loss for the Applicant and for all other Class members;
36. In these circumstances, the Applicant is (and all other proposed class members are) justified in claiming and does hereby claim damages from Insurers in an amount to be calculated using the formulas provided for in its insurance policy (P-3) as of March 23, 2020 and for the entire duration that its business activities were interrupted due to COVID-19 and the governmental order (Exhibit P-4);

B) THE CLAIMS OF THE MEMBERS OF THE CLASS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT:

37. The Defendants have failed to honor their contractual undertakings with respect to all class members similarly situated to the Applicant in an identical manner;



38. The Defendants are breaching their contractual obligations owed to Applicant and to all Class members;
39. The language of the Policy, which was drafted by the Defendants, is either identical or very similar for every member of the Class with respect to Business Interruption Coverage;
40. The interpretation of coverage and any exclusion Insurers may purport to invoke is identical or very similar for every member of the Class;
41. The formula and procedure for calculating the insurance indemnity owed to every member of the Class is identical or very similar and may be dealt with once the Policy and the Business Interruption Coverage issue has been decided by this Honorable court;
42. The only individual question pertains to the business interruption loss actually sustained by the members of the Class and whether the peril which directly caused it is or is not covered under the Policy;

C) THE RECOURSES OF THE CLASS MEMBERS RAISE IDENTICAL, SIMILAR OR RELATED QUESTIONS OF FACT OR LAW, NAMELY:

43. a) Must Insurers indemnify class members for Business Interruption Insurance due to COVID-19, in accordance with the terms and conditions of their insurance policy interpreted in accordance with Québec law?
- b) Are the Class members entitled to claim damages plus interest and the additional indemnity set out in the *Civil Code of Quebec* on these amounts, from the date of service of the Application for authorization?

D) THE COMPOSITION OF THE CLASS

44. The composition of the Class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
45. The Applicant's Principal has been in the restaurant industry for decades, knows many other restaurant owners affected by the Insurers' apparent systematic denial of coverage and by the insurance industry in general and he is well aware of their catastrophic fate and dire economic difficulties. As such, there are likely hundreds or thousands of Class Members in the same situation as the Applicant in the province of Québec;
46. The names and addresses of all persons included in the Class are not known to the Applicant, however they are known to the Defendants;
47. Class members are very numerous and are dispersed across the Province of Quebec;

48. Class members form a specialized field of commercial activity and the interpretation of the Applicant's Policy, in particular Form 5331-01, shall serve the interests of all other class members;
49. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Class member to obtain mandates and to join them in one action;
50. In these circumstances, a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice without overburdening the court system;

E) THE CLASS MEMBER REQUESTING TO BE APPOINTED AS REPRESENTATIVE PLAINTIFF IS IN A POSITION TO PROPERLY REPRESENT THE CLASS MEMBERS.

51. The Applicant requests that it be appointed the status of representative plaintiff for the following main reasons:
 - a) The Applicant is a member of the Class and has a personal interest in seeking the conclusions that it is seeking;
 - b) The Applicant's shareholder and President, Mr. George Cagianos, also holds a controlling interest (in his name and through a corporation) and is a director of two additional L'Académie restaurants in the Greater Montreal area, namely 9140-8385 Québec Inc. dba Restaurant L'Académie Anjou and 9218-2427 Québec Inc dba Restaurant L'Académie de l'Ouest (through shares in 9228-4611 Québec Inc.), the whole as appears from the extracts of the *Québec Enterprise Register* for both corporations communicated herewith as **Exhibit P-7, en liasse**;
 - c) The Applicant (and its President) are competent, in that it has the potential to be the mandatary of the claim if it had proceeded under article 91 of the *Code of Civil Procedure*;
 - d) The Applicant's President is in contact with numerous restaurant and bar owners, and intends to apprise members of the Class of the progress of the present class action;
 - e) The Applicant cares about insurance coverage for his business and knows the importance of insurance coverage for his business but that of all restaurateurs and bar owners;
 - f) The Applicant's interests are not opposed to those of other Class members;
52. Additionally, the Applicant respectfully adds that:
 - a) The Applicant has acted diligently with respect to this matter, as it has communicated with its insurance broker, submitted an insurance claim to

Insurers, obtained a copy of its insurance policy, consulted the undersigned attorneys regarding its application and interpretation, and decided to institute a class action, instead of an individual action, in order to advance the rights of all members of the Class instead of only its own;

- b) Its President has the time, energy, will and determination to assume all the responsibilities incumbent upon him in order to diligently carry out the action;
- c) It has cooperated and will continue to fully cooperate with its attorneys, who have experience in insurance law;
- d) Its President read this Application prior to its court filing and reviewed the exhibits in support thereof;
- e) Its President understands the nature of the action;
- f) Its President is well aware of the dire financial difficulties of all restaurateurs and bar owners in the Province of Québec who may be the last to be authorized by the Government of Québec to reopen;

F) THE REPRESENTATIVE PLAINTIFF CONSIDERS THAT THIS MATTER IS OF THE UTMOST URGENCY AND THAT THE ONLY FUNDAMENTAL QUESTION FOR THIS HONORABLE COURT TO DECIDE IS OF A DECLARATORY NATURE.

- 53. Applicant, like the vast majority of restaurateurs and bar owners, are hurting financially as a direct result of the COVID-19 pandemic and the country's complete shutdown;
- 54. Many restaurants and bars are running out of liquidity, may not even survive this financial crisis and looming recession and the baseless and highhanded denial of coverage by the Insurers, like other insurers, is causing extraordinary harm to the Applicant and Class members;
- 55. The relief sought by Applicant and by the Class members will only or primarily necessitate that the terms of the Policy be interpreted by this honorable court so as to determine whether Class members are or are not entitled to insurance coverage as a result of the COVID-19 pandemic;
- 56. This question can be decided first and without delay, leaving the calculation of the indemnity owed to each Class member to be decided separately, in accordance with the clear terms of the Policy;

II. DAMAGES

- 57. By refusing to indemnify the Applicant and other Class members for Business Interruption Insurance related to COVID-19, the Defendants are violating their contractual obligations towards them;

58. As set forth above, the Applicant has suffered damages which are continuously evolving as a result of the governmental decrees and measures regarding COVID-19. Given the uncertain duration of the COVID-19 pandemic, it is impossible for the Applicant to precisely quantify its damages at the present time and similarly it is impossible to estimate the damages for the totality of the class members;
59. In the alternative, the Applicant has clearly suffered damage as a result of four consecutive weeks of restricted access to its premises, namely from March 23, 2020 to April 13, 2020, the whole resulting from the governmental decrees and measures regarding COVID-19 for which it is entitled to compensation pursuant to section 9 of the Broad Form Perils;
60. In light of the foregoing, the Applicant is entitled to claim damages on behalf of all Class Members to be calculated in accordance with the formula set forth in the insurance policy;

III. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

61. The action that the Applicant wishes to institute on behalf of the members of the Class is an action for declaratory relief and in damages;
62. The conclusions that the Applicant wishes to introduce by way of an originating application are:

GRANT the class action of the Representative Plaintiff and the members of the Class against the Defendants;

DECLARE that the business interruption losses caused by COVID-19 are covered under the Policy issued by Defendants to Class Members;

DECLARE that Defendants' denial of the claim made by Applicant is wrongful and constitutes an abuse of right;

CONDEMN the Defendants to pay the Representative Plaintiff and the Class Members an amount equal to their business interruption losses during COVID-19, beginning on March 23, 2020, calculated using the formula in the Policy, the whole with interest and the additional indemnity provided by law as well as such other damages as this Honorable Court may award in connection with any finding of wrongful or abusive denial of insurance coverage by Defendants;

In the alternative CONDEMN the Defendants to pay the Representative Plaintiff and the Class Members an amount equal to four consecutive weeks of business interruption losses during COVID-19 pursuant to section 9 of the Broad Form Perils, from on March 23, 2020 to April 13, 2020 calculated using the formulas in the Policy and Broad Form Perils, the whole with interest and the additional indemnity provided by law as well as

such other damages as this Honorable Court may award in connection with any finding of wrongful or abusive denial of insurance coverage by Defendants

ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation in accordance with the policy formula;

CONDEMN the Defendants to bear the costs of the present action including the cost of exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honorable Court shall determine;

63. The interests of justice favor that this Application be granted in accordance with its conclusions;

IV. JURISDICTION

64. The Applicant suggests that this class action be exercised before the Superior Court of Quebec, in the district of Montreal, because many Class members have businesses situated and insured in this district, and because the Defendants have a place of business in this district;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

AUTHORIZE the institution of a class action in the form of an originating application in damages;

APPOINT the Applicant with the status of Representative Plaintiff of the persons included in the Class herein described as:

Class:

All businesses engaged in the operation of a restaurant and or bar, in the province of Quebec, who were forced to close their business operations or limit their operations to take-out and delivery services as a result of COVID-19 and ensuing governmental order, who sustained a loss as a result and who were denied coverage for Business Interruption Insurance by the Defendants or who have yet to file a claim for Business Interruption Insurance with the Defendants as a result of a pre-emptive blanket denial of coverage by insurers, including the defendants.

IDENTIFY the principal questions of fact and law to be treated collectively as the following:

- a) Are the Insurers contractually obliged to indemnify Class members for Business Interruption losses due to COVID-19, in accordance with the terms and conditions of their insurance policy interpreted in accordance with Québec law?
- b) Are the Class members entitled to claim damages plus interest and the additional indemnity set out in the *Civil Code of Quebec* on these amounts, from the date of service of the Application for authorization?
- c) Was the refusal of Defendants to honor their obligations under the insurance policy wrongful and abusive?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Representative Plaintiff and the members of the Class against the Defendants;

DECLARE that the business interruption losses caused by COVID-19 are covered under the Broad Form Perils and Policy issued by Defendants to Class Members;

CONDEMN the Defendants to pay the Representative Plaintiff and the Class Members an amount equal to their business interruption losses during COVID-19, beginning on March 23, 2020, calculated using the formulas in the Policy and Broad Form Perils, the whole with interest and the additional indemnity provided by law;

In the alternative CONDEMN the Defendants to pay the Representative Plaintiff and the Class Members an amount equal to four consecutive weeks of business interruption losses during COVID-19 pursuant to section 9 of the Broad Form Perils, from on March 23, 2020 to April 13, 2020 calculated using the formulas in the Policy and Broad Form Perils, the whole with interest and the additional indemnity provided by law as well as such other damages as this Honorable Court may award in connection with any finding of wrongful or abusive denial of insurance coverage by Defendants

ORDER that the claims of individual Class members be the object of collective liquidation, if the proof permits or, alternately, by individual liquidation in accordance with the policy;

CONDEMN the Defendants to bear the costs of the present action including the cost of exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this honorable court shall determine;

DECLARE that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein

ORDER the publication of a notice to the members of the Class in accordance with article 579 C.C.P. within sixty (60) days from the judgment to be rendered herein in the "News" sections of the Saturday editions of La Presse+, Le Journal de Montréal and the Montreal Gazette;

ORDER the Defendants to send an Abbreviated Notice by e-mail to each Class member, to their last known e-mail address, with the subject line "Notice of a Class Action";

ORDER the Defendants to supply class counsel, within thirty (30) days of the judgment rendered herein, all lists in their possession or under their control permitting to identify Class members, including their names, addresses, phone numbers and email addresses;

RENDER any other order that this Honorable Court shall determine;

THE WHOLE with costs including publication fees.

Montréal, August 28, 2020

SPIEGEL SOHMER INC.



Per: **M^{TRE} LAURENT DEBRUN**
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<p>NO :</p>	<p>SUPERIOR COURT PROVINCE OF QUÉBEC DISTRICT OF MONTREAL</p>
<p>9391-2186 QUÉBEC INC. dba RESTAURANT L'ACEDÉMIE CRESCENT Applicant</p> <p>-VS.-</p> <p>AVIVA INSURANCE COMPANY OF CANADA EVEREST INSURANCE COMPANY OF CANADA SOVEREIGN INSURANCE (LA SOUVERAINE COMPAGNIE D'ASSURANCE GÉNÉRALE) HDI GLOBAL SPECIALTY SE Defendants</p>	<p>APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE PLAINTIFF (Art. 571 and following C.C.P.) Nature: Class Action</p>
<p>ORIGINAL</p>	<p>Mtre. Laurent Debrun Our ref.: 732268-1002 ldebrun@spiegelsohmer.com</p> <p>SPIEGEL SOHMER</p> <p>1000-1255 Peel Street Montréal, Québec H3B 2T9 Direct Line: (514) 875-3564 Fax: (514) 875-8237</p> <p>BS-0251</p>