CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY LAW BULLETIN NO. 325

NOVEMBER 26, 2013

EDITOR: TERRANCE S. CARTER

LATE NOTICE OF CLAIM LEADS TO NO INSURANCE COVERAGE

By Barry W. Kwasniewski[*]

A. INTRODUCTION

Insurance policies of all types require insured persons or organizations, including charities and not-for-profits, to notify their insurer of claims or potential claims. These notice requirements are contained in insurance policy wordings and must be followed. The failure to put an insurer on notice of a claim or even a potential claim may lead to the insurer denying coverage under the policy. The denial of coverage would result in the insured being required to defend a lawsuit and pay a judgment without any contribution from the insurer. The Ontario Superior Court of Justice decision in *Peel Law Association v Royal Insurance*[1] highlights the importance of complying with the claim notice provisions in insurance policies. As will be discussed in this Bulletin, this decision shows why charities and not-for –profits must understand their coverage and duties under insurance policies, and give notice of a claim or a potential claim without delay to their broker or insurer.

B. THE FACTS

Two Human Rights Tribunal of Ontario ("HRTO") proceedings alleging unlawful discrimination were brought against the Peel Law Association ("Peel").[2] The first proceeding was commenced in July 2008 and

[*] Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Dianne T. Hajdasz, B.Sc. (Hons.), B.Ed., J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

[1] *Peel Law Association v Royal Insurance*, 2013 ONSC 2312. To access the decision, see http://canlii.ca/t/fx5gq

[2] Members of the Peel Law Association are lawyers of the Law Society of Upper Canada that have offices located in the Regional Municipality of Peel. The Peel Law Association promotes and protects its members by offering resources to members and advocates for its members. <http://www.plalawyers.ca/index.shtml>

the second was commenced in January 2009. Both proceedings were related and consolidated by the HRTO. Peel retained legal counsel for the proceedings in August 2008, but did not put its insurer, Royal Insurance ("Royal"), on notice of the claim at that time. Peel defended the proceeding before the HRTO. After a hearing, the HRTO found that Peel had engaged in unlawful discrimination, and was ordered to pay damages in the amount of $4,000. Peel appealed the HRTO decision to the Divisional Court, which quashed the HRTO decision. The complainants then appealed that decision to the Court of Appeal. The complainants' appeal was allowed and the decision of the HRTO was restored.[3] After all these proceedings were completed, Peel had incurred in excess of $116,889.41 in legal defence costs.[4]

Peel only notified the claims department of Royal of the proceeding by formal written notice on December 23, 2010. This formal notification date was well after the HRTO proceeding had been commenced, and after the date of the HRTO decision released on December 3, 2010.[5] The reason put forward by Peel for the late formal written notice was that Peel "had not turned their mind to insurance coverage for the HRTO proceedings."[6] Peel commenced an application seeking orders requiring Royal to provide coverage and reimburse Peel's legal defence costs or alternatively, for damages for breach of the insurance contract.

C. CLAIM REPORTING OBLIGATIONS

Peel's insurance policy covered claims that were made against it and its directors for "wrongful acts", which appear to have included unlawful discrimination claims.

When the policy period commenced in October, 2007, Peel was sent a letter from its insurance broker that described the "claims made" policy, and the obligation to report potential and actual claims in a timely manner. The letter also made reference to the notice section of the policy, which explicitly stated that Peel must provide the insurer with written notice and a description of the circumstances of any claim no later than thirty days after the policy period expires. In addition, the policy also stated that Peel must not agree to settle a claim, incur defence costs or admit liability without Royal's prior consent.

[3] *Peel Law Association v Pieters* 2013 ONCA 396.
[4] *Ibid* at para 5.
[5] The HRTO hearing took three days.
[6] *Ibid* at para 19.

D. DID PEEL PROVIDE NOTICE?

The parties disputed whether Peel complied with the notice provision in the policy. According to Royal, notice is only effective when sent to the broker or claims office. However, the insurance renewal application form completed in October 2008 requested information about "changes in legal counsel", to which Peel replied that it had retained counsel in the HRTO proceeding. Peel asserted that it complied with the notice requirement when it stated on this application that it had retained legal counsel with respect to the HRTO proceeding. In response, Royal argued that the renewal application was only considered a "go forward"[7] document asking about material changes, which was sent to the underwriting department, not the claims department. Therefore, it took the position that this was not proper notice of the claim under the policy.

The court agreed with Royal's position, finding that Peel had no intention to report a claim at the time the renewal application was completed. The court also accepted the evidence from Royal that the renewal application would not have come to the attention of the claims department.

Peel also argued that neither Royal nor the broker followed up on the information provided in the renewal application. However, the court stated that brokers and insurers are not obligated to inquire whether an insured wants to make a claim, as it is the insured's decision whether or not to submit a claim and involve the insurer. Further, in regards to Peel's renewal application, a partner at the broker had contacted Peel to inquire about the HRTO matter, but Peel advised him that it would pay any settlement costs itself. This response was considered by the court as evidence that Peel's intention was to not report a claim.

E. PREJUDICE TO THE INSURER?

The purpose of insurance policy notice provisions is to allow the insurer the opportunity to protect its interests, (as well as the insured's interests) when a claim is made or threatened to be made. Courts have recognized that delays in reporting claims may cause the insurer prejudice to these interests, which justify a denial of coverage. As a result of Peel's late notice, Royal did not have the opportunity to assess liability, investigate the matter, negotiate a settlement, and retain counsel to defend the HRTO proceeding. The court determined that these lost opportunities prejudiced the insurer, and therefore, the denial of coverage was

[7] *Ibid* at para 14.

upheld. For these reasons, the court also held that Peel should not be relieved from the consequences of its late notice by an order granting "relief from forfeiture" pursuant to s. 129 of the *Insurance Act*.

F. CONCLUSION

The *Peel* decision, demonstrates that is important for an insured (including charities and not –for –profits) to provide its insurer with proper notice of a claim or a potential claim in a timely manner, and as specified in the insurance policy. Insureds should also carefully review the insurance policy and be aware of the terms and conditions of their coverage. If there is doubt as to whether there is or is not coverage, the best practice is to report the claim. Otherwise, any non-compliance may be viewed as prejudicial to the insurer and coverage may be denied. Furthermore, an insured should not engage in any settlement discussions without first submitting a claim under the policy.

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2013 Carters Professional Corporation