

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as am. (the “Act”);

AND IN THE MATTER OF an interim cease and desist order made by the Superintendent of Financial Services under date of August 30, 2004 (the “Order”) against SNC Insurance Company (Barbados) Inc. and Stop 'N' Cash 1000 Inc. pursuant to s. 441(4) of the Act;

AND IN THE MATTER OF a request for a hearing in respect of the Order made pursuant to s. 441(5) of the Act;

AND IN THE MATTER OF a request for a stay of the Order.

BETWEEN:

**SNC INSURANCE COMPANY (BARBADOS) INC.
STOP ‘N’ CASH 1000 INC.**

Applicants

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

Before:

Mr. Colin H.H. McNairn
Chair of the Tribunal

Appearances:

Mr. Steven Sofer and
Mr. Scott Kugler
For SNC Insurance Company (Barbados) Inc.
and Stop ‘N’ Cash 1000 Inc.

Mr. Robert Conway
For the Superintendent of Financial Services

Heard:

September 10, 2004

REASONS FOR DECISION ON REQUEST FOR STAY

The Background

The Superintendent of Financial Services (the “Superintendent”) issued an interim cease and desist order dated August 30, 2004 (the “Order”) against SNC Insurance Company (Barbados) Inc. and Stop ‘N’ Cash 1000 Inc. (together the “Applicants”) pursuant to s. 441(4) of the *Insurance Act* (the “Act”). The Order recites that the Superintendent is of the opinion that the Applicants are committing acts that are unfair and deceptive acts or practices in contravention of the Act by carrying on insurance activities in Ontario without the requisite licences. Accordingly, the Order directs the Applicants to cease carrying on those activities. The Order was apparently made without notice or the opportunity for a hearing given to either of the Applicants or any other potentially interested persons.

The Applicants asked for a hearing by this Tribunal, in respect of the making of the Order, by Request for Hearing filed with the Tribunal on September 9 or 10, 2004. Prior to that filing, the Applicants made a request to the Tribunal, on notice to the Superintendent, for certain interim or other immediate relief in this matter. The Applicants asserted that serious harm would be done to the business and the 50 plus Stop ‘N’ Cash franchisees (who had apparently been notified of the Order by the Superintendent) if the Order were to continue in effect while the proceeding before the Tribunal was pursued to its conclusion in the ordinary course. I entertained that request, sitting as a one-member panel of the Tribunal, at a hearing held before me on September 10, 2004.

The primary relief requested by the Applicants at that hearing was a stay of the Order pending the outcome of the hearing on the merits. The Applicants also asked for a declaration that the activities of the Applicants were now in compliance with the Act, taking into account some changes that had apparently been made to the way in which their business operations are carried on. Coming at this stage in the proceeding, before a full hearing on the merits, such a declaration could, in my opinion, simply achieve what would amount, in effect, to an interim stay of the enforcement of the Order on the particular ground that the business operations of the Applicants were, arguably, not such as to violate the Order and, by necessary implication, were not such as to be in contravention of the licensing provisions of the Act. Therefore, I treat the request for a declaration as raising the same considerations as the request for a stay.

The Superintendent maintained, among other things, that the Tribunal did not have the authority to grant the requested relief. I invited the parties to make oral submissions on that jurisdictional issue as a preliminary matter. After hearing those submissions, I

delivered my conclusion on that issue, orally, to the effect that the Tribunal did not have the necessary jurisdiction to grant the relief sought by the Applicants. Therefore, I did not hear argument on the question of whether the circumstances of this case would justify the awarding of such relief. I indicated that I would deliver written reasons for my decision on the jurisdictional issue.

The Part of the Act under which the Order was Made

Part XVIII of the Act, entitled “UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE”, under which the Order was made, contains the following provisions:

438. For the purposes of this Part,

“person” includes an individual, corporation, association, partnership, organization, reciprocal or insurance exchange, member of the society known as Lloyd’s, fraternal society, mutual benefit society or syndicate;

“unfair or deceptive acts or practices” means any activity or failure to act that is prescribed as an unfair or deceptive act or practice.

439. No person shall engage in any unfair or deceptive act or practice.

440. The Superintendent may examine and investigate the affairs of every person engaged in the business of insurance in Ontario in order to determine whether such person has been, or is, engaged in any unfair or deceptive act or practice.

441. (1) Upon examination or investigation, or upon any other evidence, the Superintendent shall make a report if he or she is of the opinion that a person has committed or is committing any act, or has pursued or is pursuing any course of conduct, that is an unfair or deceptive act or practice or might reasonably be expected to result in a state of affairs that would constitute an unfair or deceptive act or practice.

(2) The Superintendent may give notice in writing, which shall include a copy of the report made under subsection (1), to the person that the Superintendent intends to order the person,

(a) to cease or refrain from doing any act or pursuing any course of conduct identified by the Superintendent;

(b) to cease engaging in the business of insurance or any aspect of the business of insurance specified by the Superintendent; or

(c) to perform the acts that, in the opinion of the Superintendent, are necessary to remedy the situation.

(3) Within 15 days after receiving the notice, a person may request in writing that the Tribunal hold a hearing before the Superintendent takes any action described in the notice.

(4) Despite subsection (3), if the Superintendent is of the opinion that the interests of the public may be prejudiced or adversely affected by any delay in the issuance of a permanent order, the Superintendent, without prior notice, may make an interim order as described in subsection (2) which shall take effect immediately on its making, and which shall become permanent on the 15th day after its making unless within that time the person requests a hearing before the Tribunal.

(5) If, within the time period allowed, the person requests a hearing, the Tribunal shall hold a hearing.

(6) If, within the time period allowed, the person requests a hearing and the Superintendent has made an interim order under subsection (4), the Superintendent may extend the interim order until the hearing is concluded and the order is confirmed, varied or revoked

(7) If the person does not request a hearing within the time period allowed, the Superintendent may make an order in accordance with the notice given under subsection (2) which shall take effect on the date set out in the order.

(8) At a hearing, if the Tribunal is of the opinion that an order described in subsection (2) should be made, the Tribunal may make an order which shall take effect on the date set out in the order.

(9) The Superintendent may modify any order made under this section after giving the person named in the order an opportunity to make written submissions.

(10) The person named in an order modified by the Superintendent may appeal the order to the Tribunal.

(11) The Superintendent may revoke any order made under this section.

Analysis

The Tribunal is a creature of statute and, as such, its authority must be found in its governing statutes. Some matters can come before the Tribunal under the Act by way of a request for a hearing in respect of an action or proposed action by the Superintendent; other matters can come before the Tribunal under the Act by way of appeal from a decision of the Superintendent. In the case of an appeal, the Act confers specific authority on the Tribunal to grant a stay of the decision appealed from, in s.17(6) of the Act, which reads as follows:

The filing of a notice of appeal does not stay the decision of the Superintendent but the Tribunal may grant a stay until it disposes of the appeal.

It would be inconsistent with this provision and the fact that there is no similar provision in respect of a decision of the Superintendent that can be questioned through a request for hearing, rather than an appeal, to treat the Tribunal as having the authority to stay the latter kind of decision.

While subsection (10) of s. 441 of the Act provides for an appeal from an order of the Superintendent, that provision relates only to a cease and desist order that has been modified by the Superintendent pursuant to subsection (9) of s. 441. The other subsections of s. 441 that contemplate the possibility of an affected person bringing a cease and desist order before the Tribunal clearly indicate that this is to happen by way of a request for a hearing. It is one of those other subsections that is the basis for the Order in this case, namely subsection (4). The making of an interim cease and desist order under that subsection triggers a right on the part of the person against whom the order is made to make a request within 15 days, under subsection (5), for a hearing before the Tribunal, which is what the Applicants have done. When such a request is made, it is then open to the Superintendent, under subsection (6), to extend the order until the hearing is concluded and the order is confirmed, varied or revoked by the Tribunal. It would be inconsistent with this provision to treat the Tribunal as having the authority to determine whether an interim cease and desist order will have continuing effect, until the hearing is concluded, through the grant or refusal to grant of a stay of the order.

If the Superintendent were to decide to extend the Order in this case, which hasn't happened to date, his decision to do so would be "final and conclusive for all purposes", in accordance with s. 20(2) of the Act, unless that extension were to involve a modification of the Order, in which case the Order would be subject to appeal to the Tribunal under subsection (10) of s. 441.

The Applicants argued that the Tribunal has the authority to grant the relief they have requested at this early stage of the proceeding by virtue of s. 25.0.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22, as am. (the "SPPA"), which states that:

A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under section 25.1.

The Tribunal has adopted Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal under the authority of s. 25.1 of the SPPA and s. 22(a) of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. Those Rules give the Tribunal the broad power, in Rules 12 and 13, to make orders to determine the issues before it and to make a procedural order to govern the conduct of any particular proceeding.

The SPPA states, in s. 32, that its provisions prevail over the conflicting provisions of any other enactment unless the other enactment expressly provides for the primacy of its provisions over those of the SPPA. Therefore, if there is a conflict between s. 25.0.1 of the SPPA and the provisions of the Act, s. 25.0.1 of the SPPA will prevail since the Act does not expressly assert that it has primacy over the SPPA. But this does not mean that it

would be improper to read s. 25.0.1 of the SPPA, in its application to the Tribunal, in a restricted way, so as to avoid the possibility of a conflict with the Act, if that were to be called for by the principles of statutory interpretation. In my view, the general statement in s. 25.0.1 of the SPPA can and should be read, in accordance with those principles, so as not to give the Tribunal the authority to stay an interim cease and desist order of the Superintendent because that specific authority is not consistent with the provisions of the Act for the reasons that I have already given. On that interpretation of s. 25.0.1 of the SPPA, there is no conflict between it and the provisions of the Act. I have come to the same conclusion, for similar reasons, with respect to any alleged conflict between Rules 12 and 13 of the Tribunal's Rules of Practice and Procedure and the provisions of the Act.

In any event, in the absence of a restrictive interpretation of s. 25.0.1 of the SPPA, I don't believe that there is a true conflict between that section and the provisions of the Act. Section 25.0.1 is simply a broad enabling provision that confirms that any Ontario tribunal is master of its own procedures while the Act clearly implies that this Tribunal does not have the authority to stay an interim cease and desist order made by the Superintendent or any other order or action of the Superintendent that comes before the Tribunal by way of a request for hearing. If the Tribunal were to refuse to stay any such order or action for lack of specific authority to do so under the Act, that would not put the Tribunal in violation of the SPPA nor would it significantly undermine the general latitude afforded to the Tribunal in procedural matters by the SPPA. Therefore, I would conclude that there is no conflict between the SPPA and the provisions of the Act. Moreover, I have some doubt as to whether the ability of the Tribunal to grant a stay of a decision of the Superintendent that is the subject of a hearing before the Tribunal can be fairly characterized as a "procedure" or "practice" of the Tribunal in the sense of s. 25.0.1 of the SPPA. If it can't, there can be no conflict between that section and the provisions of the Act that are in question in the context of the Applicants' request for a stay of the Order.

Disposition

The request by the Applicants for a stay of the Order and other immediate relief is denied for lack of jurisdiction to grant that relief.

DATED at the City of Toronto this 13th day of September, 2004.

“Colin H.H. McNairn”

Colin H.H. McNairn
Chair of the Tribunal