

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I-8,
as amended (the "Act"), in particular section 441;

AND IN THE MATTER OF a Notice of Proposed Cease and
Desist Order dated December 2, 2004 as against Manuel
Castro;

AND IN THE MATTER OF a hearing in accordance with
section 441(5) of the Act.

BETWEEN:

MANUEL CASTRO

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Colin McNairn
Chair of the Tribunal and Chair of the Panel

Lily Harmer
Member of the Tribunal and of the Panel

Elizabeth Shilton
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:
Manuel Castro on his own behalf

For the Superintendent:
Joe Nemet

HEARING DATES:

September 25-29, October 10, 2006

REASONS FOR DECISION

1. THE BACKGROUND TO THIS PROCEEDING

By notice dated December 2, 2004, the Superintendent of Financial Services made an interim cease and desist order against Manuel Castro (“M. Castro”) and his brother Carlos Castro (“C. Castro”) directing them to cease and desist carrying on business as statutory accident benefit representatives ("SABS representatives"). This order followed an investigation by the Superintendent, through the Financial Services Commission of Ontario (the "Commission"), into allegations that various SABS claimants represented by the Castros had not received the proceeds of their insurance settlements. The Superintendent concluded that both Castros had engaged in unfair or deceptive acts or practices in the conduct of their activities as SABS representatives. These conclusions are reflected in the report of the Superintendent that was appended to the order, and in a supplementary report dated February 25, 2005, providing particulars of the improper conduct alleged on the part of the Castros.

On December 10, 2004, each of the Castros filed a request for a hearing before the Tribunal in respect of the order. The Superintendent then extended the order until such time as the Tribunal dealt with the matter by way of confirmation, variation or revocation of the order.

By letter of March 17, 2006, C. Castro withdrew his request for a hearing. By notice to C. Castro, the Superintendent confirmed that the order had become permanent as against him. Therefore, this proceeding before the Tribunal is now for the sole purpose of determining whether the order as against M. Castro should be confirmed, varied or revoked.

2. THE ISSUES BEFORE THE TRIBUNAL

The gist of the Superintendent's allegations against C. and M. Castro as set out in the report and the supplementary report is that they had committed an unfair or deceptive act or practice by failing to act honestly in dealing with certain SABS claimants by withholding funds which lawfully belonged to those claimants. The particulars of seven claimants are detailed in the reports; Blanca Benitez, Carol Ann Aulenbach, Santos Moran and Ismael Moran, Jonathan Rodriguez, Fausto Romero and Samuel Cristales. In addition, the Superintendent alleged that the Castros had committed an unfair or deceptive act or practice by demanding a contingency fee for their services as SABS representatives. In this proceeding, the Superintendent did not pursue any issues with respect to Blanca Benitez, nor did he pursue the allegation with respect to contingency fees.

Accordingly, the issues before the Tribunal are:

- a. whether M. Castro violated his duty to act honestly in dealing with Aulenbach, Rodriguez, the Moran brothers, Romero and/or Cristales by withholding funds lawfully belonging to them; and
- b. if so, whether the Superintendent's cease and desist order should be confirmed, varied or revoked.

There is no dispute that with respect to all the claimants, the insurers paid settlement funds in full in a timely fashion to the claimants' representatives. The proceeds of settlement were not, however, turned over to the claimants in question upon receipt. Indeed, with the exception of Carol Ann Aulenbach who was eventually paid in full, none of these claimants has yet received all the money to which he is entitled. The question for this Tribunal is whether the role played by M. Castro in all of this is such that he violated his duty of honesty as a SABS representative.

3. THE RELEVANT PROVISIONS OF THE ACT, THE REGULATIONS AND THE CODE OF CONDUCT

The role of SABS representatives and the regulatory context within which these representatives operate are set out more fully in the decision of the Tribunal in *Crosbie et al v. Superintendent of Financial Services of Ontario*, FST Decision No. R0251-2005-1, dated December 1, 2005 (the decision was subsequently affirmed by the Ontario Divisional Court on October 16, 2006). Suffice it here to say that SABS representatives play an important paralegal role in representing accident victims pursuing claims against automobile insurers under the Statutory Accident Benefits Schedule (O. Reg. 403/96, as amended, a regulation under the *Insurance Act*). Persons acting as SABS representatives must meet certain requirements set out under s. 18 of O. Reg. 664 as amended (also a regulation under the *Insurance Act*). Since November 1, 2003, SABS representatives have been subject to the *Code of Conduct for SABS Representatives* (the "Code of

Conduct"), issued by the Commission. That Code of Conduct provides, among other obligations, that:

- 2.1 A representative must act honestly in dealing with the claimant, the insurer and its representatives, FSCO [the Commission], and all participants in any dispute resolution process.

(The entire Code of Conduct can be found on the Commission's Website at www.fSCO.gov.on.ca)

The term "claimant" is defined in the Code of Conduct as "a person who is seeking advice, assistance or representation concerning his or her entitlement to statutory accident benefit benefits".

The Code of Conduct also provides, in s. 2.8, that a representative must treat claimants, among others, with courtesy, respect and fair-dealing. This obligation might have been relevant in the present case but for the fact that the Superintendent did not rely on the breach of its terms in the allegations made against M. Castro.

As noted below, a breach of the Code of Conduct can provide grounds for the Superintendent making a cease and desist order against a SABS representative since the basis for such an order is that a person has engaged in "an unfair or deceptive act or practice" and such an act or practice, in the case of a SABS representative, includes acting in a manner inconsistent with the Code of Conduct.

The Superintendent's authority to make a cease and desist order is set out in the *Insurance Act*. Section 441(1) of that Act provides that if, after an investigation, the Superintendent finds that a person has engaged in an "unfair or deceptive act or practice", he shall make a report to that effect. If the Superintendent intends to make a cease and desist order, s. 441(2) provides that he is required to serve notice of that intention, along with a copy of the report, on the person to whom the order is to be directed. That person then has a right to request a hearing before this Tribunal before the order takes effect. If the Superintendent believes that delay will prejudice the public interest, he has the right to make an immediate interim cease and desist order under s. 441(4); this order will become permanent after 15 days unless a hearing before the Tribunal is requested. If a hearing is requested, the Superintendent may extend the interim order, under s. 441(6), until the hearing is concluded and the order is confirmed, varied or revoked. Section 441(8) authorizes the Tribunal, after a hearing, to make a cease and desist order of the kind the Superintendent could make under s. 441(2). While we refer to orders made under s. 441 in the way they are commonly described, i.e. as cease and desist orders, the section makes it clear that such an order may impose obligations on the person to whom it is directed to take positive actions to remedy the situation that has given rise to the making of the order.

The term "unfair or deceptive act or practice", for the purpose of s. 441 of the Act, means any unfair or deceptive act or practice prescribed by regulation (see s. 438 of the Act).

Ontario Regulation 7/00, as amended by O. Reg. 278/03, adopted pursuant to the *Insurance Act*, prescribes the following act or omission, among others, as an "unfair or deceptive act or practice" if it occurs in connection with the activities of a SABS representative:

An act or omission that is inconsistent with the Code of Conduct for Statutory Accident Benefit Representatives issued by the Superintendent and published in the *Ontario Gazette*, as it may be amended from time to time ... (s. 4(1), para 4).

The Superintendent found that M. Castro had committed an "unfair or deceptive act or practice" in the course of his business as a SABS representative pursuant to these provisions by violating his duty of honesty under s. 2.1 of the Code of Conduct. Accordingly, the Superintendent made an interim cease and desist order against him under s. 441(2). When the Castros requested a hearing before the Tribunal, the Superintendent extended the interim order under s. 441(6). This Tribunal must now determine whether that order should be confirmed, varied or revoked.

4. THE EVIDENCE

At the hearing in this proceeding, the Superintendent introduced oral and documentary evidence as to the manner in which various statutory accident benefit claimants and their claims were dealt with by M. Castro and by Castro & Associates, A.D.R. Consultants and Legal Services, a division of Ontario Chasqui Corp. All the claimants testified personally. The Superintendent called some additional witnesses besides the claimants. The oral evidence of the claimants, except that of Carol Ann Aulenbach and Jonathan Rodriguez, was given in Spanish through an interpreter. In addition, Jesus Rodriguez, father of Jonathan, testified in Spanish through an interpreter. M. Castro called only one witness - himself.

A. The Evidence Advanced on Behalf of the Superintendent

The circumstances relating to the various claimants and their claims, established through the oral evidence of witnesses and documentary evidence put forward by the Superintendent, are set out below.

Carol Ann Aulenbach

Ms. Aulenbach was injured in a motor vehicle accident on December 2, 2002. Several weeks after the accident, on the recommendation of her doctor, she engaged the services of Castro & Associates to pursue a claim for statutory accident benefits against her insurer, Dominion of Canada General Insurance Company. Ms Aulenbach signed a written retainer, dated January 21, 2003, at the office of Castro & Associates in London, Ontario providing, among other things, for the payment of disbursements and specified fees of Castro & Associates. Ms. Aulenbach testified that she understood M. and C.

Castro to be partners in the business. She conceded, however, that this impression came from her referring doctor rather than from anything specific that was said to her by anyone in the offices of Castro & Associates.

Ms. Aulenbach met with M. Castro at the Toronto office of Castro & Associates to investigate the possibility of filing for mediation of her claim. Subsequently on November 26, 2003, he represented her at a mediation held by teleconference with the insurer. As a result of the mediation, she accepted the insurer's offer of \$22,500 in full satisfaction of her claim. On December 9, 2003, she met with M. and C. Castro to complete the paperwork in connection with her settlement. As part of the insurer's standard form documentation, she signed an acknowledgement that she had read the release, and M. Castro signed to indicate that he had fully explained its terms to her. On the same day, she also signed a power of attorney in favour of C. Castro of Castro & Associates authorizing him to endorse, on her behalf, any cheque issued by the insurer relating to her motor vehicle accident. She testified that she understood she had to sign this document so that the cheque from the insurer could be cashed. When Ms. Aulenbach asked when the settlement funds would come through, she was told "before Christmas".

By December 19, 2003 the insurer's cheque for \$22,500, payable to Ms. Aulenbach, had been sent to Castro & Associates, apparently to the attention of M. Castro, and deposited in its trust account at its bank. Ms. Aulenbach made a number of calls to the Castro & Associates office to ask when she would receive her settlement money. Finally, she called in at the office on January 20, 2004 and was given a current cheque for \$5,688.41 and a further cheque, postdated to January 27, 2004, for \$8,000 (the total, \$13,688.41, was her share of the proceeds of settlement after payment of fees and disbursements).

Ms. Aulenbach deposited the \$5,688.41 cheque to her account with TD Canada Trust and left the \$8,000 cheque with her bank to be credited to her account on January 27, 2004. Upon her return from vacation in mid-February, she learned from her bank manager that the \$8,000 cheque had not cleared because a stop order had been placed on it. As a result, her bank account was in overdraft. Frequent telephone calls to Castro & Associates to request a new cheque produced no results; her evidence was that whenever she was successful in reaching one of the Castros on the line, she was usually referred to the other. Ms. Aulenbach's bank manager, Jayme Martin Salvatori, who testified in these proceedings, also made efforts to resolve the problem. M. Castro wrote to Ms Martin on April 30, 2004 confirming discussions that had taken place between them in February of that year in which he had requested and she had agreed to a 90 day moratorium on payment to the bank of the outstanding \$8,000. In that letter (Exhibit 7) he notes:

We are writing to advise you we will be in possession of funds by the second week of May and as agreed in our conversation will seek the assistance of our bank Manager to return the funds to you.

No funds were, however, forthcoming in May.

In March of 2004, Ms. Aulenbach lodged a written complaint with the Commission, which was received on March 11, 2004. At about the same time as she made her complaint to the Commission, Ms. Aulenbach commenced a small claims court action against M. Castro, C. Castro and Castro & Associates to recover the \$8,000 owing to her. A defence was filed by M. Castro on May 20, 2004, on behalf of the defendants, admitting to insufficient funds to cover the cheque, but claiming that any monies owed were owed to the bank and not to Ms. Aulenbach. In that defence M. Castro describes himself as an “employee” of Castro & Associates.

The Commission commenced an investigation into the conduct of M. and C. Castro. Two investigators, who also testified in this proceeding, interviewed M. Castro as part of this investigation on August 9, 2004. On August 11, 2004 Ms. Aulenbach’s small claims court action was finally settled by payment of the outstanding amount of \$8,000, plus an additional \$1,000.

Ismael and Santos Moran

On July 3, 2000, Ismael Moran and his brother Santos Moran were injured in a motor vehicle accident. They both claimed accident benefits from the insurer of the vehicle, State Farm Mutual Automobile Insurance Company. To assist them with their claims, they hired various representatives in sequence including, ultimately, Castro & Associates. Santos Moran testified to his understanding that C. Castro owned the business, but that M. Castro did all the legal work.

The Morans first went to see M. Castro in January of 2002, influenced to a large extent by the fact that he spoke Spanish, their native language. They each signed a retainer in English providing, among other things, for the payment of disbursements and specified fees of Castro & Associates.

M. Castro was successful in settling both claims with the insurer prior to arbitration, for \$42,750 each. On October 31, 2003, the Morans each signed: (i) a full and final release in favour of the insurer; (ii) a separate signed acknowledgement on a Castro & Associates form, dated the same date, confirming among other things that they had been advised by Castro & Associates that the proceeds of the accident benefits claim less professional fees, taxes and proper disbursements "will take approximately 6 weeks to process" from the date of signing the release; and (iii) a power of attorney in favour of C. Castro of Castro & Associates, in terms similar to the one signed by Carol Ann Aulenbach.

The insurer’s release form contains an acknowledgement signed by the Morans that they had read and understood the release, and a notation signed by M. Castro to the effect that he had explained the document to them. The Morans nevertheless testified that when they signed they did not understand these documents, and they simply signed unread the package of documents they were given. All of the documentation was in English. The Morans also testified that they expected to receive their money within a month of the signing of the release. Santos Moran in particular was adamant that the impact of the

power of attorney was never explained to him; he testified that only subsequently did he learn that the power of attorney “cedes rights to everything”.

By November 12, 2003, the settlement cheques from the insurer, payable to the Morans, had arrived at the offices of Castro & Associates and been deposited in the firm’s bank account. The Morans were not notified when the money arrived. In fact, Ismael Moran, whose evidence was generally corroborated by his brother, testified that M. Castro told them in December that the settlement funds had *not* been received from the insurer; he did give them a small amount of money at that time, but told them it was because he was a very good person and he wanted them to have something in the fridge over Christmas. Again in January, M. Castro told them that the insurer had not paid, so they themselves went to the insurer’s office to make inquiries. At that time, they were told that the settlement cheques had been sent to Castro & Associates in November. They were shown copies of the cheques and were told that C. Castro had deposited them to the credit of Castro & Associates trust account. The Morans' testimony was that when C. Castro learned they had been in direct touch with the insurer, he became angry and threatened that they would never receive a penny from him; when they raised the matter with M. Castro, he told them that the laws had changed and therefore the funds were on hold.

The Morans testified that they received small payments on account from both M. and C. Castro, both in cash and by cheque. Some of the cheques cleared; others were returned at the request of the Castros or dishonoured. Receipts for some of the amounts were put in evidence. The Morans continued to press the Castros for payment of their shares of the proceeds of the settlements, sometimes spending entire days at the office of Castro & Associates for this purpose. They were frequently told to come back, and were promised their money on several occasions. In early March of 2004, M. Castro offered to pay them each \$1,000 by way of interest on their claims if they would agree to defer payment for three months. At that time, he told them that his brother was “tight” with money, but that he, Manuel, was an honourable man and would pay what was owing no matter how long it took. The Morans rejected this proposal, apparently because they thought it was a trap, and made complaints to the Commission, which then became part of the investigation.

Because of the lack of complete documentation, it is not clear how much is still owing to the Morans. It is nevertheless clear that they have not been paid in full. At the hearing, they testified that some \$15,000 to \$17,000 remained owing to each of them. M. Castro did not dispute this amount.

Jonathan Rodriguez

Jonathan Rodriguez was the driver and sole occupant of a car owned by his father, Jesus Rodriguez, when it was involved in an accident on December 15, 2001. At the time, he was a minor, aged 17. He suffered injuries as a result of the accident. The vehicle was insured by Aviva Canada Inc. (formerly CGU Group).

Jonathan Rodriguez attended with his father Jesus Rodriguez at the London office of Castro & Associates on or about June 8, 2003. They chose Castro & Associates because

the Castros provided services in Spanish, the native language of Jesus Rodriguez, and because a sister-in-law of Jesus worked in the office. They met with both Castros to discuss Jonathan's accident benefits claim against the insurer arising out of the motor vehicle accident. That initial meeting was conducted largely in Spanish, which Jonathan Rodriguez only understood to the extent of about 70%. Jesus Rodriguez was told that because Jonathan was a minor, an adult would have to make the claim on his behalf. Jesus assumed this role. He signed a retainer in favour of Castro & Associates, which included an agreement to pay certain fees and disbursements.

While it appears that C. Castro was primarily responsible for handling the Rodriguez claim, it was M. Castro who negotiated the final settlement with the insurer at the pre-hearing stage. Jonathan Rodriguez signed a full and final release, dated October 2, 2003, in favour of the insurer, in consideration of a payment of \$8,250. Jesus Rodriguez signed a power of attorney on the same date, authorizing C. Castro of Castro & Associates to endorse any cheque from the insurer relating to Jonathan's motor vehicle accident.

The insurer's cheque for the Rodriguez settlement was sent to M. Castro at Castro & Associates and was deposited in the firm's trust account on October 29, 2003. As with the Morans, the Rodriguezes were not notified that the money had arrived, and learned this only after making inquiries directly with the insurer. Two weeks after being advised by the insurer that the money had been sent, Jonathan and Jesus Rodriguez contacted the Castros to obtain payment. They made several visits to the London office of Castro & Associates, two visits to the Toronto office, and numerous telephone calls, leaving messages for C. Castro, M. Castro and a secretary, but these messages were not answered. They began to find the London office always closed and the phones were not being answered at that location. Only one payment, in the amount of \$750, was ever made on account of Jonathan Rodriguez' claim. Jesus Rodriguez testified that C. Castro finally told him that they didn't have the money because they had used it to pay debts.

At some point, Castro & Associates rendered a "Final Account" in respect of Jonathan Rodriguez' accident benefit claim, which showed an opening amount of \$8,250 by way of a "trust receipt" from the insurer and, at the end, a net amount of \$4,524.26 owing to Jonathan Rodriguez. This account was rendered by M. Castro. Likewise it was M. Castro who drafted a letter to Jonathan Rodriguez in January of 2004 on the letterhead of Castro & Associates (Exhibit 41) (which may have been inadvertently released to Jonathan Rodriguez), confirming that he had represented Jonathan in connection with his claim, and that he was providing funds to enable Jonathan to settle an account for rehabilitation services that were provided to him in connection with the injuries that gave rise to his accident benefit claim. No such funds were provided.

In May of 2004, Jonathan Rodriguez made a written complaint about M. and C. Castro to the Commission after he and his father had obtained legal advice and learned that it would be too expensive to sue for the amount owed to them by Castro & Associates.

Fausto Romero

Fausto Romero was involved in traffic accidents on April 24, 2001 and May 3, 2001 in which he sustained personal injuries. He filed claims with his automobile insurer, Kingsway General Insurance Company, and hired M. Castro, then at a firm called Castro & Castro, to assist him with those claims. At his first interview with M. Castro, in the office of Castro & Castro on Bloor Street in Toronto on May 30, 2001, he signed a retainer by which he agreed to pay certain fees and disbursements to Castro & Castro.

Around the end of October, 2001, M. Castro ceased doing business as Castro & Castro. While there is some conflict in the evidence as to what Mr. Romero was told at this time and what options he was offered, it is clear that Mr. Romero ultimately followed M. Castro to Castro & Associates. Mr. Romero's contacts in respect of his claims throughout the process were always with M. Castro; he testified that he came to the understanding that at Castro & Associates, M. Castro did the work and C. Castro handled the money.

M. Castro represented Mr. Romero at a mediation held at the Commission. The mediation was unsuccessful but a settlement was subsequently reached, prior to arbitration, for \$26,982.07 covering both claims, an amount which included various payments to certain service providers. Minutes of Settlement, dated December 3, 2003, were executed by the insurer and M. Castro of Castro & Associates, as representative of Mr. Romero, to that effect. At the office of Castro & Associates on this same date, Mr. Romero signed a full and final release in favour of the insurer, a power of attorney in favour of C. Castro of Castro & Associates in terms similar to that signed by Aulenbach, the Morans and Jesus Rodriguez, and an acknowledgement that he had given authority to Castro & Associates to settle the claims arising out of his accident on April 24, 2001 for \$26,982.07. These documents were apparently signed in the presence of a Spanish-speaking secretary in the office of Castro & Associates, who served as a witness to Mr. Romero's signature. He testified that they were not translated for him, although he was given a limited explanation in Spanish of what they were for.

The insurer's cheque payable to Mr. Romero for his portion of the proceeds of settlement (net of the amounts to service providers) was deposited in the Castro & Associates trust account on December 12, 2003. Mr. Romero was not advised of this by the Castros. When Mr. Romero found out from the insurer that the cheque had been sent, he went to the Castro & Associates office and spoke with M. Castro. M. Castro initially told him that the cheque had not arrived; subsequently, he told him that it had arrived, but had not yet been deposited in the bank, so Mr. Romero would have to wait for a week or two before the money would be available.

When he did not receive his money, Mr. Romero frequented the Castro & Associates office to demand payment from whichever of M. Castro or C. Castro was there on a particular day. Eventually, he retained a lawyer, who filed a Superior Court claim on his behalf against M. Castro, C. Castro and Castro & Associates, for \$13,751.82 plus damages and costs. On July 16, 2004, default judgment was signed against the defendants in the amount of \$13,751.82 (the amount owed to Mr. Romero net of fees and

disbursements owing to Castro & Associates) plus pre-judgment interest and \$1,000 in costs. The judgment has never been paid. Mr. Romero testified that he had no money to try to collect on the judgment, after paying his lawyer \$7,000 to obtain it.

Samuel Cristales

Samuel Cristales was involved in a motor vehicle accident on December 10, 2001 while driving his employer's truck, which was insured by Aviva Canada Inc. (formerly CGU Group). He suffered serious back injuries as a result of the accident and has not been able to work since. He hired Castro & Associates on January 24, 2002 to assist with the claim. No written retainer agreement was submitted in evidence, although Mr. Cristales testified that he understood that he would be charged 20% of the final settlement for his services.

M. Castro represented Mr. Cristales throughout in his dealings with the insurer. After an initial attempt to deny the claim on technical grounds was rejected by an arbitrator, the insurer offered to settle the matter for a payment of \$125,000 to Mr. Cristales and additional payments to certain named service providers. Mr. Cristales signed a handwritten authorization dated June 22, 2004, by which he directed M. Castro to settle his accident benefit claim for this amount and recited his understanding that he would net \$90,000 out of any such settlement after deductions for professional fees and disbursements. M. Castro's signature also appears on this document.

On June 25, 2004, Mr. Cristales met with M. Castro at the office of Castro & Associates. At that time, Minutes of Settlement with the insurer, providing for settlement of all Mr. Cristales' claims against the insurer for \$125,000, were signed by M. Castro as representative of Mr. Cristales. Mr. Cristales himself signed a full and final release in favour of the insurer.

Also filed in evidence was a power of attorney apparently signed by Mr. Cristales in favour of C. Castro of Castro & Associates authorizing him to endorse any cheque from the insurer relating to Mr. Cristales' accident. M. Castro's signature appears on the power of attorney as one of the witnesses to the signature of Mr. Cristales. The document is dated July 19, 2004. Mr. Cristales testified that while he was not able to say one way or the other whether or not the signature was his, he did not recognize the power of attorney and had no recollection of signing it. He was adamant that no such document had ever been explained to him. He further testified that if he had signed any such document, it must have been on June 25, 2004 as part of a package which had been put in front of him for signature. He was certain that he had signed no document on July 19, 2004 although he did agree that he had been in the office on that day. He testified that at the time he knew some English, but not much.

The insurer's settlement cheque for \$125,000, payable to Mr. Cristales, was picked up by M. Castro on July 19, 2004 from the insurer's office. That cheque was deposited into the Castro & Associates trust account on the same date. Certain service providers to Mr. Cristales were paid separately and directly by the insurer.

Mr. Cristales testified that about two weeks after the settlement documents were signed, he called M. Castro to see if the settlement funds had come in. M. Castro told him no; that it would take four to six weeks. Mr. Cristales then checked with the insurer and discovered that the funds had been sent. On his return to the Castro & Associates office, he was told by M. Castro that the insurer's cheque had indeed been received, but that it would take a few days to negotiate it with the bank. When he tried again a few days later to get in touch with M. Castro, he was advised by C. Castro that his brother was away on vacation for a month and he would have to wait for his return. Two days later, a sceptical Mr. Cristales went to the Castro & Associates office, without prior notice, and found M. Castro at work there. When he asked for his money, M. Castro attempted to renegotiate the amount, referring to additional payments which had to be made to service providers, and arguing that Castro & Associates deserved a higher fee for three years of hard work. M. Castro then offered to pay in installments: \$30,000 and the balance of \$60,000 in three months time. When questioned about why payment could not be made in full since the insurer's cheque had arrived, M. Castro responded that the government had them in a bad state.

Mr. Cristales refused to negotiate any terms and insisted on immediate payment of his full entitlement. He then retained a lawyer who wrote a demand letter, dated August 19, 2004, to M. Castro on Mr. Cristales' behalf. When that produced no results, Mr. Cristales went to the Commission. To date, Mr. Cristales has received none of the \$90,000 to which he is entitled.

B. The Evidence of M. Castro

M. Castro testified that he has been representing clients with respect to accident claims for many years. From 1993 to 1998, he provided his services in partnership with his brother Carlos, under the name Castro & Castro, Personal Injury Consultants and Legal Services, a division of Manca Corp. In 1998, however, C. Castro left the partnership. In 2000, C. Castro established his own business, Castro & Associates, A.D.R. Consultants and Legal Services, a division of Ontario Chasqui Corp.

Sometime in 2001, M. Castro shut down Castro & Castro for medical and personal reasons, and went to work for Castro & Associates as a Senior A.D.R. Litigation Specialist for Accident Benefits. At that time, Castro & Associates had an office in Toronto on Bathurst Street and was in the process of opening another office in London, Ontario. M. Castro's job functions included explaining the statutory accident benefits regime to potential clients, representing clients in mediations and arbitrations and training personnel. He testified that his work took him out of the office a great deal.

M. Castro further testified that he was not a partner, director or shareholder in this business, and had no financial interest in the business, except as an employee or consultant. A corporation profile report dated November 13, 2003, prepared by the Ontario Ministry of Consumer and Business Services, and filed in evidence, lists the sole director of Ontario Chasqui Corp. as C. Castro. According to M. Castro's evidence, he was not involved in matters of administration or finance for Castro & Associates, and had

no signing authority for the firm, including bank signing authority; C. Castro had all the responsibility in those areas. Castro & Associates maintained two accounts with its bank, TD Canada Trust - a general account and a trust account. The cancelled settlement cheques from the insurers that were admitted in evidence in this proceeding generally bore the signature of C. Castro by way of endorsement for deposit.

The precise nature of M. Castro's financial arrangements with Castro & Associates was not made entirely clear. M. Castro was provided with an office, a phone and a leased car. Castro & Associates paid the premiums for his errors and omissions insurance premiums. M. Castro testified that he was paid by Castro & Associates on a case-by-case basis, but did not specify the basis on which the payment was calculated. Indeed, he testified that that he hadn't been paid anything at all since the end of 2002. When asked why he was prepared to continue to work when he was not being paid, he responded that he enjoyed doing the work and was pleased to get the experience. In addition, he testified that he and his brother tried to support each other through hard times, and he didn't really need the remuneration because his work as a SABS representative for Castro & Associates was not his only source of income; he also spent 40% of his time doing translating, small claims work and assisting with long-term disability claims. Although he testified that he hadn't filed an income tax return for four years, he also described himself as 'financially comfortable'.

As required by O. Reg. 664, as amended, M. Castro maintained errors and omissions from November 1, 2003. He did not, however, notify his insurer of Carol Ann Aulenbach's small claims court action against him. When asked why he had not done so, his response was that he knew it was unnecessary because he did not doubt that C. Castro would pay any judgment that might result. He likewise testified that he did not notify the insurer about Fausto Romero's lawsuit and default judgment, because of his belief that once a default judgment had been obtained, the insurer could not do anything. It appears that he did notify the insurer at some point about the Superintendent's investigation, although the evidence is not clear on exactly when that took place.

M. Castro contradicted some of the particulars of the claimants' evidence. For example, he testified that:

- ◆ Samuel Cristales did sign his power of attorney on July 19, 2004, the nature of the document was explained to him at that time and he told Mr. Cristales on that day that the insurer's cheque was either ready for pick up or had already been picked up;
- ◆ he clearly advised Fausto Romero that he was not an owner of Castro & Associates and that, in his experience, Mr. Romero would not sign any documents unless they were explained to him;
- he explained all the documents to the Moran brothers; and
- he always returned all his phone calls.

In general, however, he did not dispute the claimants' evidence about the events leading to their failure to receive their proceeds of settlement. Nor did he seriously dispute most of their evidence about his own role in those events, although he attempted to distance himself from the complainants by describing them as clients of Castro & Associates, and not of himself personally. The gist of his testimony was that he was simply following business practices in place at Castro & Associates, and the responsibility for any failure of those practices to deliver funds to the claimants fell solely on Castro & Associates. He characterized his own role as being that of an independent contractor whose services were limited to representing claimants in the pursuit of their claims against insurers,

When questioned about why he had taken no steps to ensure that the claimants would receive their money or to warn them that they might have trouble in that regard, M. Castro insisted that he had no reason to doubt the solvency of the business. According to his testimony, he had no way of checking on the financial condition of the business since he had no economic interest in it and the relevant information was in C. Castro's control. When pressed by counsel for the Superintendent about whether he had any concerns by the beginning of 2004 about the ability of Castro & Associates to pay the amounts due to its clients, he responded that he was always told by C. Castro that there was no problem. At one point, he did admit that he was aware that C. Castro did not have the ability to pay and the business was trying to reduce costs by getting by with fewer employees, but in the main his testimony was that he relied on C. Castro's assurances that all would be well with Castro & Associates, despite the fact that he had not personally been paid for his own services since 2002, and despite the patterns of defaults in payment that was developing by 2004.

4. ANALYSIS

In his report, the Superintendent alleged that C. Castro and M. Castro violated their duties as SABS representatives to act honestly by withholding funds that lawfully belonged to the claimants. There is no doubt that funds belonging to the claimants were withheld. The proceeds of insurance settlements that should have been treated as trust funds and turned over directly on receipt to the claimants were not so treated and money to which the claimants were rightfully entitled was used for other purposes. We heard evidence of the considerable hardship which has resulted for these claimants.

The question for this Tribunal, however, is not whether funds were withheld, but whether M. Castro's involvement in the withholding of these funds resulted in a violation of his duty of honesty to claimants imposed by the Code of Conduct, and if so, what order should be made as a result. We note that the Code of Conduct did not come into effect until November 1, 2003, and accordingly we are primarily concerned with conduct that took place on or after that date.

The claimants involved in this case all retained Castro & Associates to represent them in respect of their accident claims. Their settlement cheques were endorsed by C. Castro and deposited into the trust account of Castro & Associates. The evidence was that M. Castro

had no ownership interest or financial interest of any kind in Castro & Associates, that he had no bank signing authority and that he had no formal managerial or administrative responsibilities at Castro & Associates; C. Castro was the owner, manager and sole director of the firm and controlled access to the bank accounts. M. Castro provided representation services to clients who had retained Castro & Associates. In view of those facts, what responsibility, if any, does M. Castro bear for what occurred here?

M. Castro's initial argument appears to be that since the claimants' contractual relationship was with Castro & Associates and not with him, he cannot have any responsibility for the fact that they did not get their money. In our view, that argument has no merit. While he may not owe contractual debts to claimants, he has responsibilities to them as a SABS representative.

The Code of Conduct imposes personal obligations upon SABS representatives in respect of their dealings with, among others, a "claimant", defined as "a person who is seeking advice, assistance or representation concerning his or her entitlement to statutory accident benefits". There is no requirement for a formal retainer or contract. The fact that the individuals whose situations are the subject of this proceeding entered into retainers with Castro & Associates, rather than M. Castro, does not mean that they were not "claimants" who were represented by M. Castro. M. Castro cannot shelter from the obligations imposed upon SABS representatives by the Code of Conduct by virtue of the fact that he represented claimants as an employee or consultant to Castro & Associates. If he acted as a SABS representative with respect to these claimants, the Code of Conduct mandates that he had a duty of honesty towards them.

M. Castro did not seriously dispute that he did, to some degree, act in the capacity of a SABS representative with respect to these claimants, and we so find. It appears that several claimants were also represented by C. Castro from time to time, but the evidence is clear that M. Castro provided at least some representation for all claimants. M. Castro argued, however, that his representative role was limited and had ceased before the settlement funds came in. He further argued that the problems that occurred here were entirely out of his purview and out of his control, given the nature of his role at Castro & Associates.

We are unable to conclude on the evidence that M. Castro was directly involved in the decision to withhold the claimants' settlement funds or that he obtained a direct financial benefit from that decision. In our view, however, the evidence is clear that he did fall short of his duty of honesty to these claimants in two important respects which bear directly on the withholding of their settlement funds. We refer to the fact that:

- ♦ he obtained powers of attorney from claimants, which enabled Castro & Associates to cash their settlement cheques, without clearly explaining to those claimants the effect of this kind of instrument and without offering them other options for dealing with their proceeds of settlement; and

- ◆ he failed to provide accurate and informed answers to claimants in response to inquiries about their settlement monies and, generally, misled claimants about the status and safety of those settlement monies.

We discuss each of these aspects of M. Castro's conduct in detail below.

A. Obtaining Powers of Attorney

In all cases, once the insurance settlements had been agreed on and the appropriate releases executed, the insurers sent cheques *payable to the claimants* to Castro & Associates. In the cases of Aulenbach and Rodriguez, there was evidence that the insurer sent the cheques to M. Castro's attention; in the case of Cristales, the evidence was that M. Castro personally picked up the cheque at the insurer's office. The cheques were deposited by C. Castro into the Castro & Associates trust account without notification to the relevant claimant and without obtaining the claimant's endorsement on the cheque. This was possible only because each claimant had executed a power of attorney in favour of C. Castro of Castro & Associates. Without the power of attorney, the cheques in favour of the claimants could not have been cashed by Castro & Associates.

Potential clients were not advised up front that a condition of their retainer was that they would have to turn their settlement proceeds over to Castro & Associates, which would then pay itself first. Indeed, the claimants generally signed retainer agreements, on a Castro & Associates form, by which they agreed to pay certain fees and disbursements that would be charged to them by the firm in connection with the provision of services relating to their accident benefit claims. These retainers did not deal with the issue of how any settlement amounts would be paid to the claimant or how Castro & Associates would collect its fees and disbursements. Claimants who might object to turning over their settlement cheques to their SABS representative, or the firm through which he or she worked, were thus deprived of the opportunity to "shop the market" for another SABS representative or firm that was prepared to pass the insurer's settlement cheque directly on to the claimant. Only later, usually at the time of settlement, were claimants presented with the power of attorney document authorizing C. Castro of Castro & Associates to endorse the insurer's settlement cheque.

Whether it is ever appropriate to present claimants at a late stage in the representation process with a request to sign a document which so clearly favours the representative, or the firm providing such representation, at the expense of the claimant is not a question we have to decide in this case. We are certainly of the view that such a request by a SABS representative could *only* be compatible with the Code of Conduct's obligation to act honestly in dealing with claimants if accompanied by:

- a full and clear explanation of the document's purpose and legal impact; if the claimant is not English-speaking, a heavy onus would rest on the SABS representative to demonstrate that the claimant understood the implications of the document he or she was signing if it was in the English language;

- a clear option, without prejudice to the settlement, to sign the document, or not to sign and, if not, to deal with fees and disbursements in some mutually agreeable way that does not give the representative, or the firm through which the representation is provided, custody or control of the settlement monies.

We find that these two conditions were not met in connection with the execution of powers of attorney by Mr. Romero and Mr. Cristales and that the second condition was not met in connection with the execution of the power of attorney by Ms. Aulenbach. These three complainants were the only ones who signed their powers of attorney after November 1, 2003, the date the Code of Conduct came into effect.

Each of Mr. Romero and Mr. Cristales testified that the power of attorney with which he was presented was not translated or explained. Ms. Aulenbach testified that when the document was presented to her for signature, she was told that it had to be signed in order to cash the insurer's cheque in payment of her claim settlement. M. Castro did not agree, insisting in his evidence that the powers of attorney and their implications were explained to each of these claimants.

Where the evidence of the claimants differs from that of M. Castro on this issue, we accept the evidence of the claimants as the more credible. While M. Castro testified that he explained the powers of attorney, he did not testify as to the nature of the explanation he provided. It was clear from the evidence of the claimants overall that the execution of documents was frequently treated by M. Castro and the staff of Castro & Associates in a very cavalier manner. In some cases, M. Castro was not even present for the execution of powers of attorney, delegating this function to clerical staff; in such cases, he testified that he relied on clerical staff to provide translations and explanations. The powers of attorney signed by Mr. Romero and Mr. Cristales do not recite that they were translated into Spanish, although other standard form documents used by Castro & Associates contain such a recital. There was no evidence that any of the claimants were told that the power of attorney was for the benefit of Castro & Associates. We cannot accept that an appropriate explanation of the meaning and the legal import of these powers of attorney was given to any of these claimants.

The need for a full explanation of the power of attorney and of its optional nature, in the interests of honest dealing with claimants, is particularly compelling in the case of Samuel Cristales. By the time Mr. Cristales would have been presented with the form of power of attorney for his signature, in June or July of 2004, M. Castro must, despite his denials in this proceeding, have been fully aware of the financial difficulties of Castro & Associates and fully aware that claimants whose claims he had settled were at risk of not getting their settlement monies. He himself had not been paid by the firm for a couple of years. Throughout the first part of 2004, there had been serious problems for Carol Ann Aulenbach, Ismael and Santos Moran, Jonathan Rodriguez and Fausto Romero. None of these claimants had received his or her full entitlement despite aggressive efforts to secure payment, including lawsuits outstanding in the cases of Carol Ann Aulenbach and Fausto Romero in which M. Castro was a defendant/respondent along with C. Castro and Castro & Associates. In the face of this growing mountain of evidence of financial crisis

in the business, we simply cannot accept M. Castro's assertion that he believed all was well because C. Castro told him that all was well.

M. Castro did the work on Mr. Cristales' claim up to the settlement and his signature appears on most of the documents relating to the claim, including the power of attorney. Yet he did not tell Mr. Cristales of the poor credit history of Castro & Associates in its relationship with other claimants. He did not seek out any hard information, from C. Castro or anyone else, that would provide a reasonable level of assurance that Mr. Cristales could expect to actually receive his share of the settlement funds if they were paid to Castro & Associates. And, in particular, he did not suggest to Mr. Cristales that he would be well advised not to sign the power of attorney, as was his right, but to insist on direct receipt of the settlement cheque from the insurer.

Accordingly, we find that M. Castro violated his duty of honesty to claimants Aulenbach, Romero and Cristales by soliciting from them, without adequate disclosure of pertinent information, powers of attorney that enabled Castro & Associates to cash their settlement cheques.

B. Misleading Claimants about Settlement Monies

We turn now to a consideration of M. Castro's conduct after the settlement cheques were issued by the various insurers. All of the cheques in favour of the claimants with whom we are concerned in this proceeding were issued after or immediately before November 1, 2003, the effective date of the Code of Conduct. There is no doubt that once these claimants became concerned about the status of their settlement funds and began to pursue Castro & Associates for information and payment, M. Castro, together with his brother, was involved in an active campaign to avoid them as much as possible and, when unsuccessful in that tactic, to make excuses for delays in payment. M. Castro attempted to avoid or put off the claimants who were pursuing him for payment of their accident benefit entitlements, by:

- ◆ telling claimants that settlement funds had not been received from the insurer when they may well have been received (Ismael and Santos Moran, Fausto Romero and Samuel Cristales);
- ◆ blaming the unavailability of funds on changes to the law (Ismael and Santos Moran);
- ◆ failing to respond to telephone messages (Jonathan Rodriguez);
- ◆ making small partial payments (Ismael and Santos Moran); and,
- ◆ seeking concessions from claimants on the timing of their payments, and in one case, on the amount (Ismael and Santos Moran, Samuel Cristales).

These are, of course, all signs of a business in financial difficulty unable to satisfy its ongoing liabilities. However, the claimants in this case were not merely creditors of a business. They were beneficiaries of trust funds held in the name of the business and were, therefore, interested in those funds as equitable owners.

M. Castro clearly continued to be materially involved with all the claimants after their settlements were negotiated. We note, for example, that he:

- signed a variety of significant documents on behalf of Castro & Associates, including legal documents such as the defense filed in response to Carol Ann Aulenbach's small claims court action against Castro & Associates and the Castro brothers;
- negotiated with the claimants on behalf of Castro & Associates in attempting to get them to defer or compromise their claims to their proceeds of settlement;
- frequently used the word "we" in describing certain actions of Castro & Associates in connection with the claims, including in his letter to the bank in respect of the claim of Carol Ann Aulenbach; and
- issued accounts to claimants on behalf of Castro & Associates and entered into correspondence with them about their settlements.

In the face of this uncontradicted evidence, we find that his relationship with these claimants continued after settlement of their claims. The continuing relationship can be fairly taken to be that of claimant and SABS representative in the absence of an express termination of M. Castro's role as SABS representative. Accordingly the Code of Conduct continued to apply to his dealings with the claimants.

In many cases, the claimants were not able to be precise in their testimony about the actual dates of their contacts with M. Castro and it is, therefore, not possible in all cases to determine whether Castro & Associates was actually in receipt of the relevant settlement funds on any occasions when M. Castro told a complainant that funds had not been received from the insurer. Furthermore, since M. Castro's evidence was that he did not deal with the mail or the banking, it is possible that a cheque had been received without him being aware of it. We are not prepared, therefore, to make a finding that he lied to any of claimants about the fact that their cheques had been received from the insurers. It is clear, however, that in at least the case of the Morans, he advised claimants that their cheques had not been received, when reasonable efforts to ascertain the facts would have confirmed that the cheques had been received and deposited weeks before. In the case of Mr. Cristales' claim, M. Castro advised the claimant that it would take four to six weeks for settlement funds to arrive after the settlement documents were signed. In fact, the insurer's cheque in settlement of that claim and the other claims of which we were made aware in the course of this proceeding were delivered much more quickly than that. M. Castro testified that in the normal course, if a settlement cheque took more than two weeks to arrive, it meant that something was amiss. We find, therefore, that M.

Castro acted dishonestly in respect of claimants by advising them as to the status of delivery of their settlement funds without informing himself of the facts or by making unrealistic assumptions.

We have no doubt that SABS claimants are entitled to timely and accurate information from their SABS representatives about the status of their settlement funds. In this case, those funds were directed to Castro & Associates by virtue of powers of attorneys and were held by that firm in a bank account that was designated as a trust account. M. Castro recognized that the settlement funds were "trust receipts" in the hands of Castro & Associates as evidenced by the terms of the "Final Account" that he rendered in respect of Jonathan Rodriguez' accident benefit claim. The claimants' entitlement to timely and accurate information about their settlement funds is particularly compelling in these circumstances where a trust is involved.

At no point did M. Castro report to the claimants for whom he acted that their settlement funds were in jeopardy, although he must have known that they were not getting that information from C. Castro or Castro & Associates. At best, he continued to deal with claimants with blinders on. His evidence was that he made some general inquiries of C. Castro as to the financial condition of Castro & Associates, but he never suggested that he had made any attempt to check the trust account or otherwise determine what was happening to the settlement funds of claimants that were held in that account. We don't accept that he was relieved of any responsibility for making such an attempt because he was not an officer or director of Castro & Associates.

We find that M. Castro acted dishonestly in respect of claimants by remaining silent about what had happened to their settlement funds when they asked about those funds and by actively misleading claimants about the status and safety of those funds, given that a reasonable amount of due diligence on his part might well have revealed the fate of the funds.

5. ADDITIONAL ISSUE

Two additional issues arose out the evidence that caused the Tribunal concern. We refer to:

- ◆ the failure of M. Castro to report the problems which occurred in this case to his errors and omissions insurer; and
- ◆ the failure of M. Castro to report the judgment against him, obtained by Fausto Romero, to the insurer or to respond himself to that judgment by taking steps to satisfy it.

These matters were not addressed in the Superintendent's reports and were not the subject of the allegations before this Tribunal. Accordingly, we make no findings with respect to them. We do not wish our silence to be interpreted as a finding that these matters do not engage the Code of Conduct; clearly they do. We leave to another day,

however, the question of the precise scope and application of the Code with respect to such matters.

6. DISPOSITION

We are persuaded that M. Castro violated his duty to act honestly in dealing with claimants, imposed by s. 2.1 of the Code of Conduct, by:

- ◆ obtaining powers of attorney from the claimants Aulenbach, Romero and Cristales, which enabled Castro & Associates to cash their settlement cheques, without clearly explaining to those claimants the effect of this kind of instrument and without offering them other options for dealing with their proceeds of settlement; and
- ◆ failing to provide accurate and informed answers to claimants in response to inquiries about their settlement monies and, generally, by misleading claimants about the status and safety of those settlement monies.

We believe a cease and desist order against M. Castro is appropriate. The parties to this proceeding agreed that the Tribunal is entitled to make a cease and desist order that is conditional and, in particular, that is limited as to its term of duration. Indeed, the Tribunal has previously decided as much, after receiving argument on the point, in *Crosbie et al. v. Superintendent of Financial Services of Ontario*, FST Decision No. RO251-2005-1, dated December 1, 2005 (the decision was subsequently affirmed by the Ontario Divisional Court on October 16, 2005). At the end of the hearing in this proceeding, we invited the parties to make representations as to the appropriate term of any cease and desist order, if it were to be limited in duration, that we might make in this case. We received such representations in oral form.

In view of the fact that, despite M. Castro's role in the withholding of funds, it was not proven that he was a party to the actual decision to withhold the claimants' settlement funds or that he derived a direct financial benefit from that decision, we believe that any cease and desist order against M. Castro should not be for an unlimited term. In determining the appropriate term, we have taken into account the fact that he has been subject to an interim cease and desist order, pending the hearing in this case and our decision, for the past two years. We have decided to make the cease and desist order against M. Castro effective for one year from the date of this order.

Manuel Castro is ordered, for a period of one year from the date of this order, to:

- ◆ cease carrying on business as a statutory accident benefit representative; and
- ◆ cease advertising or holding himself out, in any form, as a statutory accident benefit representative within Ontario.

This order replaces the original cease and desist order made by the Superintendent by notice dated December 2, 2004.

Our order reflects a variation in the terms of the original order to respond to the facts that we are not now concerned with the application of the order to anyone other than M. Castro, that a cease and desist order has been in effect for some time now and that the notification to clients required by the original order should have long since taken place.

DATED at Toronto, Ontario, this 18th day of December, 2006.

“Colin McNairn”
Colin McNairn, Chair of the Tribunal
and of the Panel

“Lily Harmer”
Lily Harmer, Member of the Tribunal
and of the Panel

“Elizabeth Shilton”
Elizabeth Shilton, Member of the Tribunal
and of the Panel