FST File No. R0251-2005
FST Decision No. R0251-2005-1

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 and Notice of a Proposed Permanent Cease and Desist Order, dated May 19, 2005, against Robert Crosbie and 1460246 Ontario Inc., carrying on business as R.E.C. Paralegal, as supplemented by an Interim Cease and Desist Order and Notice of a Proposed Permanent Cease and Desist Order, dated June 22, 2005;

AND IN THE MATTER OF a hearing in accordance with section 441(3) of the Act.

BETWEEN:

ROBERT CROSBIE and 1460246 ONTARIO INC.,
carrying on business as R.E.C. PARALEGAL

Applicants

\- and -

SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO

Respondent

BEFORE:

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

Mr. Martin J.K. Brown
Member of the Tribunal and of the Panel

Mr. Kevin Ashe
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicants
Mr. Jonathan Strug

For the Respondent
Mr. Joe Nemet

HEARING DATES:

August 2-4, 16-17, 2005

REASONS FOR DECISION

Nature of the Proceeding

This matter comes before the Tribunal as the result of requests for hearing made pursuant to the *Insurance Act* (the "Act") by Robert Crosbie ("Crosbie") and 1460246 Ontario Inc., carrying on business as R.E.C. Paralegal (together, the Applicants"). Those requests are in respect of two instruments issued by the Superintendent of Financial Services (the "Superintendent"), pursuant to s. 441 of the Act, each comprising an interim cease and desist order and notice of intention to make all or a substantial portion of that cease and desist order permanent. The first instrument, dated May 19, 2005, embodies an interim order (the "First Order") that requires the Applicants, and any agents or representatives, to:

> "A. Immediately cease carrying on the business of statutory accident benefit representatives;
>
> B. Immediately notify in writing **all** Crosbie's clients who have claims for statutory accident benefits that Crosbie, and any of his agents or representatives, can no longer act for them; provide them with copies of the cease and desist order; and, provide copies of every notification sent to each client to the Superintendent forthwith; and
>
> C. Immediately cease advertising or holding out, in any form, as statutory accident benefits representatives within Ontario."

The stated intention of the Superintendent is to make the First Order permanent.

The second instrument, dated June 22, 2005, issued by way of supplement to the first instrument, embodies an interim order (the "Second Order") that requires the Applicants, and any agents or representatives, to:

"A. Immediately cease carrying on the business of statutory accident benefit representatives;

B. Immediately cease providing any service to anyone related in any way to a claim for statutory accident benefits, whether or not such services are charged a fee or not;

C. Immediately cease advertising or holding out to the public in any way, that services of any kind relating to claims for statutory accident benefits are offered or provided, whether or not such services are charged a fee or not;

D. Immediately cease sending, or allowing the use of, REC Paralegal letterhead, or the name REC Paralegal, in connection with any claim for statutory accident benefits regardless if the person has or has not filed a declaration with the Superintendent to be exempted from the prohibition set out in section 398 of the *Insurance Act*;

E. Immediately provide to the Superintendent a list of the names, addresses and telephone numbers of all persons who had claims for statutory accident benefits who were clients of Crosbie or REC Paralegal as of May 19, 2005, to date."

The stated intention of the Superintendent is to make the Second Order permanent with the deletion of paragraph D and of the word "Immediately" at the beginning of each of the other paragraphs and with a few modifications to paragraph E.

Upon the filing of a request for hearing in respect of each of these instruments, the Superintendent extended the operation of the interim cease and desist order to which each instrument gave effect, by notice under s. 441(6) of the Act, until the conclusion of the hearing before the Tribunal and the confirmation, variation or revocation of the order or until revocation of the order by written instrument of the Superintendent.

Regime of Regulation for Statutory Accident Benefit Representatives

A statutory accident benefit representative (a "SABS representative") is an individual who performs what is usually described as a paralegal role in representing persons making claims against automobile insurers for benefits provided for in the *Statutory Accident Benefits Schedule* (being Ont. Reg. 403/96, as am., made under the Act). SABS representatives do not have to be licensed or registered under the Act. However, the Act prohibits any person who is not a lawyer from acting as a public adjuster - i.e. acting in the negotiation and settlement of insurance claims on behalf of claimants - if the claims

in respect of which the person is engaged arise out of motor vehicle accidents (s. 398). The activities of SABS representatives are caught by that prohibition. But an individual who would assume to act as a SABS representative is afforded an exemption from the prohibition if he or she:

- obtains and maintains a minimum level of errors and omissions liability insurance coverage;
- refrains from representing persons who have sustained a "catastrophic impairment" as a result of a motor vehicle accident;
- does not have a record of conviction under certain provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, as am.; and
- files a declaration with the Superintendent setting out certain required information.

(Section 18 of Ont. Reg. 664, as am., as read with s. 398(3) of the Act).

An individual who is able to satisfy these conditions (sometimes referred to in these Reasons as an "exempted SABS representative") is entitled to act as a SABS representative in Ontario without offending the Act. However, notwithstanding satisfaction of these conditions, a person may be prohibited from acting as a SABS representative by the terms of a cease and desist order, made by the Superintendent pursuant to the Act, if that person has engaged in "an unfair or deceptive act or practice" that is prescribed by regulation (see ss. 438 and 439 of the Act). The unfair or deceptive acts or practices that are so prescribed include:

- the commission of any act prohibited under the Act or the regulations (s. 1, para. 1 of Ont. Reg. 7/00, as am.);
- an act or omission that is inconsistent with the Code of Conduct for Statutory Accident Benefit Representatives (the "Code of Conduct") issued by the Superintendent when the act or omission occurs in connection with the representation of an individual who is claiming benefits under the *Statutory Accident Benefits Schedule* (s. 4(1), para. 4 of Ont. Reg. 7/00, as am.). [The Code of Conduct may be found on the website of the Financial Services Commission of Ontario ("FSCO") at www.fsco.gov.on.ca.]

The acts that are prohibited by the Act, the commission of which falls within the first category of unfair or deceptive acts or practices, include the following:

- the furnishing of false information to FSCO whether the information is required under the Act or is volunteered (s. 447(2)(a));
- a failure on the part of a person engaged in the business of insurance in Ontario to comply with a request to furnish information to the Superintendent relating to any settlement or adjustment under a contract of insurance or respecting any activities relating to the business of insurance (s. 33(1), as read with s. 447(2)(d)); and

- a failure to comply with any requirement of an order or direction made under the Act (s. 447(2)(b)).

The acts or omissions, on the part of a SABS representative, that are inconsistent with the Code of Conduct, and therefore fall within the second category of unfair or deceptive acts or practices, include the following:

- a failure to demonstrate a proper understanding and willingness to comply with the duties of a representative, including advising a claimant that he or she is not a lawyer (s. 2.10);
- a failure to disclose a conflict of interest (as defined in s. 1.2), in connection with a claim to statutory accident benefits, to a benefits claimant and to the insurer (s. 3.9);
- a dishonest act in dealing with FSCO (s. 2.1);
- a failure to respond to a request for information from FSCO fully and promptly when requested to do so (s. 3.11).

Regime for the Making of Cease and Desist Orders

The Superintendent has the authority, under the Act, to 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" (s. 440). The process that must be followed if a cease and desist order is to be made on the basis of a determination that a person has been, or is, so engaged is set out in s. 441 of the Act (reproduced in the Appendix to these Reasons) and is described below.

If, as a result of an investigation, or on the basis of any other evidence, the Superintendent is of the opinion that a person has, or is, engaged in an unfair or deceptive act or practice, or conduct that might reasonably be expected to lead to such an act or practice, he must report to that effect and may give notice to any person to be named in a cease and desist order of his intention to make such an order, together with a copy of the relevant report (s. 441(1) and (2)). Should the Superintendent be of the opinion that the interests of the public may be prejudiced by any delay in the issuance of a permanent order, he may issue an interim cease and desist order to take effect immediately (s. 441(4)). A cease and desist order may require a person to:

- cease or refrain from doing any act or pursuing any course of conduct identified by the Superintendent;
- cease engaging in the business of insurance or any aspect of the business of insurance specified by the Superintendent; or
- perform the acts that, in the opinion of the Superintendent, are necessary to remedy the situation.

(Section 441(2))

A person affected by a proposed cease and desist order may request a hearing before the Tribunal in respect of that order (s. 441(3)), but this does not, in our view, detract from the mandatory nature and coercive effect, in the meantime, of any interim cease and desist order, directed to that person, for the period during which the interim order remains outstanding. If, at any such hearing, the Tribunal is of the opinion that a cease and desist order of the kind contemplated by the Act should be made, it may make such an order (s. 441(8)), and may confirm, vary or revoke any interim order (s. 441(6)).

Description of the Applicants, their Roles and Relationships

Crosbie is a paralegal whose business activities included, prior to the First Order, acting as a SABS representative. Crosbie had met the conditions for exemption from the prohibition in the Act against acting as a public adjuster in connection with motor vehicle accident claims, i.e. he was an exempted SABS representative.

R.E.C. Paralegal is a company that, prior to the First Order, provided paralegal services. Crosbie is a 49% shareholder of R.E.C. Paralegal and was compensated for his services as a SABS representative by that company prior to the First Order but, according to Crosbie, he has not been so compensated since that time, he does not know who holds the balance of the shares of R.E.C. Paralegal, he has not been either a director or an officer of that company in recent years, he does not know who the directors and officers of the company are other than one Jameson Johnson, who is a director and president and does paralegal work in respect of bail hearings, and he has not received any dividends on his shares in the company.

Since "R.E.C." are the initials of Crosbie, we can fairly assume that the business style "R.E.C. Paralegal" was derived from those initials. It is clear from the documentary evidence presented to us that Crosbie signed letters on R.E.C. Paralegal letterhead that were written in connection with the provision of representation on SABS claims. Yet R.E.C. Paralegal did not have the same benefit as Crosbie did of the exemption from the prohibition in the Act against acting as a public adjuster in respect of motor vehicle accident claims and, indeed, was in no position to qualify for that exemption as it is only open to individuals, not companies. However, neither the First Order nor the Second Order, as directed to R.E.C. Paralegal, was issued on grounds that R.E.C. Paralegal had violated the Act in acting as a public adjuster in respect of motor vehicle accident claims.

In the circumstances, we believe that some, at least, of the conduct of Crosbie that the Superintendent has alleged constitutes an "unfair or deceptive act and practice" can be attributed to R.E.C. Paralegal as well as to Crosbie personally.

Acts or Practices Alleged by the Superintendent to Constitute a Basis for the First Order

In the report that was appended, as required, to the First Order, the Superintendent relied on two kinds of conduct on the part of Crosbie as the basis for his opinion that unfair or deceptive acts or practices had been committed justifying the making of a cease and

desist order against the Applicants. The first kind of conduct involved alleged breaches of certain obligations under the Act and directions of the Code of Conduct that are designed for the direct protection of the community at large, including insureds, insurance claimants and insurers. The second kind of conduct involved various actions alleged to evidence a lack of co-operation with the Superintendent in his investigation, in breach of provisions in the Act and directions of the Code of Conduct that are designed, primarily, to ensure the effectiveness of the regulatory role of the Superintendent or, put another way, the governability of persons who are subject to the Act or the Code of Conduct, as the case may be. We will call the first kind of conduct "operational misconduct" and the second kind of conduct "regulatory accountability misconduct".

Acts or Practices Alleged to Constitute Operational Misconduct

The operational misconduct alleged by the Superintendent in his report accompanying the First Order consisted of:

- a failure by Crosbie to disclose a conflict of interest;
- Crosbie's employment of individuals who provided representation for persons with SABS claims but had not satisfied the conditions for exemption from the prohibition in the Act against so acting; and
- improper conduct by Crosbie in acting as a SABS representative.

The alleged failure to disclose a conflict was in relation to claims submitted by Crosbie to an insurer for payment of the cost of snow removal services rendered to one of his SABS clients by his son, Rob Crosbie. The invoices sent to the insurer in support of those claims bore the name of Rob Crosbie. We received evidence that, when confronted with an assertion, by the insurer, of a potential conflict of interest, Crosbie did not deny or conceal the fact that his son had provided the services but simply denied that there was a conflict of interest in the circumstances. Accordingly, we have concluded that the Superintendent has not established that Crosbie engaged in an "unfair or deceptive act or practice" by failing to disclose a conflict of interest, an omission that, if it had occurred, would be inconsistent with the Code of Conduct (s. 3.9).

At the hearing before this Tribunal, the Superintendent suggested that Roland Spiegel ("Spiegel"), who wrote a number of very aggressive letters to insurers in relation to the claims of insureds who were represented by Crosbie and/or R.E.C. Paralegal (which were placed in evidence by the Superintendent), was in fact acting as a SABS representative, as evidenced by those letters, without having satisfied the conditions for an exemption from the prohibition in the Act against acting as a public adjuster in respect of motor vehicle accident claims. In each such letter, Spiegel represented to the insurer that that he had been "assigned/retained by … R.E.C. Paralegal to provide Rehabilitation Counseling and Case Management Services with reference to [certain] claims for Accident Benefits and other damages/claims arising out of the … Motor Vehicle Accident" described in the letter. Spiegel's role was challenged by more that one insurer on the basis that he was acting as a SABS representative. In his evidence, Crosbie described Spiegel as a kinesiologist who had taken courses in rehabilitation. He said that Spiegel was not

employed by R.E.C. Paralegal but was retained as a consultant in the medical aspects of SABS claims. He also testified that when he became aware of the complaints by some insurers that Speigel was acting as a SABS representative, he asked Speigel to take the steps necessary to obtain the benefit of the exemption from the prohibition that would otherwise prevent him from acting in that role. Speigel ultimately completed those steps although there was some delay in his securing the necessary errors and omissions insurance coverage.

In our view, the Superintendent failed to establish that the activities of Spiegel were of a kind that could only be lawfully performed by an exempted SABS representative. The fact that Spiegel ultimately took steps to qualify for the exemption cannot be taken as evidence that his activities were of the kind that could only be performed by an exempted SABS representative. In any event, we are not persuaded that either Crosbie or R.E.C. Paralegal can be said to have committed an "unfair or deceptive act or practice" simply by virtue of having retained Spiegel, an independent consultant, who did not have the benefit of an exemption, to perform the services that he performed for Crosbie or R.E.C. Paralegal even if those services could be said to be of a kind that could only be performed by an exempted SABS representative. Either of Crosbie or R.E.C. Paralegal might be shown, on sufficient proof of involvement, to have abetted or counseled the commission of an offence by Spiegel under the Act, which would be an offence under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (ss. 77 and 78) but, if so, their acts of abetting or counseling would constitute acts prohibited by the latter statute rather than by the Act. The Act does not make those who aid or counsel the commission of an offence under the Act liable along with the primary offender.

There were others who had some involvement with Crosbie or R.E.C. Paralegal, namely Natalie Masly and Ivan Brookes, that the Superintendent suggested were performing services for Crosbie or R.E.C. Paralegal that could only be performed by an exempted SABS representative. Crosbie described Natalie Masly's responsibilities within his office as secretarial and administrative in nature and Ivan Brookes' activity on behalf of Crosbie or R.E.C. Paralegal as being limited, in time and function, and carried out in the capacity of an independent paralegal. We didn't hear any evidence that convinced us that these descriptions were inaccurate.

At the hearing before the Tribunal, the Superintendent also suggested that Crosbie had acted improperly in representing SABS claimants in proceedings before the Superior Court, a role that, as a non-lawyer, he could not perform. We were not directed to any element of the definition of an "unfair or deceptive act or practice" that would embrace that kind of representation and, therefore, make it a basis for a cease and desist order under the Act. Crosbie may have failed to advise his clients who commenced Superior Court proceedings that he was not a lawyer, one of the duties of a SABS representative being to provide that advice to SABS claimants (see s. 2.10 of the Code of Conduct), but we don't know whether this was the case or not. Crosbie insisted that he had simply allowed clients who had commenced legal proceedings to use the R.E.C. Paralegal address as their address for the sake of convenience and that the clients were, in fact, self-represented in these proceedings. However, there was evidence before us that one Danny

Kochan, writing to an insurer-defendant on R.E.C. Paralegal letterhead, served the statement of claim in one such proceeding (Crosbie described Danny Kochan as a "process server"). We don't believe that this evidence is sufficient to refute the claim of Crosbie that he and R.E.C. Paralegal were not, in fact, representing the plaintiffs in these kinds of proceedings.

Since we have decided that there was no operational misconduct, we must go on to consider whether there was any regulatory accountability misconduct in order to decide whether there is a proper basis for the First Order.

Acts or Practices Alleged to Constitute Regulatory Accountability Misconduct

Upon receipt of complaints about the activities of Crosbie and R.E.C. Paralegal from various insurers, FSCO commenced an investigation under the direction of Fred Hollis ("Hollis"), one of its investigators. Both Hollis and Crosbie testified as to the circumstances of their interaction in the course of that investigation. The following description of what transpired is drawn from the evidence of both of those individuals.

Hollis telephoned Crosbie on or about March 17, 2005 to arrange a meeting with him. Hollis attended, as arranged, at the R.E.C. Paralegal office on March 18. At that time, he indicated to Crosbie that he wanted to talk to him about an investigation he was conducting. There was some preliminary discussion between them about the allegation that had been made by an insurer of a conflict of interest on the part of Crosbie in respect of the snow clearing done for a client by Crosbie's son, but that was the extent of the discussion about specifics of complaints that had been made about Crosbie or R.E.C. Paralegal to FSCO. Hollis had told Crosbie, at the beginning of their meeting, that he was going to tape record the interview. Crosbie objected to that procedure and indicated that he had someone available to take notes as a record of the interview, but Hollis said that would not be sufficient. Crosbie also asked, at some point in the limited discussion that took place, for the documents that provided the basis for any complaints against him. Hollis told Crosbie that he would not proceed without tape recording the interview, that Crosbie would be given a transcript of the recording and that Crosbie would be shown the relevant documents as he was asked questions by Hollis. Since Crosbie refused to proceed on this basis, the interview terminated, Hollis saying that he would be in touch. Crosbie asked how he could contact Hollis' supervisor and Hollis told him how he could reach Robert Barbour ("Barbour"), the Head of Investigations at FSCO.

By letter dated March 18, 2005, Crosbie wrote to Barbour noting that Hollis had insisted on tape recording his interview of Crosbie on that day and stating, among other things, that he had not been referred to any specific authority on the part of FSCO to require such recording and that he had not been given anything by FSCO to which he could respond. Barbour replied to Crosbie, by letter of March 22, indicating that an interview by an investigator could be satisfactorily recorded either by taping or by hand written verbatim notes and that Crosbie would be given the opportunity, during his interview, to peruse any documents relevant to questions put to him before responding to those questions.

Hollis wrote to Crosbie, by letter dated March 29 but faxed on March 31, making a formal request that he attend at FSCO's office on April 5, 6 or 7 for an interview about complaints concerning Crosbie's business practices as a SABS representative and requesting that he bring with him the files relating to nine named SABS clients. The letter recited s. 31(1) of the Act as the authority for making the request for information and noted the obligation of Crosbie, under s. 3.11 of the Code of Conduct, to respond promptly. Crosbie testified that his reaction to the March 29 letter was that he would need the consent of the nine named SABS clients to the disclosure of their files to FSCO given the confidentiality of the information they contained and that, accordingly, he called each of those clients and asked them to come in to his office to discuss release of the relevant files. Four client directions to Crosbie/R.E.C. Paralegal were tendered in evidence each, basically, instructing that his or her files not be released to FSCO at all or without his or her clear authorization. Crosbie also testified that some lawyers to whom some of the relevant client files had been forwarded had objected strongly to his discussing those files with Hollis.

Hollis followed up on his letter of March 29 with a telephone call to Crosbie on Friday, April 1, at which time Crosbie said that he had to get in touch first with a couple of lawyers, that he had privacy concerns about the information in the requested client files and that he had questions about the applicability to him of certain provisions of the Act and regulations that were relied upon by Hollis. He also stated that he would address all of these concerns in a fax to Hollis but that he wouldn't be able to send the fax until the following Monday, April 4. Hollis says that the reason Crosbie gave for his inability to send the fax that day was that he was out of the office as there had been a break and enter and the police were in the office conducting an investigation. On the other hand, Crosbie indicates that he said something to the effect that there were police in his office and that a break and enter investigation was going on, but didn't indicate that the police presence was related to a break and enter. We heard evidence from an official of a company that provided an alarm system for the R.E.C. Paralegal office that he was to come to the office on April 1 to discuss with Crosbie the large number of calls that had been coming in to the security monitoring station from that office. However, the meeting was cancelled, apparently by Crosbie. When the two met a couple of days later, the security company official examined the doors of the office and noted that a latch on the back door was not locking properly and that it looked as if someone had been trying to break in. Hollis later contacted the police and was advised that no break and enter at the R.E.C. Paralegal office had been reported.

When Crosbie's promised fax setting out his concerns didn't arrive, Hollis phoned Crosbie on April 8 but was told that Crosbie was out of the office at a mediation, so Hollis left a message for him, which was not returned. On April 11, Hollis sent a letter to Crosbie by way of follow-up to his earlier letter of March 29, referring to the various letters and phone calls that were exchanged between them and concluding that if he didn't hear from Crosbie by April 13, he would be submitting a report recommending that a cease and desist order be made against Crosbie. However, on April 12, the day before that deadline, Crosbie faxed Hollis a letter, dated April 11, which was apparently the fax he had promised in the course of the April 1 telephone call, stating that:

- he was advised by the Paralegal Society that certain sections of the Act and regulations on which Hollis had relied in his letter of March 29 did not apply in the circumstances;
- he was not in breach of the Code of Conduct as he had responded promptly to FSCO's requests for information;
- his clients and a law firm handling one of his client files had forbidden him from disclosing or discussing the relevant files without specific authorization;
- as he believed Hollis was using deceptive tactics to try to get him to release his client files, he needed the assistance, at any meeting with Hollis, of the Paralegal Society, a lawyer from his errors and omission insurer and his personal lawyer;
- the dates proposed for a meeting, i.e. April 5, 6 and 7, were too soon, but that once the Paralegal Society and his personal lawyer had gotten together they would call to set up a meeting, should they advise that Hollis had the authority to order such a meeting, and he would attend any such meeting with his counsel, counsel for the Paralegal Society and counsel for the errors and omissions insurer and would respond, promptly and fully, to any particular question Hollis might have.

This letter was copied to the Superintendent, the Ombudsman for Ontario, the Paralegal Society and Crosbie's errors and omissions insurer.

On April 12, Crosbie also sent a letter, dated April 5, to Barbour, stating the position that he was entitled to full disclosure of the complaints against him and that once all the lawyers were in possession of the complaints and their supporting documents, a time and date for a meeting with Hollis would be arranged.

Hollis had no further contact with Crosbie and after waiting for a period of time he prepared a report recommending the making of a cease and order against Crosbie and R.E.C. Paralegal which led to the report of the Superintendent, dated May 19, 2005, in support of the First Order. It does not appear that Crosbie, R.E.C. Paralegal or anyone on their behalf contacted Hollis or FSCO after April 12 and before the issue of the First Order on May 19.

We are not satisfied, on the basis of our evaluation of the evidence, that Crosbie deliberately misled Hollis, in the course of their telephone conversation of April 1, as to the events then unfolding in the R.E.C. Paralegal office that would prevent him from faxing a letter to Hollis that day setting out his concerns about the investigation process. Even if Hollis was deliberately misled, there was no impairment of the progress of the investigation as a result of the misrepresentation. Hollis' promised letter would have been delayed beyond April 1 because of the police presence in the R.E.C. Paralegal office whether the police were there to investigate a break and enter or to execute a search warrant. Nothing is likely to have turned on Hollis' reliance on what may have been an inaccurate statement by Crosbie as to the reason for the police presence. Given all of these factors, we have concluded that the reason given by Crosbie, in the course of his

April 1 telephone conversation with Hollis, for his inability to send out a fax on that day, should not be taken to constitute an “unfair or deceptive act or practice” on the basis that it involved the furnishing of false information to FSCO (see s. 447(2)(a) of the Act) or a dishonest act in dealing with FSCO (see s. 2 of the Code of Conduct).

In responding, at the hearing, to the allegations that Crosbie had not co-operated with the Superintendent in the investigation, in breach of provisions of the Act and directions of the Code of Conduct, counsel for Crosbie and R.E.C. Paralegal did not argue that Hollis’ formal request for information from Crosbie was without legal authority or that the requested client files could not be legally produced in response to such a request because of privacy legislation or otherwise. These were two of the positions that seem to have been taken by Crosbie in his April 11 letter to Hollis.

In all of the circumstances, we have concluded that Crosbie and R.E.C. Paralegal did, in fact, engage in an “unfair or deceptive act or practice”, justifying the making of a cease and desist order against them, by failing to comply with the formal request for information, made under s. 31(1) of the Act (see s. 33(1), as read with s. 447(2)(d)) and by failing to respond to a request for information from FSCO fully and promptly when requested to do so (see s. 3.11 of the Code of Conduct). However, we have also concluded that the Superintendent proceeded with undue haste to the issue of the First Order, given that Crosbie continued to have some unresolved concerns about the way Hollis was pursuing his investigation. There was no evidence before us to establish that those concerns were not *bona fide*. We note that the First Order was made without Hollis or anyone else at FSCO initiating further contact with Crosbie following Hollis' April 11 letter to Crosbie. Yet, in that letter, Hollis had given Crosbie until April 13 to get in touch with him, a deadline that Crosbie, in fact, met - although just barely - with his letter of April 11, which was apparently faxed to Hollis at 7:34 p.m. on April 12.

Acts or Practices Alleged by the Superintendent to Constitute a Basis for the Second Order

The Second Order, issued on June 22, 2005, is in its terms generally similar to the First Order, issued on May 19, 2005, which it supplements. However, it is different in two respects. It does not repeat the requirement of the First Order that the Applicants immediately notify their SABS clients that they can no longer act on their behalf; but it does add a new requirement that the Superintendent be immediately provided with a list of the names, addresses and telephone numbers of all such clients. The Second Order is also more specific than the First Order in one respect; it makes clear that the Applicants are to cease providing any services relating to claims for SABS benefits and to cease holding out to the public that they provide such services "whether or not such services are charged a fee or not". The last clause reflects an apparent awareness by the Superintendent that R.E.C. Paralegal was taking the position with some insurers that Crosbie was not in violation of the First Order in providing services to SABS clients to whom he had ceased charging fees. We received in evidence copies of three "messages" to insurers or insurance adjusters written after May 19 on the letterhead of R.E.C. Paralegal, without any signature or without Crosbie's signature, stating that "I am not a

SABS representative" or "I am exempt from being a SABS representative" because no direct or indirect compensation is received for services provided.

There may be some question as to whether someone who provides representation to SABS claimants but is not compensated for those services is free to operate without the benefit of the exemption from the prohibition against a public adjuster acting in respect of motor vehicle accident claims (note the wording of s. 398(1) of the Act and s. 19 of Ont. Reg. 664). However, the fact is that the First Order required Crosbie and R.E.C. Paralegal to immediately cease holding themselves out "in any form as statutory accident benefits representatives within Ontario" (para. C of the First Order). The "messages" sent out by R.E.C. Paralegal, referred to above, would seem to hold R.E.C. Paralegal or Crosbie out, to the persons to whom they were directed, as entitled to act as SABS representatives.

The acts or practices alleged by the Superintendent to constitute a basis for the Second Order, in the report that was appended, as required, to that Order, are the same as those alleged to constitute a basis for the First Order with the addition of other specified acts and practices that allegedly occurred after the First Order was made, all of which involve, essentially, non-compliance by Crosbie with the terms of the First Order. Non-compliance with one cease and desist order can be the basis for a further such order since that non-compliance amounts to the commission of an act that is, effectively, prohibited by the Act (s. 447(2)(b)) and, as such, is an "unfair or deceptive act or practice" that can provide the basis for a cease and desist order (s. 1, para. 1 of Ont. Reg. 7/00, as am.). There were no grounds of operational misconduct on the part of Crosbie or R.E.C. Paralegal that were put forward as a basis for the Second Order other than those that had already been alleged as a basis for the First Order.

In his report accompanying the Second Order, the Superintendent alleged that Crosbie did not file with the Superintendent copies of his letters to clients advising them about the First Order and advising them that he could no longer act for them (as per para. B of the First Order). Crosbie did not contest this allegation in his testimony, but said that he had not notified his SABS clients in writing of the Order as it was impractical to do so since he had in excess of 500 such clients (perhaps in excess of 1000 such clients); rather, he advised his clients of the Order as they had occasion to contact him or he had occasion to contact them. Crosbie admitted that he had not raised with FSCO the problem that he had in providing written notice to his SABS clients.

The Superintendent also alleged, in his report, that Crosbie continued, after the First Order, to represent and advise persons with SABS claims and provide services to clients in relation to such claims (contrary to para. A of the First Order). We received evidence from insurers, or their representatives or agents, of a number of situations in which R.E.C. Paralegal or Crosbie, using R.E.C. Paralegal letterhead, had communicated with them, after the First Order, on behalf of SABS clients. Crosbie explained the need for communication in one of those situations as driven by his concern that a crucial deadline might be missed, to the prejudice of the client, if the insurer were not contacted while he was in the course of transferring the client's file to someone else.

Finally, the Superintendent alleged, in his report, that the former clients of Crosbie who were assumed by one Olga Leyenson ("Leyenson") after the First Order were not provided with a copy of the First Order (as required by para. B of that Order) and that Leyenson had associated herself in various ways with R.E.C. Paralegal after that Order, including through continuation of the use of R.E.C. Paralegal letterhead (resulting in a violation of para. A of the First Order). Mr. Crosbie testified that after Leyenson qualified as an exempted SABS representative, effective from May 3, 2005, she was able to represent SABS clients, including Crosbie's former clients, and that she started her own paralegal company. He also testified that she hadn't been employed by R.E.C. Paralegal after July, 2003.

We have concluded on the basis of the evidence that Crosbie and R.E.C. Paralegal did not comply with the First Order in the following respects:

- they did not notify Crosbie's SABS clients in writing that he could no longer act for them and they did not provide copies of such notifications to the Superintendent; and
- Crosbie, in communications with insurers or their representatives or agents, continued to represent some of his clients in relation to their SABS claims.

These activities were in breach of the First Order and, therefore, constituted the commission of acts prohibited by the Act and, consequently, "unfair or deceptive acts and practices" providing a basis for the Second Order. We would characterize the activities in question as amounting to regulatory accountability misconduct, rather than operational misconduct, since they involved the breach of a regulatory direction of the Superintendent, embodied in the First Order.

Acts or Practices Alleged by the Superintendent to be in Breach of the Second Order

The Second Order required Crosbie and R.E.C. Paralegal, among other things, to take immediate action to provide the Superintendent with a list of the names, addresses and telephone numbers of all persons who had SABS claims and were clients of Crosbie or R.E.C. Paralegal as of May 19, 2005. It appears from the evidence that this did not happen.

Order of the Tribunal

After the conclusion of the oral hearing in this proceeding, we asked the Registrar of the Tribunal to invite the parties to make written submissions on two questions, as follows:

- does the Tribunal have the authority to issue a cease and desist order under s. 441(8) of the *Insurance Act* with a specific expiry date; and
- if so and if the Tribunal should choose to exercise that authority in this case, what would be an appropriate expiry date, in the circumstances of

> this case, for a cease and desist order in the terms of the cease and desist order proposed by the Superintendent?

The Registrar issued that invitation by letter of September 25, 2005 to the parties. On consent of the parties, the initial deadlines for delivery of written submissions were extended so that the last set of submissions was due by November 21, 2005.

In his written submissions, Crosbie (at this stage acting on his own behalf) maintained that the Tribunal was limited to determining whether there were any acts or conduct on the part of Crosbie or R.E.C. Paralegal that convinced the Tribunal that a "permanent cease and desist order" should be made against them. Counsel for the Superintendent, in his written submissions, maintained that the first question posed by the Tribunal should be answered in the affirmative and that, in answer to the second question, the appropriate expiry date for any time-limited cease and desist order that the Tribunal might make should be no earlier than May 20, 2007, the second anniversary of service of the First Order.

We have concluded that a cease and desist order made under s. 441(7) or (8) of the Act (s. 441 is reproduced, for convenience of reference, in the Appendix to these Reasons) does not have to be open-ended and, therefore, with no time limit or other built-in termination event or mechanism. The basis for making an "interim" cease and desist order under s. 441(4) is the potential prejudice to the public interest arising from any delay in the issuance of a "permanent order", a term that may be taken to refer to the kind of order contemplated by s. 441(7) or (8). Given the context in which the term "permanent order" is used, we think that it simply means an order that is not an "interim order", i.e. it is not an order that continues pending the expiry of the period of time for making a request for hearing or the outcome of a hearing. "Permanent" does not, in our opinion, necessarily imply continuation "in perpetuity". Although, s. 441(11) provides that the Superintendent may revoke an order made under s. 441, this does not carry the logical implication that this is the only way in which an order may come to an end.

If we are wrong in our conclusion about s. 441 and its language cannot fairly support the making of a cease and desist order that is limited in time, then the making of a cease and desist order by the Tribunal under that section (in particular, s. 441(8)) can be supported under s. 21(2) of the *Financial Services Commission of Ontario Act, 1997*, R.S.O. 1997, c. 28, which provides general authorization for the Tribunal to make an order subject to the conditions that are set out in the order. We believe that this section can be reasonably read to authorize the making of an order that includes a condition to the effect that the order only continues until a specified date.

For the reasons set out below, we have decided that it is appropriate to limit the term of the cease and desist order that we would make in the present case and that the limited term of the order should be one year. First, the Superintendent proceeded with undue haste to the issue of a cease and desist order (see p. 12 of these Reasons), foreclosing the opportunity, prematurely, of resolving the question within FSCO of whether Crosbie or R.E.C. Paralegal had, in fact, engaged in operational misconduct. Second, although

unable to secure the co-operation of Crosbie in the initial investigation, the Superintendent did have the chance, through the hearing before this Tribunal, to make the case that Crosbie and R.E.C. Paralegal had been guilty of operational misconduct. Indeed, the Superintendent was able to question Crosbie, through cross-examination, during the course of the hearing. Of course, the Tribunal hearing process may not have provided a complete equivalent of an interview with Crosbie and the production of relevant documents at the much earlier, investigation stage. However, we think that the hearing went a good distance towards remedying the lack of information from a full investigation. Third, the Superintendent did not succeed in establishing to our satisfaction, through the hearing, that Crosbie or R.E.C. Paralegal had engaged in operational misconduct (see pp. 7-9 & 13 of these Reasons), but was only able to convince us that they had engaged in regulatory compliance misconduct. Therefore, the only sanction that we can properly impose relates to the latter misconduct. We take the position, solely for the purposes of determining the appropriate penalty, that regulatory compliance misconduct may be treated as qualitatively different from operational misconduct and, generally, as calling for a lesser penalty.

Given our various findings in this matter, we hereby order Crosbie and R.E.C. Paralegal to do, and continue doing, during the period of one year from the effective date of this order, the following:

A. Cease carrying on business as statutory accident benefit representatives;

B. Cease providing any service to anyone related in any way to a claim for statutory accident benefits, whether or not such services are charged a fee or not; and

C. Cease advertising or holding out to the public in any way that services of any kind relating to claims for statutory accident benefits are offered or provided, whether or not such services are charged a fee or not.

The lettered paragraphs of this order are in the same terms as the first three lettered paragraphs of the form of cease and desist order proposed by the Superintendent in the instrument containing the Second Order, but we have not included the final paragraph of that proposed cease and desist order, which would require the delivery to the Superintendent of a list of SABS claimants who were clients of Crosbie or Paralegal. That final paragraph is unnecessary as we have now dealt definitively with the allegations by the Superintendent about the activities of Crosbie and R.E.C. Paralegal, up to and including the date of the Second Order, as they relate to those clients. Our order shall be effective from the date of these Reasons and shall thereupon replace the interim cease and desist orders made by the Superintendent in this proceeding.

Nothing in our order is meant to preclude the making of another cease and desist order against Crosbie or R.E.C. Paralegal on the basis of non-compliance with this order or on the basis of conduct that is not simply a violation of the First Order or the Second Order and has occurred after the date of the Second Order.

DATED at Toronto, Ontario this 1st day of December, 2005.

_"Colin H.H. McNairn"_________
Colin H.H. McNairn, Chair of the Tribunal and of the Panel

__"Martin J. K. Brown"___________
Martin J.K. Brown, Member of the Tribunal and of the Panel

__"Kevin Ashe"__________________
Kevin Ashe, Member of the Tribunal and of the Panel

APPENDIX

Insurance Act, R.S.O. 1990, c. I-8, as am.

Superintendent's Report

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.

Notice

(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.

Request for hearing

(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.

Interim order

(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.

Hearing

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

Extension of order

(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.

No request for hearing

(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.

Hearing

(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.

Modification

(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.

Appeal

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

Revocation

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