

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, C. I.8, as amended (the *Act*), in particular sections 31(1), 438, 441(2) and 441(4), and Ontario Regulation 7/00, in particular section 19(1);

AND IN THE MATTER OF an Interim Cease and Desist Order and Notice of a Proposed Cease and Desist Order, dated August 16, 2007, against Roland Spiegel;

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

B E T W E E N:

ROLAND SPIEGEL

Applicant

-and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Denis Boivin
Member of the Tribunal and Chair of the Panel

APPEARANCES:

For the Applicant
Mr. Roland Spiegel

For the Superintendent
Mr. Robert Conway

HEARING DATE:

September 17, 2007 (by teleconference call)

DECISION ON A PRELIMINARY MOTION

Introduction

During the Pre-hearing Conference (“PHC”) of September 5, 2007, the Superintendent (represented by Mr. Robert Conway) and Mr. Roland Spiegel (representing himself) agreed to ask direction from the Tribunal on a number of preliminary issues in order to facilitate the hearing process in this matter. First, Mr. Conway requested a procedural order directing Mr. Spiegel to provide the Superintendent with open access to his fax machine. Second, the parties moved that three questions be answered before continuation of the PHC:

- 1) Whether Mr. Spiegel is engaged in business activity that is subject to regulation under the *Insurance Act*?
- 2) What impact, if any, does the Tribunal’s decision in *Robert Crosbie and 1460246 Ontario Inc., carrying on business as R.E.C. Paralegal v. Superintendent of Financial Services* (December 1, 2005) (No. R0251-2005-1) (*Crosbie*) have on the current proceedings?
- 3) Whether the equitable doctrine of *laches* constitutes a bar to these proceedings?

Accordingly, a motion was heard by teleconference call on September 17, 2007, at which point the Tribunal heard oral submissions from both parties with respect to these issues.

The Procedural Order

During the first session of the Pre-hearing Conference, counsel for the Superintendent expressed some concerns about the exchange of documents between his office and Mr. Spiegel. He noted that the amount and size of documents received from Mr. Spiegel was unusual for this stage of the proceedings. Moreover, even though Mr. Conway’s fax machine was continuously available for the purpose of receiving documents, he did not have a similar access to Mr. Spiegel’s fax machine for the purpose of responding to his requests for information. Accordingly, Mr. Conway requested a procedural order directing Mr. Spiegel to provide the Superintendent with open access to a fax machine, namely, 24 hours per day and 7 days per week. This would allow personnel from Mr. Conway’s office to send documents when it is most convenient and cost efficient.

Although the Tribunal understands the concerns expressed by Mr. Conway, the order requested will not be granted. The Tribunal has not been directed to any legislative provision or case-law that would support granting an order of such nature, that is, an order that would require Mr. Spiegel, who is the subject of a Proposed Cease and Desist Order and an Interim Cease and

Desist Order, to purchase and maintain specific equipment for the purpose of saving time and money for the Superintendent.

The Business Activities of Mr. Spiegel

The first preliminary issue raised by the parties concerns the jurisdiction of the Superintendent with respect to the professional activities of Mr. Spiegel. During the PHC and the motion hearing, Mr. Spiegel vehemently argued that he was not “engaged in the business of insurance” within the meaning of section 31(1) of the *Insurance Act*. Rather, in his oral and written submissions, Mr. Spiegel described himself as a “health care provider” who offers health, medical and rehabilitation services to people who have claims for accident benefits pursuant to the *Statutory Accident Benefits Schedule*, Ont. Reg. 403/96 (*SABS*). Accordingly, he claims the Superintendent has no authority to compel him to furnish information regarding his business activities pursuant to section 31(1) and, thus, no authority to issue either an Interim or Permanent Cease and Desist Order for his failure to furnish said information. Mr. Spiegel expressed his willingness to cooperate with the enforcement personnel of the Superintendent, but not because he owes them a duty to furnish information – simply as a matter of professional courtesy.

The Tribunal can only act on the evidence placed before it. Other than the self-characterisations made by Mr. Spiegel in his oral and written submissions during the PHC and the motion hearing, the only evidence presented at this stage of the process with respect to the nature of the business activities performed by Mr. Spiegel consists of seven letters written by Mr. Spiegel and two letters written by Robert Crosbie on behalf of R.E.C. Paralegal, the paralegals involved in the *Crosbie* matter referred to in the introduction. These nine letters are contained in the Brief submitted by the Superintendent in preparation for this motion hearing. At no point did Mr. Spiegel contest the authenticity of these letters. On the contrary, he referred to them on more than one occasion during his oral and written submissions. For ease of reference, the following Table lists these letters in chronological order and assigns a number to each of them.

Letter	Location	Date	From	To	Client
1.	Tab 4	November 30, 2004	Robert Crosbie R.E.C. Paralegal	H. M. Certas	D. P.
2.	Tab 3	December 6, 2004	Roland Spiegel	S. F. TTC	G. C.
3.	Tab 4	January 27, 2005	Roland Spiegel	H. M. Certas	D. P.
4.	Tab 3	February 8, 2005	Roland Spiegel	S. F. TTC	G. C.

5.	Tab 3	February 16, 2005	Roland Spiegel	S. F. TTC	G. C.
6.	Tab 4	February 28, 2005	Roland Spiegel	S. W. Injury Advisors	H. A.
7.	Tab 4	March 3, 2005	Robert Crosbie R.E.C. Paralegal	L. C. Certas	D. P.
8.	Tab 4	April 7, 2005	Roland Spiegel	C. S. AVIVA	H. A.
9.	Tab 5	August 27, 2007	Roland Spiegel	M. G. Allstate	N. N.

In letters 2-6, 8 and 9, the following titles appear under Mr. Spiegel’s signature: “Rehabilitation Consultant” and “Case Manager”. These titles are also attributed to him by Mr. Crosbie in letters 1 and 7, written on behalf of R.E.C. Paralegal. Each letter written by Mr. Spiegel is directly addressed to an insurance provider and is basically a response to this insurer’s decision to deny accident benefits. In the opening paragraph of letters 2 to 6 and 8, Mr. Spiegel describes his mandate as follows:

Please be advised that we have been assigned/retained by the above-named representative (R.E.C. Paralegal) to provide him/her with Rehabilitation Counselling and Case management Services, with reference to his/her claims for Accident Benefits and any other damages/claims arising out of the above-captioned Motor Vehicle Accident.

This opening sentence is somewhat ambiguous. First, the words “we have been assigned/retained by the above-mentioned representative (R.E.C. Paralegal)” suggest that Mr. Spiegel’s principal or client is R.E.C. Paralegal, a company that provided paralegal services to people with SABS claims. However, this representative’s name does not appear anywhere “above” this statement. On the contrary, the only names that appear “above” the first paragraph (under the object-line “Our Client”) are the names of the actual individuals who were claiming accident benefits. Second, the words “to provide him/her with Rehabilitation Counselling and Case Management Services, with reference to his/her claims for Accident Benefits and any other damages/claims” literally refer back to the “above-mentioned representative”. However, a legal representative does not have a claim to benefits or damages. Instead, these claims belonged to the individuals identified by Mr. Spiegel as “Our Client”. By way of contrast, the opening paragraph of the letter written on August 27, 2007 (letter 9) is much clearer: the word “representative” has been removed and Mr. Spiegel describes himself as acting directly on behalf of someone claiming accident benefits.

This said, there is nothing ambiguous about the other sections of the letters written by Mr. Spiegel. Having read each letter attentively, the Tribunal makes the following two findings regarding their pith and substance. First, none of the seven letters debates or even explains the merits of the corresponding claim for accident benefits from a health, medical or rehabilitation perspective. One would expect a letter from a “health care provider”, written for the purpose of contesting an insurer’s decision to deny health care benefits, to include diagnoses, prognoses and the objective rationales for any proposed treatment plan. However, the letters written by Mr. Spiegel are strikingly silent by their lack of any express or implicit health care vocabulary. To be sure, the Tribunal makes no findings regarding the extent to which Mr. Spiegel actually offered health, medical or rehabilitation services to each of these clients. There is no evidence before the Tribunal on this point and, in any event, the Superintendent does not challenge Mr. Spiegel’s assertion that he does provide health care services to his clients. Rather, the question is whether letters 2-6 and 8 support a finding that Mr. Spiegel has also engaged in the business of insurance within the meaning of section 31(1) of the *Insurance Act*.

Second, the letters in question are predominantly written from the perspective of a legal advocate, that is, from the perspective of someone who forcefully and passionately defends the rights of his or her clients. One may object to Mr. Spiegel’s choice of language and tone, but there is nothing wrong with his mission. In substance, each of the letters entered into evidence outlines (1) the various grounds upon which the insurer’s decision is invalid or illegal under the law, (2) the steps that must be taken to rectify the situation, and (3) the consequences that the insurer will face if it does not alter its decision. This is the essence of advocacy. What’s more, the letters are replete with specific words and expressions that one may expect to find in the written communications of a legal representative, but not in a letter emanating from a health care provider. By way of example, Mr. Spiegel recurrently made the following statements in letters 2-6 and 8: “your rejection and denial of the above-noted Treatment Plan is fatally flawed and manifestly defective in a material way”; “you have failed and neglected to pursue the appropriate investigations”; “you are herein formally placed under notice and advisement for breach of the statutory provisions of the *Insurance Act*”; “your delinquent acts include the following”; and “failure to adequately respond to the above-noted request/notice will leave us with no other alternative but to pursue legal means against you personally”. These letters also cite numerous legislative provisions and, in the case of letter 9, refer to findings reached by arbitrators and courts in the context of litigation. To state the matter differently, any paralegal or lawyer could have written letters such as those entered into evidence without being accused of having, thereby, provided health care services.

Once again, the question before the Tribunal is not whether, or to what extent, Mr. Spiegel provides health care services to his clients. Moreover, the question is not whether health care providers are, as a general rule, subject to the authority of the Superintendent under the *Insurance Act* and its regulations. The preliminary issue at hand is far more specific. Simply stated, the question is whether the past business activities of Mr. Spiegel, as disclosed by the

evidence before the Tribunal, are sufficient to trigger the duty to furnish information imposed by section 31(1) of the *Insurance Act*. The fact that Mr. Spiegel and thousands of other health care professionals offer health, medical and rehabilitation services to individuals with claims for automobile accident benefits has little relevance with respect to this determination. When someone is factually “engaged in the business of insurance” within the meaning of section 31(1), this person is subject to the authority of the Superintendent with respect to said business activities. This is true, regardless of what title this person uses when signing correspondence, and regardless of what other professional activities this person is engaged in.

In the *Crosbie* matter, the Tribunal concluded that section 31(1) of the *Insurance Act* applies to SABS representatives. In upholding this finding, the Ontario Divisional Court made the following observations in paragraph 11 of its reasons:

The Tribunal correctly held that Mr. Crosbie was engaged in the “business of insurance” and, therefore, subject to a duty to disclose under s. 31(1) and subject to investigation by the Superintendent pursuant to s. 440. SABS representatives are engaged in making adjustments of accident benefits for private individuals. They are a creature of statute, as s. 398 and Ont. Reg. 7/00 clearly define the conditions under which they obtain a licensing exemption. The *Code of Conduct* referenced in the regulation readily points to the Superintendent’s role in supervising them and protecting the public.

Mr. Spiegel may prefer calling himself a “Rehabilitation Consultant & Therapist”, a “Life, Social & Vocational Coach”, a “Medical and Rehabilitation Services Provider”, and a “Rehabilitation Case Manager” (see letter 9). However, the evidence before the Tribunal leads to the conclusion that he was also engaged in making adjustments of accident benefits for private individuals. As such, the Superintendent had authority to compel him to furnish information regarding said business activities under section 31(1) of the *Insurance Act*.

The Impact of the *Crosbie* Decision

Although Mr. Spiegel was not a party to the proceedings in the *Crosbie* matter, his letters were adduced into evidence by the Superintendent in order to support an allegation of operational misconduct against another paralegal whose business activities included acting as a SABS representative. In particular, in the *Crosbie* matter, the Superintendent issued a Cease and Desist Order under section 441 of the *Insurance Act* stating that Mr. Crosbie and a company with whom he was affiliated (R.E.C. Paralegal) had engaged in unfair or deceptive acts or practices by, *inter alia*, employing individuals such as Mr. Spiegel “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”. According to the Superintendent, in the *Crosbie* matter, the letters written by Mr. Spiegel revealed that he was indeed providing “representation for persons with SABS claims” and, at the relevant time, he had not satisfied the conditions for exemption.

In *Crosbie*, the Tribunal rejected all allegations of operational misconduct made against Mr. Crosbie and R.E.C. Paralegal, including the one involving the employment of Mr. Spiegel. The Tribunal addressed this particular allegation in the following two paragraphs of its 17-page decision. According to Mr. Spiegel, this portion of the Tribunal's reasons contains a finding that he is not engaged in business activity covered by the *Insurance Act* and this finding is binding in the current proceedings:

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 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 than 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 Spiegel was acting as a SABS representative, he asked Spiegel 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. Spiegel 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. [emphasis added]

Mr. Spiegel's argument is not without merit. Indeed, the first two sentences of the second paragraph suggest that the evidence adduced in the *Crosbie* matter was not sufficient to establish that Mr. Spiegel was providing representation for persons with SABS claims within the meaning of the prohibition against public adjusters contained in section 398 of the *Insurance Act*. Naturally, this observation would not preclude the Superintendent from adducing further evidence in a separate proceeding against Mr. Spiegel. However, counsel for the Superintendent has conceded that, with the exception of letter 9, the evidence relied upon in the present case is essentially the same as the evidence referred to by the Tribunal in the *Crosbie* matter. Given this concession, one can understand Mr. Spiegel's frustration.

Having said this, these two sentences cannot be taken out of context. A careful reading of the entire paragraph – especially the third sentence – clearly demonstrates that the Tribunal did not rest its final decision on a negative assessment of the evidence adduced by the Superintendent with respect to the nature of the activities performed by Mr. Spiegel. Instead, the Tribunal based its ultimate decision on the fact that Mr. Crosbie and R.E.C. Paralegal did not commit an unfair or deceptive act or practice simply by **employing** Mr. Spiegel, even if his activities could be described as falling within the prohibition contained in section 398 of the *Insurance Act*. Stated somewhat differently, the allegation of operational misconduct against Mr. Crosbie and R.E.C. Paralegal was not that Mr. Spiegel was a SABS representative – that was not the question before the Tribunal. Indeed, the nature of Mr. Spiegel's business activities had nothing to do with the conduct of Mr. Crosbie and R.E.C. Paralegal. Instead, the allegation of misconduct was that they had **employed** someone who had not satisfied the conditions for an exemption against the prohibition contained in section 398 of the *Insurance Act*. According to the Tribunal, even on the assumption that this allegation was true, the proper venue would be proceedings against Mr. Crosbie and R.E.C. Paralegal under the *Provincial Offences Act*.

Every lawyer and law student knows the difference between the *ratio decidendi* of a decision – the point in a case which determined the judgment – and an *obiter dictum* – words of an opinion entirely unnecessary for the decision of the case. They also know the importance of this distinction: not every word written in a judgment has a binding effect on future legal proceedings. Having read the *Crosbie* decision carefully, I conclude that the two sentences relied upon by Mr. Spiegel have no impact on the current proceedings. These words were simply *obiter*. Accordingly, the *Crosbie* decision does not preclude the Tribunal's findings made under the previous heading in relation to the business activities of Mr. Spiegel.

The Doctrine of *Laches*

The third preliminary issue concerns the delays involved in issuing the Proposed Cease and Desist Order and the Interim Cease and Desist Order (the Orders) against Mr. Spiegel. The Superintendent issued the Orders on August 16, 2007. In the Report attached to the Orders, the Superintendent explains that complaints were received against Mr. Spiegel in 2004 and 2005 regarding his activities as a SABS representative. The Report also notes that an investigator was

assigned to the file (Mr. Fred Hollis), that “repeated requests” for information were made to Mr. Spiegel as early as January 8, 2006, and that the details of the allegations were outlined in a letter dated March 13, 2006.

In his formal Request for Hearing, dated August 20, 2007, Mr. Spiegel attached three letters that he sent to Mr. Hollis: (1) March 16, 2006; (2) March 22, 2006; and (3) March 13, 2007. In the first letter, Mr. Spiegel strongly objects to the jurisdiction of the Superintendent to investigate his affairs because, in his opinion, neither health care providers nor SABS representatives are engaged in the business of insurance within the meaning of the *Insurance Act*. However, he qualifies this position in the second and third letters. In these subsequent letters, he concedes that the duty to furnish information applies with respect to his activities as a SABS representative, but he states that the complaints received in 2004 and 2005 do not relate to said activities and that he is “primarily (first and foremost)” a health care provider. In all three letters, Mr. Spiegel expresses his willingness to address, in writing, any questions or concerns that Mr. Hollis or the Superintendent would have regarding his affairs. However, he adamantly refuses to participate in an oral interview.

For the sake of argument, there are two delays involved in this matter. The first is the delay between the receipt of the complaints against Mr. Spiegel and the ensuing investigation by the Superintendent. Assuming that sufficient complaints were received by January 2005 to warrant an investigation (this is the assumption most favourable to Mr. Spiegel), it appears that requests for information were not made until January 2006, approximately one year later. The second delay is between the receipt of the letter written on March 22, 2006, in which Mr. Spiegel clarifies his position, and the issuance of the Orders on August 16, 2007, approximately seventeen months later. Given these delays, is it inequitable to allow these proceedings to move forward?

The Tribunal rejects Mr. Spiegel’s *laches* argument for the following three reasons. First, whether these delays are viewed in isolation or in combination, there is nothing inherently unfair about the lapse of time involved in this matter. Second, there is a reasonable explanation for both delays. The Tribunal released its decision in the *Crosbie* matter on December 1st, 2005. As noted, this decision addressed an important question of principle, namely, whether SABS representatives were subject to the duty to furnish information under section 31(1) of the *Insurance Act*. Hence, it is reasonable for the Superintendent to await the outcome of this decision before commencing an investigation against another SABS representative. Furthermore, since the Tribunal’s decision had been appealed to the Divisional Court and subsequently to the Court of Appeal, it is understandable that the Orders against Mr. Spiegel were not issued earlier than August 2007. Third, even on the assumption that the Superintendent neglected to exercise his rights in due course, there is no evidence that Mr. Spiegel relied on the Superintendent’s alleged inaction to his detriment. Indeed, there is no evidence that Mr. Spiegel changed his condition or position as a result of conduct, misrepresentation or silence on the part of the Superintendent. If anything, the documents submitted by Mr. Spiegel in this matter and

his oral submissions during the PHC and the motion hearing reveal the exact opposite: from the outset, he has consistently and repeatedly challenged the authority of the Superintendent to regulate his business affairs.

Conclusion

For the above reasons, the Tribunal concludes that some of the activities of Mr. Spiegel are subject to regulation under the *Insurance Act* and that neither the *Crosbie* decision nor the doctrine of *laches* prevents these proceedings from moving forward. However, the Tribunal declines to make the procedural order requested by counsel for the Superintendent.

DATED at Toronto, Ontario, this 12th day of October, 2007.

“Denis Boivin”
Denis Boivin
Member of the Tribunal and Chair of the Panel