

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Insurance Act*, .S.O. 1990, c. 18, as amended  
(the “Act”);

**AND IN THE MATTER OF** a decision dated February 28, 2005 of the  
Executive Director, Licensing and Market Conduct Division of the  
Financial Services Commission by delegated authority from the  
Superintendent of Financial Services to deny the application for a life  
insurance agent’s licence dated August 27, 2004 by Elias Cicvak;

**AND IN THE MATTER OF** a Notice of Appeal in accordance with  
section 17(1) of the Act filed by Elias Cicvak.

**BETWEEN:**

**ELIAS CICVAK**

Appellant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

Kevin Ashe  
Member of the Tribunal and of the Panel

Ralph E. Scane  
Member of the Tribunal and of the Panel

## **APPEARANCES:**

Elias Cicvak, the Appellant, in person (by conference telephone)

Joe Nemet, for the Superintendent of Financial Services (by conference telephone)

## **HEARING DATE:**

August 17, 2005

## **REASONS FOR DECISION**

### **Background and Facts**

This case comes to the Tribunal by way of an appeal by Mr. Elias Cicvak (the “Appellant”) from a decision of a delegate of the Superintendent of Financial Services (the “Superintendent”) dated February 28, 2005. That decision was to deny the Appellant’s application for a life insurance agent’s licence, dated August 27, 2004, on the basis that he had not passed the required qualifying examination.

The criteria for the granting of an insurance agent’s licence are set out in section 4 of Ontario Regulation 347/04. That section provides that: “An application for a licence shall be granted if the Superintendent is satisfied that the applicant has [among other things] completed a course acceptable to the Superintendent for the Life Licence Qualification Program and has passed the examination approved by the Superintendent for the Program if the applicant is an individual and is applying for a life insurance licence” (s. 4(1)(d)).

The predecessor provision was to the effect that the Superintendent had to be satisfied that the applicant for an insurance agent’s licence “has passed the qualifying examination set by the Superintendent for the purpose if the applicant is an individual” (s. 4(1)(d) of Ontario Regulation 663, R.R.O. 1990, as amended by Ontario Regulation 760/94).

The Appellant first wrote the qualifying examination for an initial life insurance agent’s licence (then called a Level I licence) on November 27, 2001. At that time, the qualifying examination “set by the Superintendent” for applicants for such a licence was administered by the Canadian Association of Insurance and Financial Advisors (“CAIFA”) under contract with the Financial Services Commission of Ontario (“FSCO”), of which the Superintendent is the chief executive officer. CAIFA advised the Appellant, in an unsigned document, that he had achieved a grade of 64% on his examination and that a passing grade was 75%. The Appellant immediately contacted CAIFA to question his mark, as he had received marks in the 90% range on practice tests that he had taken through his sponsoring insurer. He also asked CAIFA for the test sheet and detailed test results. That request was denied.

The Appellant did not make an application to the Superintendent for a life insurance agent's licence at this time as that would have required the submission of evidence of a passing mark earned on the qualifying examination. Nor did he apply for such a licence at any time before his application of August 27, 2004, the denial of which gave rise to this appeal.

With effect from January 1, 2003 (subject to a one month transitional provision), the Superintendent ceased to recognize the CAIFA examination as the qualifying examination for applicants for a life insurance agent's licence and substituted completion of the Life Licence Qualification Program (the "LLQP") as the only qualifying proficiency requirement for such applicants. From June 1, 2002, successful completion of the LLQP had been an alternative method of qualifying for a life insurance agent's licence.

The LLQP was developed through the Canadian Council of Insurance Regulators, of which the Superintendent is a member, for use throughout Canada except in the province of Quebec. The LLQP has a study course component and an examination component. In Ontario, there are 10 authorized course providers and one examination administrator, namely Durham College, which carries out its functions under contract with FSCO. The passing grade for the LLQP examination was set initially at 50%, reflecting the regulators' perception that the LLQP examination was harder than the CAIFA examination. A 60% passing grade was recommended by the educational consultant engaged to assist in the development of the LLQP, but a 50% pass mark was adopted by the regulators as an interim measure.

The Appellant says that he was unaware of the fact that the passing grade on the qualifying examination for a life insurance agent's licence had been changed to 50% and was never so informed by FSCO. However, he says that when he learned of that fact in August of 2003, he contacted his sponsoring insurer and, with its encouragement, he pursued the LLQP qualification, commencing the study program. He says that he contacted Durham College by phone in early October of 2003 about writing the LLQP examination. He was later advised by the College that he should write the preliminary test on November 27, 2003 and that he was booked to take the LLQP examination on the first available occasion thereafter, on December 3, 2003. On the latter date, he wrote the examination. The next day, he received advice of his examination results from the College. He was awarded a grade of 52.86% and was told that if he wanted to write the examination again, he should contact the College. He immediately phoned the College to ask why he would want to re-write and was told that the passing mark was 60% not, as he had thought, 50%.

On October 1, 2003, FSCO had sent out a letter to sponsoring life insurers (including the Appellant's sponsoring insurer), insurance associations and all LLQP course providers advising them that as of November 1, 2003 the passing grade for the LLQP examination would be 60%. This change was in line with changes in the passing grade in the other provinces that had adopted the LLQP. It followed a recommendation of a consultant who had reviewed the LLQP for the Canadian Council of Insurance Regulators. Some of the

other recommendations of the consultant, including a proposal to reduce the number of available choices in responding to questions on the LLQP examination, were adopted at the same time as the increase in the passing grade to 60% was implemented.

Under date of August 27, 2004, the Appellant submitted his application for a life insurance agent's licence to the Superintendent. As evidence of completion of the qualifying examination, the Appellant appended the document advising of his examination result of 64% achieved on the CAIFA examination that he wrote on November 27, 2001. By the time this application was submitted, the Appellant had written the LLQP examination on four other occasions (in addition to the December 3, 2003 occasion), receiving a mark of 50% or more but less than 60% each time.

By Notice of Hearing dated December 24, 2004, the Superintendent advised the Appellant that he had appointed an Advisory Board, pursuant to section 393(9) of the *Insurance Act*, to hold a hearing and make a report, with such recommendations as it might see fit, on the question of whether a life insurance agent's licence should be granted to the Appellant. The Advisory Board hearing took place on February 4, 2005. The record of the proceeding before that Board, which is before us on this appeal, includes copies of the documents that were admitted in evidence at the earlier hearing and a transcript of the oral evidence presented at that hearing. The description of the central facts relating to this matter, as set out above, is drawn from that evidence.

On February 4, 2005, the Advisory Board issued its report to the Superintendent, recommending that he not issue a life insurance agent's licence to the Appellant. The Executive Director, Licensing and Market Conduct Division of FSCO, acting as a delegate of the Superintendent, issued his decision on February 28, 2005, adopting the recommendation of the Advisory Board and denying the Appellant's application for a life insurance agent's licence.

By Notice of Appeal dated May 2, 2005, the Appellant has appealed that decision to this Tribunal, as permitted by section 17(1) of the *Insurance Act*. Before the commencement of the hearing on the appeal, the Appellant served notice on the Attorney General of Canada and the Attorney General for Ontario, pursuant to Rule 7 of the Rules of Practice and Procedure for Proceedings Before the Financial Services Tribunal, indicating his intention to raise certain constitutional challenges before the Tribunal. Neither of the Attorneys General appeared before the Tribunal or made submissions to it.

### **Appellant's Arguments**

The Appellant made a number of arguments at the hearing before this Tribunal in support of his position that he should be issued a life insurance agent's licence, including the following:

1. The Appellant was treated unfairly by CAIFA, an agent of FSCO and, therefore, of the Superintendent, when he was denied a copy of the test sheet and the detailed test results on the CAIFA examination.

2. There is a right to be re-tested, after failing an examination, that is recognized by Canadian educational institutions and other test-conducting organizations. The Appellant was not advised of that right after he wrote his first qualifying examination (the CAIFA examination). The Superintendent failed to communicate to the Appellant, directly or through Durham College, its contracted examination administrator, the fact that after June 1, 2002 he could be re-tested by writing an LLQP examination for which the passing mark was 50%.
3. As many others were given the opportunity to be examined under the 50% pass-mark regime, which was in place for 18 months, the Appellant (along with others in his position) was discriminated against and denied his equality rights under the *Canadian Charter of Rights and Freedoms*. Moreover, his right to re-testing, his due process rights and his right to pursue a livelihood were denied, contrary to the Charter.
4. As the Appellant had “registered” with Durham College in October, 2003 to take the LLQP examination, at a time when the pass mark was 50%, he couldn’t then be examined against a 60% pass-mark standard given that he had proceeded promptly to arrange to sit the examination. In effect, the conditions of the qualification process for a life insurance agent’s licence were changed to his detriment and without notice to him while the process was underway.
5. In any event, the Appellant had established, through his results on the CAIFA examination, that he had mastered 64% of the insurance knowledge base thought to be required on the part of life insurance agents, which exceeded the current minimum standard of 60% under the LLQP.

### **Respondent’s Arguments**

The responses of the Respondent to the Appellant’s arguments can be summarized as follows:

1. There was no evidence that the Superintendent (or FSCO) was aware, before December, 2003, that the Appellant had attempted any qualifying examination for a life insurance agent’s licence or that the Superintendent (or FSCO) did anything to deter or prevent the Appellant from attempting that examination at any time.
2. Even if the Superintendent was aware, or should have been aware, of the circumstances of the Appellant, there was no duty to advise the Appellant about the changes in the passing mark on the qualifying examination for a life insurance agent’s licence or to invite him to take the examination when the passing mark was 50%.

3. None of the actions or inactions on the part of the Superintendent (or FSCO), or for which he is responsible, about which the Appellant complains, is proscribed by the *Canadian Charter of Rights and Freedoms*.
4. The CAIFA examination was different from the LLQP examination and the LLQP examination that had a 50% pass level was different from the LLQP examination that had a 60% pass level, in which case a 64% mark on the CAIFA examination does not equate to a 64 % mark on either of the LLQP examinations.

### **Discussion**

When we refer hereafter to the evidence or lack of evidence in this case, we have in mind the body of evidence that was introduced before the Advisory Board at its earlier hearing in this matter. The Appellant sought to introduce two additional documents at the hearing before the Tribunal that were not in evidence before the Advisory Board, namely an e-mail from a FSCO licensing representative to the Appellant, dated July 5, 2005, and an e-mail from a Durham College project manager to the Appellant, dated July 4, 2005. We did not admit, and therefore have not considered, those documents as we do not believe that they are “significant to the issues raised in the appeal,” which is one element of the grounds for admitting new evidence on an appeal under Rule 43.03 of the Rules of Practice and Procedure in Proceedings before the Financial Services Tribunal.

There was no evidence in this case of any practice on the part of Canadian educational institutions and other test-conducting organizations to allow for the re-testing of failed examinees. We are not aware of any such practice that is so notorious that we could take notice of it in the absence of evidence. Therefore, there is no basis for us to conclude that the Appellant had a right to be re-tested, assuming that such a right could derive from a practice followed by Canadian institutions and organizations.

We do not think there was any duty on the part of the Superintendent to inform the Appellant when the LLQP was adopted that he could try the qualifying examination for a life insurance agent’s licence once again with the opportunity to be assessed against a 50%, rather than a 75%, passing standard. There was no evidence in this case that the Superintendent (through FSCO or otherwise) knew, or could reasonably be expected to know, of the Appellant and his unsuccessful attempt at the CAIFA examination so as to be in a position to inform the Appellant directly of the new life agent qualification regime, under the LLQP, when it came into effect. No sufficient basis was shown for attributing to the Superintendent the knowledge that CAIFA had of the Appellant and his examination results. The Appellant alleged that when CAIFA ceased administering the life agent qualifying examination, under contract with FSCO, its records in that regard would have been turned over to FSCO especially since CAIFA, according to the Appellant, ceased to exist. However, there was no evidence that any such transfer of records occurred and the evidence of a FSCO official was that CAIFA, in fact, continues to exist, under another name, and continues to administer the Level II life agent’s licence examination, taken by the current holders of Level I licences. Even if it could be established that the Superintendent had knowledge, or should be deemed to have

knowledge, of the Appellant's history of attempting the qualifying examination for a life insurance agent's licence, there would still have been no duty upon the Superintendent to advise the Appellant of the opportunity to write the new examination under new standards. The Superintendent cannot reasonably be expected to place every individual who fails a qualifying examination upon a mailing list for advice as to future changes in the rules for qualification.

There was also an absence of any evidence that would establish responsibility on the part of the Superintendent for any unfair treatment of the Appellant at the hands of CAIFA. In any case, it is too late in the day for the Appellant to complain about that unfair treatment. He should have pursued that complaint when he was denied a copy of the test sheet and his detailed test results on the CAIFA examination taken in November of 2001 and when it might have been practicable to investigate the facts of that complaint.

There was no evidence in this case that the Superintendent made any representation to the Appellant before he first wrote the LLQP examination to the effect that the pass mark would be 50% or that the then current pass mark of 50% would not be raised after he arranged to write the examination. Durham College does not appear, from the evidence, to have made any such representation. The most that can be said is that it may have misled the Appellant by failing to tell him that the passing mark on the LLQP examination was being increased from 50% to 60%, as of November 1, 2003, when it was, no doubt, aware of that fact at the time the Appellant initially inquired of the College about writing the examination. However, the College had no way of knowing that the Appellant was unaware of this fact or that he would attach particular importance to it. There was no evidence of the details of the contractual relationship between Durham College, on the one hand, and FSCO or the Superintendent, on the other hand, so we cannot tell whether the College was acting as the agent of FSCO or the Superintendent in communicating information about the LLQP examination process to the Appellant and others. Therefore, we cannot say whether the Superintendent could be held responsible for any omission by the College to disclose pertinent information to those who arranged with the College to write the LLQP examination. In any event, if we had to decide the question, we would hold that no duty rests upon the Superintendent to ensure that its contracting agencies, such as Durham College, volunteer information about current passing standards to applicants who have not specifically asked for this information.

The evidence clearly establishes that the CAIFA examination, the LLQP examination that was marked to a 50% passing standard and the LLQP examination that was marked to a 60% passing standard were all different examinations. Therefore, we reject the Appellant's argument that the 64% mark he achieved on the CAIFA examination in November, 2001 can be equated to a 64% mark on the LLQP examination he wrote in December, 2003.

The Appellant has failed to establish that the Superintendent acted, in this matter, in breach of the *Canadian Charter of Rights and Freedoms* for the following reasons;

- none of the rights and freedoms under the Charter embraces a right to re-testing;
- any discrimination associated with the change in the passing grade on the LLQP examination cannot be characterized as based on any of the prohibited grounds of discrimination set out in the Charter (s. 15) or on analogous grounds;
- the Appellant's right to pursue the gaining of a livelihood has not been infringed contrary to the Charter (s. 6(2)) because any restriction imposed by the Superintendent on that right was not associated with the Appellant moving to Ontario; and
- any denial of the Appellant's due process rights was not contrary to the Charter (s. 7) because it was not associated with the deprivation of his right to life, liberty or security of the person.

In any event, the rights and freedoms guaranteed by the Charter are not absolute but are subject to reasonable limits prescribed by law as can be justified in a free and democratic society (s. 1 of the Charter).

The test that this Tribunal has adopted as a basis for deciding whether it should interfere on appeal with a decision of the Superintendent, or his delegate, accepting a recommendation of an Advisory Board following a hearing is whether the hearing was unfair or there was no reasonable basis for the decision (see *Jatinder Suri v. Superintendent of Financial Services* (FST File No. I0138-2000) and *Patrick Lee v. Superintendent of Financial Services* (FST File No. I0182-2002)). We have concluded, for the reasons set out above, that there was a reasonable basis for the decision of the Superintendent's delegate to deny the Appellant a life insurance agent's licence and indeed that, in our view, this decision was correct. The Appellant alleged that the hearing he had before the Advisory Board was unfair because the Board disregarded or misunderstood his arguments and was confused as to the central issues in the case. If there was any unfairness in the hearing before the Board in these respects, that unfairness was remedied by the hearing provided to the Appellant by this Tribunal and the careful review that we have given to his arguments before the Tribunal and to the evidence before the Advisory Board.

Even if we were persuaded of the merit of one or more of the arguments that the Appellant has put in this case, it is doubtful that the appropriate remedy would be the granting of a life insurance agent's licence to the Appellant, which is the relief that he has claimed. We would be very reluctant to order the issue of such a licence to any individual who had not met the formal proficiency requirements for a licence that have been imposed, under the *Insurance Act* and Regulations, in the interests of protecting the insurance-buying public. Section 4(1) of Regulation 347/04, under the *Insurance Act*, is, in our view, adequate to authorize the LLQP and to enable the Superintendent to approve

the LLQP examination as the qualifying examination for life insurance agents and to establish the passing mark, from time to time, on that examination.

**Disposition**

The Appellant's appeal is hereby dismissed.

**DATED** at Toronto, Ontario, this 8th day of September, 2005.

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

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"Kevin Ashe"  
Kevin Ashe  
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