



Financial Services Tribunal

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DECISION NO. 2017-FIA-001(a)

In the matter of an appeal under s. 242(1) of the *Financial Institutions Act*,
R.S.B.C. 1996, c. 141

BETWEEN: Jocelyn Fenelon **APPELLANT**

AND: Insurance Council of British Columbia and
Financial Institutions Commission **RESPONDENTS**

BEFORE: A Panel of the Financial Services Tribunal
Theodore F. Strocel, Q.C., Chair

DATE: Conducted by way of written submissions
concluding on September 25, 2017

APPEARING: For the Appellant: Self-represented
For the Respondent Council: David T. McKnight, Counsel
For the Respondent Superintendent: Sandra Wilkinson, Counsel

APPEAL

[1] The Appellant Jocelyn Fenelon (the "Appellant", the "Applicant" or "Mr. Fenelon") applied to the Respondent, the Insurance Council of British Columbia (the "Insurance Council" or the "Respondent") for a Level 2 general insurance agent licence (the "Application"). He appeals to the Financial Services Tribunal (the "FST") the decision of the Respondent to deny the Application, which was made by the Insurance Council at a meeting on March 14, 2017 and communicated to Mr. Fenelon by letter dated April 13, 2017 (the "Decision"). By operation of s. 242(3) (a) of the *Financial Institutions Act* [RSBC 1996] c. 141 ("FIA"), the Financial Institutions Commission ("FICOM") is a party to an appeal of a decision of the Insurance Council to the Tribunal. FICOM agreed with and adopted the submissions of the Insurance Council in this appeal.

BACKGROUND

[2] The Respondent has established rules for the qualification of its licensee applicants (the "Rules"), and those Rules require that an applicant complete specified courses of study in the year immediately preceding a licence application. An exception is provided in Rule 2(20), which provides that an application will be considered where the applicant can "demonstrate that alternate education and/or experience obtained is equivalent to the requirements set out in Council Rules" (an "Equivalency Exemption"). Mr. Fenelon chose to apply for a licence based upon his claim for an Equivalency Exemption.

[3] Mr. Fenelon had previously held general and life insurance licences issued by the Respondent, which were terminated by the Respondent in 2007 and 2008 because of misconduct on the part of Mr. Fenelon. Mr. Fenelon appealed those terminations to the FST and the decision of the Respondent was confirmed and varied by this Tribunal in 2009 in *Fenelon v. Insurance Council of British Columbia*, Decision No. FST 08-045.

[4] With respect to the present matter, the Application was delivered to a review committee of the Respondent. An equivalency report was prepared. Mr. Fenelon was invited to attend a meeting of the committee on January 9, 2017, but he failed to attend. In his absence, the review committee "*believed that the Applicant had not established that he should be granted a Level 2 agent licence based on equivalency*" and recommended that the matter be reviewed by the Respondent.

[5] The review committee met with Mr. Fenelon on February 6, 2017 to discuss the equivalency report and to hear his submissions. After the meeting, it prepared a report for consideration by the Respondent. In that report, the review committee recommended that the Application for a Level 2 agent licence based on equivalency be declined.

[6] A meeting of the Respondent was held on March 14, 2017. Its minutes state that "*Council considered [Mr. Fenelon's] application for a Level 2 agent licence as well as the recommendations of an RC into the suitability of the Applicant.*" The minutes go on to say, "*[i]n 2007, his licence was terminated after he was found unsuitable to hold an insurance licence.*" Finally, the minutes state, "*[i]n reaching this conclusion, Council took into consideration the disciplinary action that resulted in its 2008 decision, and found that the Applicant had failed to demonstrate he qualified, based on his past education and experience.*"

[7] In a letter to Mr. Fenelon dated April 13, 2017, Gerald Matier, Executive Director of the Insurance Council, advised Mr. Fenelon that his Application had been denied, and that in coming to the decision to deny the Application, the Insurance Council had considered Mr. Fenelon's "*involvement in the insurance industry as an IT consultant since 2007*", his recent completion of continuing education courses, and the misconduct he engaged in which led to the loss of his general insurance agent licence in 2007. Mr. Matier explained the relevance of the misconduct as follows:

However, Council noted that it has been nine years since the Applicant was last licensed to engage in general insurance business. In considering the relevance of the Applicant's past experience as a licensed general insurance agent, Council noted that the Applicant lost his general insurance licence in 2007 when it determined he could not be relied upon to publicly conduct insurance business in accordance with the usual practice of the business of insurance. The fact that the Applicant has not been engaged in general insurance business for nine years, along with the reasons why the Applicant lost his general insurance agent's licence, makes it difficult to give much weight to his past experience as a general insurance agent.

[8] Neither the meeting minutes nor Mr. Matier's letter explain specifically why the moral failings of Mr. Fenelon compromise the education and experience Mr.

Fenelon had achieved prior to 2007. It is apparent from the nature of the appeal filed by Mr. Fenelon that he believes that he was denied a licence because of the misconduct which occurred a decade ago.

[9] Mr. Fenelon was advised of his right to request a hearing before the Respondent to dispute the Insurance Council's findings or its intended decision, and was given until May 1, 2017 to request a hearing. However, Mr. Fenelon did not request the hearing. Instead, he filed an appeal to this Tribunal. He claims that he does not trust the internal Council process, and that the Respondent is biased against him. He asks that the Decision be reversed and that the licence be granted.

ISSUES ON APPEAL

[10] The following issues shall be considered in reviewing the Decision:

1. Was the Insurance Council's finding that the Appellant's experience and education were not equivalent to the educational requirements of Rule 2(4) reasonable?
2. Was the Insurance Council reasonable in finding that the Appellant's historical misconduct reduced the weight of his past education and experience?
3. Was the Insurance Council reasonable in finding that the Appellant's explanation for his prior misconduct was not relevant to his equivalency request?
4. Does s. 16 of the *Criminal Code* apply to this matter and if so, how?
5. Do s. 12 and 15 of the *Canadian Charter of Rights and Freedoms* apply to this appeal and, if so, how?
6. Did the Insurance Council create unreasonable delays that prejudiced Mr. Fenelon?

RELEVANT LEGISLATION

[11] The Insurance Council has been given the duty to issue licences to and regulate the activities of insurance agents in the Province of British Columbia. In doing so, it is authorized to make rules [*FIA s. 225.1(2)(d)*]:

... respecting the education, experience or other qualifications of applicants for a licence, including rules conferring the discretion to determine equivalent education, experience or qualifications[.]

[12] The Insurance Council has made Rules respecting the educational requirements to be completed by an applicant for a Level 2 general insurance agent licence as follows [*Rule 2(4)*]:

An individual applying for a level 2 general insurance agent licence must:

- (a) within the 1 year preceding the application date have successfully completed:
 - (i) the courses approved by Council and administered by:
 - (A) the Insurance Brokers Association of British Columbia; or
 - (B) the Insurance Institute of Canada; or
 - (ii) the qualification exam(s) established by Council, if any.

[13] The particular requirements of the Insurance Council regarding the educational requirements are found on its website:

Although insurance industry experience is not required, an applicant must be an authorized representative of a licensed general insurance agency and have met the educational requirements.

Education

There are four education options available to applicants as follows. The results from successful completion of any of these options are considered valid for a period of one year from completion date. If applicants wait longer than one year to obtain a licence, they will be required to rewrite the exam(s).

1. Fundamentals of Insurance and CAIB 2 and 3 - available through IBABC; OR
2. CAIB 1, 2 and 3 - available through IBABC; OR
3. Insurance Institute Courses C11, C130 and C131; OR
4. Insurance Institute General Insurance Essentials Program (Parts 1 and 2), C130 and C131.

[14] The requirements of the Insurance Council for applicants who wish to obtain a licence based upon equivalent education and/or experience are as follows [*Rule 2(20)*]:

Where an applicant does not meet the education and experience requirements under Council Rules, a licence application will be considered where the applicant:

- (a) submits a completed licence application;
- (b) submits a completed equivalency proposal in the form required by Council; and
- (c) can demonstrate that alternate education and/or experience obtained is equivalent to the requirements set out in the Council Rules.

[15] The Rules of the Insurance Council also require that the applicant satisfy other criteria, namely [*Rule 3(2)*]:

If an applicant satisfies Council that the applicant:

- (a) has met all of the requirements set out in the Act and Council Rules;

- (b) is trustworthy, competent and financially reliable;
- (c) intends to publicly carry on business as an insurance agent, salesperson or adjuster in good faith and in accordance with the usual practice of the business of insurance;
- (d) has not in any jurisdiction:
 - i. been refused, or had suspended or cancelled, an insurance licence or registration;
 - ii. been convicted of an offence; or
 - iii. been refused or had suspended or cancelled a licence or registration in any other financial services sector or professional field;

for a reason that reveals the applicant unfit to be an insurance agent, salesperson or adjuster; and

- (e) does not hold other business interests or activities which would be in conflict to the duties and responsibilities of a licensee, or give rise to the reasonable possibility of undue influence,

then the Council may consent to issuing a licence.

[16] With respect to the criteria governing reactivation of an insurance licence previously held, the Rules state [*Rule 2(19)*]:

An applicant who previously held a licence:

- (a) within the 2 years preceding the application date, may apply for the same licence subject to:

- (i) the class of licence being issued under Council Rules;
- (ii) the applicant having held a licence of the same class:
 - (A) for 5 of the 7 years preceding the application date; or
 - (B) for the 2 years preceding the termination date of the licence and being able to demonstrate that the applicant was actively engaged in the business of insurance authorized under the licence for that 2 year period; and

- (iii) any other provision of the Act and Council Rules; or

- (b) within 1 year preceding the application date, may apply for the same licence subject to:

- (i) the class of licence being issued under Council Rules;
- (ii) the applicant having held a licence continuously for the 1 year preceding the termination date of the licence and being able to demonstrate that the applicant was actively engaged in the business of insurance authorized under the licence for that 1 year period; and
- (iii) any other provision of the Act and Council Rules.

DISCUSSION AND ANALYSIS*Mr. Fenelon's previous career as an insurance agent*

[17] Mr. Fenelon was licensed as an insurance agent by the Insurance Council from 1994 until 2007. He completed all of the educational requirements for these licences in 1993. He was a nominee for approximately 10 years. He was also previously licensed as a life and accident and sickness agent from 1995 until 2008.

[18] In 2008, a hearing committee of the Insurance Council found that he failed to act in a trustworthy manner or in good faith by taking and misusing Insurance Corporation of British Columbia ("ICBC") licence plate decals, driving his own vehicles without insurance, making a material misstatement to the Insurance Council, and being complicit in backdating an ICBC Autoplan transaction to circumvent a violation ticket issued to him by the Royal Canadian Mounted Police.

[19] The hearing committee ordered that:

- (a) Mr. Fenelon's life and accident and sickness insurance agent licence remain cancelled;
- (b) Mr. Fenelon would not be suitable to hold any insurance licence for 3 years commencing February 5, 2008;
- (c) Mr. Fenelon be fined \$5,000; and
- (d) Mr. Fenelon pay Council's investigation costs of \$10,187.50 and its hearing costs of \$5,786.22 prior to making an application for an insurance licence after February 5, 2011.

[20] Mr. Fenelon appealed to this Tribunal in 2009, which changed the date for the commencement of the 3-year period during which Mr. Fenelon was not eligible to apply for a general insurance agent licence, lowered the time Mr. Fenelon would be ineligible to hold other insurance agent licences from three years to two years, eliminated the fine, and changed the deadline for paying the awarded costs to the Insurance Council.

[21] At the time of the original hearing regarding Mr. Fenelon's conduct, the hearing committee confirmed the findings made by the Insurance Council and rejected Mr. Fenelon's submissions that the misconduct was caused by stress brought on by work, personal and medical conditions. This Tribunal found in the 2009 decision that the Insurance Council acted reasonably in rejecting Mr. Fenelon's submissions [*Fenelon FST 08-045 at p. 14*]:

While it may be Mr. Fenelon's opinion that stress caused his misbehaviour, there was no evidence presented at the hearing to link Mr. Fenelon's sources of stress to his misconduct. That is, there was no evidence that stress or any of the conditions he mentioned would have caused him to commit the misconduct that he committed. In the absence of such evidence, Council was reasonable in not accepting that stress contributed to his misconduct.

[22] By way of introduction to his reply submissions in the current matter, the Appellant states as follows:

My position remains the same; a wrong has been committed; I was unfairly dealt with by the respondent and subsequently on appeal by the Financial Services Tribunal. Although the Tribunal decision varied some aspects of (sic) respondent's decision, it fell short of recognizing the proximate cause of the misconduct.

[23] In regard to the Appellant's submissions that he was treated unfairly in the decisions of the Council and the FST when his licences were cancelled, I must point out that those decisions and the findings made are not the subject of this appeal and cannot be retried or reconsidered by the FST on this appeal. The decision before me on appeal is the Insurance Council's current refusal to issue the Appellant a new licence.

The Application

[24] The Insurance Council received Mr. Fenelon's application for a Level 2 general insurance agent licence on July 25, 2016.

[25] On August 17, 2016, the Insurance Council advised Mr. Fenelon that it could not consider his application until the amounts outstanding under the FST order of 2009 were paid in full. It also advised him that he must requalify educationally or attempt to qualify under Rule 2(20), the equivalency provision.

[26] On September 1, 2016, Mr. Fenelon paid the outstanding amounts and made his equivalency request.

[27] In support of his application to Council, Mr. Fenelon submitted various certificates of completion from places not included in the list of educators accredited by the Insurance Council. In subsequent correspondence, staff of the Insurance Council advised Mr. Fenelon of further requirements, in particular, they requested that he provide a detailed explanation showing why the courses he completed were equivalent to the courses required by the Insurance Council. Mr. Fenelon did not provide a response to this specific request.

[28] Regarding his recent experience, Mr. Fenelon told the Insurance Council's review committee that while he had been unlicensed since 2007, he had "been in the background" in the insurance industry, as a technical consultant for various insurance related computer programs. He told the committee that he had maintained ongoing insurance experience through his computer work with insurance brokers over the years and the continuing educational courses he had completed.

Standard of Review

[29] The Appellant did not expressly address the standard of review applicable to this appeal before the FST. The Respondent submits that reasonableness is the appropriate standard for the FST to apply, meaning that the FST ought not to interfere with the Decision unless it is unreasonable.

[30] The Decision which is the subject of this appeal was initially an “intended” decision. Mr. Fenelon was given notice that he could request a hearing before the Insurance Council to make submissions regarding his licence application and the intended decision. Instead, he did nothing, after which the Insurance Council confirmed its decision. He now appeals to the FST.

[31] The FST is not a tribunal of first instance, but an appeal tribunal which decides matters on the record: s. 242.2(5) *FIA*. The record consists of the evidence that was before the Insurance Council, as well as the decision and reasons given by the Insurance Council as the original decision maker: s. 242.2(6) *FIA*. In my view, the appropriate standard of review for the issues raised in this case is one of reasonableness. The Insurance Council has been given the duty to set standards for the licensing of insurance agents, which includes the level of appropriate education and background. The role of this Tribunal in this particular case is to ensure that the decision made by the Insurance Council was reasonable. If the decision was reasonable, the FST will not interfere with it. I agree with and will apply the approach used by Member Hamilton in *Chambers v Real Estate Council (British Columbia)*, 2005 Carswell BC 3216, who stated as follows [*at para 46*]:

I believe the appropriate standard of review on these circumstances is to ask if the Council could reasonably have reached the decision it made, based on all of the evidence and documentation presented to it and ask if the decision is fair relative to other applicants in similar circumstances.

New Evidence

[32] Attached to Mr. Fenelon’s submissions to this Tribunal were several documents which did not form part of the record of evidence before the Insurance Council in coming to the Decision. These documents were comprised of medical information relating to both Mr. Fenelon and his wife regarding certain motor vehicle incidents (the “Medical Information”), general information relating to the relationship between criminal responsibility and mental disorders, and certificates showing completion of several insurance-related continuing education courses. Also attached to Mr. Fenelon’s submissions, at Tab 1, were a series of documents which he says were provided to the Insurance Council in advance of the Decision, and were improperly excluded from the Record provided to this Tribunal. Mr. Fenelon requests that all of the above noted documentation be entered as new evidence on this appeal.

[33] The FST has the authority to permit the introduction of new evidence under certain circumstances. Section 242.2(8)(b) of the *FIA* provides as follows:

On application by a party, the member considering the appeal may do the following:

- ... (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
 - (i) is substantial and material to the decision, and

- (ii) did not exist at the time the original decision was made, or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

[34] With the exception of one medical certificate, the Medical Information presented by Mr. Fenelon predates the Decision and, if relevant, should have been presented to the Insurance Council prior to the Decision. Similarly, the medical certificate dated June 30, 2017 merely confirms medical treatment which took place years prior to the Decision, and could reasonably have been produced by Mr. Fenelon's doctor at an earlier date and presented to the Insurance Council prior to the Decision.

[35] Further, the documents which comprise the Medical Information are not substantial or material to the Decision. They concern medical records pertaining to Mr. Fenelon's wife and to Mr. Fenelon's health since he lost his licensing in 2009. Although the documents appear to support Mr. Fenelon's rationale for not applying for a licence sooner, the reasons for his delay in applying for a licence do not change the finding of fact by the Insurance Council that Mr. Fenelon has not held a licence since 2009, and they are irrelevant to the issue of Mr. Fenelon's qualification as a licensee. Accordingly, the Medical Information is not accepted in evidence for purposes of this appeal.

[36] Mr. Fenelon also submitted an excerpt from the *Criminal Code* and an article from the Canadian Journal of Psychiatry dated March 2015. While I suspect these materials are meant to support his claim of mental infirmity as the reason for his misconduct, there is no submission to this effect, nor is there any clinical analysis or anything else that would make these materials relevant. As a result, these materials are rejected as well.

[37] Mr. Fenelon also submitted continuing education certificates for courses completed since the Decision. Since the courses were not completed at the time of the Application and the Decision, they are irrelevant to the reasonableness of the Decision, and consequently are inadmissible for purposes of this appeal. This does not preclude Mr. Fenelon from taking additional courses and/or submitting these certificates with a new application for a licence based on additional education and experience. I also note that had Mr. Fenelon availed himself of the opportunity for a hearing before the Insurance Council, he could have provided this information before the intended decision to refuse him a licence was confirmed.

[38] With respect to the material that Mr. Fenelon has included at Tab 1 of his submissions, and, in particular, his letter of January 6, 2017 with enclosures, the Respondent advises that these materials were inadvertently left out of the Record. The Respondent confirms that the materials were provided to the hearing committee on February 6, 2017, reviewed orally at the Review Committee Meeting and should properly have been part of the Record. Accordingly, this material is admitted into evidence on this appeal.

Issue 1: Was the Insurance Council's finding that the Appellant's experience and education were not equivalent to the educational requirements of Rule 2(4) reasonable?

[39] There are three components of any application for a licence based upon equivalency: comparable education, suitable experience in the field, and timeliness, by which I mean that the education and experience must precede closely any application for an insurance licence.

[40] Dealing first with comparable education, the certificates provided by Mr. Fenelon provided little information beyond what was stated on them. They were not issued by the *Insurance Brokers Association of British Columbia* or the *Insurance Institute of Canada*, as accredited by the Insurance Council. Therefore, Mr. Fenelon was obliged, by Rule 2(20) to provide information to satisfy the Insurance Council that his courses were equivalent to those sanctioned by it. He did not do this. In the circumstances, the finding of the Insurance Council that Mr. Fenelon's education was lacking is reasonable.

[41] Turning next to equivalent experience, Mr. Fenelon submitted that his experience as an information technologist in the insurance industry should qualify him as a Level 2 insurance agent. In my view, the Insurance Council was reasonable in rejecting this as experience which would excuse him from its educational requirements under Rule 2(4). The skill set and education required for an insurance agent bears no resemblance to that required of a computer technician, even one like Mr. Fenelon, who may deal with insurance issues tangentially through the course of his work.

[42] On the timeliness issue, the Insurance Council found that Mr. Fenelon completed all of the education necessary to hold insurance licences in 1993, and participated actively in the insurance industry until 2007. The Insurance Council also considered that since that time Mr. Fenelon had not been licensed.

[43] The Insurance Council requires that the education and experience of a licensee be current, to take into account the changing nature of a dynamic industry. It requires that the education be completed less than one year prior to an application for a licence. The Rules respecting reactivation of a licence are particularly revealing in that they limit the class of person who can apply for reactivation of a formerly held insurance licence to those who have held licences within the past 2 years.

[44] The Insurance Council also requires continuing education for its general insurance agents, which must be completed in each year.

[45] Based on the above, it is not unreasonable that in considering Mr. Fenelon's request for a licence based upon equivalency the Insurance Council discounted his education and experience based on the fact that he had been out of the insurance industry for 9 years.

[46] Accordingly, I find that the determination of the Insurance Council that Mr. Fenelon's education and experience were not equivalent to the educational requirements of Rule 2(4) was not unreasonable.

Issue 2 - Was the Insurance Council reasonable in finding that the Appellant's historical misconduct reduced the weight of his past education and experience?

[47] The Insurance Council's primary duty is to protect the public in its regulation of the insurance industry. The issue of an applicant's previous misconduct bears on issues such as trustworthiness, competence and good faith, each of which needs to be assessed by the Insurance Council prior to issuing a licence (*Rule 3(2)*).

Therefore, an applicant's misconduct must always be considered by the Insurance Council when considering an application for a licence.

[48] The Insurance Council decided to reject Mr. Fenelon's Application on the equivalency issue rather than on a specific issue of current trustworthiness. However, they considered that the historical misconduct had compromised Mr. Fenelon's prior education and experience because it showed that at the time he "could not be relied upon to publicly conduct insurance business in accordance with the usual practice of the business of insurance".

[49] Mr. Fenelon referred me to a number of cases in which the licensee did not have his or her licence cancelled as a result of the misconduct complained of. However, in reading the cases, the regulator always required the licensee to undertake further education in order to remediate the behaviour. This highlights the importance, rightly so, that the Insurance Council places on appropriate education to ensure protection of the public and appropriate licensure.

[50] Mr. Fenelon used his past experience as an insurance agent to ground his argument before the Insurance Council that he was currently competent to hold a general insurance license. In my view, it was reasonable for the Insurance Council to question the extent to which Mr. Fenelon's past experience could be evidence of current competence in light of his inability in the past to be able to "conduct insurance business in accordance with the usual practice of the business of insurance". Accordingly, the Insurance Council was reasonable both in considering Mr. Fenelon's misconduct in this instance, and in reducing the weight of his past education and experience as a result.

Issue 3 - Was the Insurance Council reasonable in not considering the Appellant's explanation for his prior misconduct as relevant to his equivalency request?

[51] The personal health and other issues that may have contributed to the behaviour of Mr. Fenelon which caused the misconduct, or the reason why he has not sought a licence before now, are irrelevant to his ability to demonstrate his equivalent education and experience as required by Insurance Council Rule 2(20). The Insurance Council is mandated to protect the public and to ensure that its licensees are properly educated. It cannot allow exceptions to licensing requirements for applicants who are not qualified, regardless of the reason.

[52] Therefore, I find that the Insurance Council was reasonable in not considering Mr. Fenelon's explanations as relevant factors to his equivalency request.

Issue 4 - Does s. 16 of the *Criminal Code* apply to this matter and if so, how?

[53] Mr. Fenelon submits that s. 16 of the *Criminal Code* applies to a disciplinary hearing, and that this is relevant to this Appeal. Section 16 states:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. *[Emphasis added]*

[54] Firstly, this applies to criminal proceedings only, and as a result does not apply here. Secondly, this is not a discipline hearing, but rather an appeal of a denial of an application for a licence, so again, it is inapplicable.

Issue 5 - Do s. 12 and 15 of the *Charter of Rights and Freedoms* apply to this appeal and, if so, how?

[55] Mr. Fenelon submits that the Decision offends s. 12 and 15 of the *Charter of Rights and Freedoms*, which are as follows:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

. . .

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[56] Mr. Fenelon did not raise this matter before the Insurance Council before its intended decision, nor did he raise it in his Notice of Appeal or initial submission before this Tribunal. He raised it only in response to the submission of the Insurance Council. Were I to consider ruling in Mr. Fenelon's favour on this point, I would have invited the Insurance Council to respond. I do not believe that is necessary.

[57] Mr. Fenelon states that he was suffering from depression in 2009 which caused him to engage in the misconduct which led to the cancellation of his licences. He contends that the Insurance Council's Decision offends his *Charter* rights because it does not take into consideration his depression as a mental disorder, and because it was unreasonable for the Insurance Council to "*inflict more pain*". Because of this, he submits that the Decision should be overturned, and the licence issued to him.

[58] The FST is established pursuant to s. 242.1 of the *FIA*, and s. 242.1(7)(d) of the *FIA* establishes that s. 44 of the *Administrative Tribunals Act* [SBC 2004] c. 45 (the "*ATA*") applies to appeals conducted by this Tribunal. Section 44 of the *ATA* states that the FST does not have jurisdiction over constitutional questions.

[59] This issue was considered by the FST in *Cook v. Registrar of Mortgage Brokers*, 2011-MBA-001(a), and more recently in the case of *Kadioglu v. Real Estate Council of British Columbia*, 2015-RSA-003(b).

[60] In *Cook*, the FST found that the appellant was making an application for an individual constitutional remedy in that he was seeking to have a summons set aside on the basis of a *Charter* violation. The FST held [*at paras 46 and 49*]:

[46] While the Appellant has subsequently said that this 'is not strictly a *Charter* issue', his argument is clearly founded on the *Charter* principles discussed in *Jarvis*. All his grounds and arguments flow from and rely on the *Charter*. Even in suggesting that the determination of this issue 'does not require any form of *Charter* analysis', he states that 'The Registrar's improper exercise of that power may result in a *Charter* breach'. In my view, the inquiry the Appellant wishes to have the Tribunal make into the nature of the investigation can only be relevant if the characterization the Appellant seeks to impress upon the FST would give rise to a *Charter* breach.

...

[49] As discussed above, there is no question that, in this case, the Appellant is asking the FST to exercise its existing remedial powers to set aside a Summons, in vindication of his *Charter* rights, on the ground that the Summons was issued for an improper constitutional purpose. In doing so, the Appellant is clearly seeking a remedy under s. 24(1) of the *Charter*: *R. v. Conway*, [2010] 1 S.C.R. 765 at para. 22. It follows that notice under s. 8 of the *Constitutional Question Act* is required unless the Appellant is seeking a remedy 'consisting of the exclusion of evidence or consequential on such exclusion'.

[61] In *Kadioglu*, Member Baker, QC, followed this reasoning [*at paras 71-72*]:

[71] While not bound by the FST's decision in *Cook*, I find the reasoning persuasive. While the Appellant herein asserts that he is not seeking a constitutional remedy, he is seeking to have the appeal allowed, in part, in vindication of what he says are breaches of his *Charter* rights. Mr. Kadioglu states that the following *Charter* rights were breached: his right to have a hearing within a reasonable time under s. 11(b), his right to be advised of the specific offence levelled against him in a timely way under s. 11(a), and his right to have a hearing free of bias and prejudice under s. 11(d). Mr. Kadioglu also referred to s. 7 (right to life, liberty and the security of the person) and s. 15(1) (equality rights) in his submissions on his right to have a three person panel render the decision under appeal; however, he did not articulate how those sections had application to the arguments he advanced.

[72] Without getting into the merits of any of these claims, the reasoning in *Cook* is directly applicable to the *Charter* positions advanced by the Appellant herein. I find that the Tribunal does not have jurisdiction to entertain a remedy under s. 24(1) of the

Charter, which is in substance what the Appellant is seeking in his argument relying on the *Charter* sections described above. As the Appellant has not met the threshold jurisdictional question, I have not considered the merits of his positions in relation to the *Charter*.

[62] I agree with Member Baker. The FST does not have jurisdiction to entertain a remedy under s. 24(1) of the *Charter*, which is in substance what the Appellant is seeking. Accordingly, the *Charter of Rights and Freedoms* does not apply to this appeal.

Issue 6 - Did the Insurance Council create inordinate delays that prejudiced Mr. Fenelon?

[63] The timeline of this Application is as follows:

- (a) The Insurance Council received Mr. Fenelon's application on July 25, 2016;
- (b) It wrote to Mr. Fenelon on August 17, advising that Mr. Fenelon must pay the costs of the 2009 decision before the application could proceed;
- (c) Mr. Fenelon made the required payments on September 1, 2016;
- (d) Between September 1 and November 10, 2016, through correspondence between Mr. Fenelon and the staff of the Insurance Council, Mr. Fenelon provided further required information. He did not, however, provide any explanation in support of his claim of educational equivalency as required by the Rules;
- (e) A Review Committee meeting was scheduled for January 2017, but Mr. Fenelon failed to attend;
- (f) Mr. Fenelon attended a Review Committee meeting on February 6, 2017;
- (g) The Insurance Council rendered its Decision on March 14, 2017, communicated to Mr. Fenelon by letter on April 13, 2017.

[64] In my view, Mr. Fenelon was dealt with fairly and in a timely manner and there is no evidence of any unreasonable delay on the part of the Insurance Council.

CONCLUSION AND DISPOSITION

[65] At the time of the Decision, Mr. Fenelon had been absent from the insurance industry for 10 years. It was reasonable for the Insurance Council to require that he have sufficient current education and/or experience to support his application for a Level 2 general insurance agent licence. Mr. Fenelon failed to demonstrate to the Insurance Council that he had sufficient education and/or experience to replace the educational requirements set out in Rule 2(4). Accordingly, the Insurance Council's Decision was reasonable in all the circumstances.

[66] The Appeal is dismissed.

[67] With respect to costs, either party shall be entitled to make submissions regarding costs by **January 31, 2018**, to which the other party will have a right of reply until **February 14, 2018**. In the event both parties make an initial submission, a right of reply will exist for both parties to the extent of dealing with matters not already addressed.

"Theodore F. Strocel, Q.C."

Theodore F. Strocel, Q.C.
Chair
Financial Services Tribunal

January 17, 2018