PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H. NO. 77574**

IN THE COUNTY COURT
OF DISTRICT NUMBER ONE

BETWEEN:

CLEVELAND COLLEY

APPELLANT

- and -

THE SUPERINTENDENT OF INSURANCE

RESPONDENT

Castor H. G. Williams, Counsel for the Appellant;
Jonathan Davies, Counsel for the Respondent.

1993, January 7th, Palmeter, C.J.C.C.:- This is an appeal from a decision of R.G. Martin, Deputy Superintendent of Insurance, dated February 11th, 1992, wherein he declined to issue a life insurance agent's license to the Appellant.

The matter was heard on September 30th, 1992 and decision was reserved.

The facts are as set out in the factum of the Appellant and agreed to by the Respondent, and are as follows:

1. Mr. Cleveland Colley was a licensed life insurance agent/broker. He was licensed pursuant to the provisions of the **Insurance Act**. R.S.N.S. 1967, c. 148, from 1972 to 1989, at which point in time, the Superintendent of Insurance decided not to approve the issuance of a license.

2. The non-renewal/issuance of Mr. Colley's license in 1989 was due to allegations of irregularities in his practice as a life insurance agent.

3. The aforesaid allegations of irregularities were heard by an Advisory Board which rendered a report on 11 August 1989 (Casebook Tab 3). By letter dated 15 August 1989 (Casebook Tab 2), R. G. Martin, Deputy Superintendent of Insurance, did not approve the issuance of a license to Mr. Colley.

4. The decision of Mr. Martin was appealed to the County Court and, by decision dated 5 July 1990 (Casebook Tab C), His Honour Judge N. R. Anderson, J.C.C., upheld the decision of Mr. Martin.

5. The decision of His Honour Judge N. R. Anderson was appealed to the Appeal Division and, by decision dated 14 June 1991 (Casebook Tab 5), the Court upheld and confirmed the decisions made below.

6. By Application dated 21 August 1991, Mr. Colley applied again for a life insurance agent's license (Casebook Tab A).

7. An Advisory Board was convened and a hearing was held 27 November 1991 and 16 December 1991.

8. The Advisory Board made a report and recommendation on 5 February 1992 (Casebook Tab 6). On 11 February 1992, R. G. Martin, Deputy Superintendent of Insurance, adopted the Board's report and declined to issue a license to Mr. Colley. (Casebook Tab H).

9. By Notice of Appeal dated and filed 12 March 1992, Mr. Colley appealed the decision of Mr. R. G. Martin, Deputy Superintendent of Insurance.

The grounds of appeal are as follows:

(a) The Deputy Superintendent of Insurance erred in law when he relied upon documents adjudged and adjudicated upon in an earlier decision made by him, including his earlier decision, as the basis of his present decision, leading to a real likelihood and reasonable apprehension of bias on the part of the Deputy Superintendent of Insurance;

(b) The Hearing conducted by the Advisory Board was contrary to the rules of natural justice and in addition, violated s. 7 of the **Canadian Charter of Rights and Freedoms;**

(c) The Deputy Superintendent of Insurance failed to adhere to statutory procedural requirements, acted in bad faith and in so doing violated s. 15 of the **Canadian Charter of Rights and Freedoms**;

(d) The decision of the Deputy Superintendent of Insurance was perverse and contrary to the information placed before the Advisory Board and is a violation of the principles of fundamental justice;

At the time of the hearing of the appeal counsel for the Appellant argued grounds (a) and (b) jointly. On these grounds the Appellant made a number of submissions which I would determine to be as follows:

1. That the scheme of review adopted by Mr. Martin violated procedural fairness in that the documents relied upon included decisions on issues raised and determined in an earlier application, including his own decision not to issue a license, and the decision of the Courts upholding his decision.

2. That the prejudicial value of the Court and the earlier recommendations and reports far outweighed any relevancy to the current proceedings, that is their probative value.

3. That the presentation of the earlier decisions and recommendations to the Advisory Board set up in these proceedings denied the presentation of an impartial report by the Board, and was in excess of jurisdiction.

4. That the issues raised in the 1989 decision to refuse to issue a license were subject to the doctrine of **res judicata** and **issue estoppel.**

To summarize, the Appellant submits that the Advisory Board erred in law and procedure and that its recommendation is tainted not only with bias but with procedural unfairness which violates the principle of natural justice and offends the principle of fundamental justice. Accordingly, the Appellant submits that the decision of Mr. Martin is also tainted with bias.

The Superintendent of Insurance has a discretionary power pursuant to s. 26(1) of the **Insurance Act.** R.S.N.S. 1989, c. 231 to issue licenses, including life insurance licenses. Subsection 8 of Section 36 states as follows:

36 (8) The Superintendent may grant a license where

(a) in the Superintendent's opinion, the applicant is suitable to be licensed and the proposed licensing is not for any reason objectionable;

(b) the applicant passes a qualification examination if one is prescribed by the Superintendent or passes any supplemental examination if the applicant fails the qualification examination and pays any fees associated with the writing of examinations as may be prescribed by the regulations;

(c) the application indicates the name of the insurer who sponsors the applicant;

(d) the Superintendent is satisfied that the applicant intends to hold himself out publicly and carry on business as a **bona fide** agent; and

(e) the Superintendent is satisfied that the applicant is not in a position to use coercion or undue influence to secure insurance business.

Subsection (9) of s. 36 of the **Act** provides that the Superintendent may appoint an Advisory Board for investigation and report, as follows:

36 (9) In determining the granting or refusal of an application for a license or renewal of a license, or the suspension or cancellation of a license or the reinstatement of any suspended or cancelled license, the Superintendent may, in any case where the Superintendent deems it proper, nominate an advisory board consisting of three persons, one of whom shall be the Superintendent or another person appointed by the Superintendent, one of whom shall be a representative of insurers and one of whom shall be a representative of agents licensed pursuant to this **Act** and may refer a matter to the Board for hearing and report, and the Superintendent shall take such report into consideration when making a decision pursuant to this Section.

This subsection indicates the Superintendent "may" nominate an Advisory Board, and the Section is clear that Mr. Martin was not under an obligation to do so. He did have the option to so appoint, which he did, which under the circumstances I find was the proper procedure to follow. When the Appellant expressed concern about the proposed chair, Mr. Martin appointed a chair who was independent of his office to sit on the Board in his stead.

It is clear that a "mere suspicion" or a "mere possibility" of bias is not sufficient to vitiate a decision. There must be a real possibility of bias.

See: **R.** v. **Walker**, (1968), 63 W.W.R. 381 (Alta. C.A.).

Elliot v. **University of Alta. Governors**, (1973) 4 W.W.R. 195 (Alta.)

At the time of hearing before the Board the Appellant objected to the considerations by the Board of his previous licensing, including the decisions taken. I agree with counsel for the Respondent that nothing could be more relevant to the Board or the Superintendent's consideration than the previous history of licensing, including the previous denial of license and the Court decision therein.

In my opinion it is essential that an Advisory Board consider everything when making a recommendation to the Superintendent to enable him to make a decision, having regard to Section 36(8) of the **Act.** In other words, is the applicant "suitable" and is the proposed licensing for "any reason objectionable".

The previous decisions are a matter of public record and, I agree, highly relevant to the suitability of a candidate for licensing. Under the circumstances the prior decisions are uncontestable, and I accept the submission by the Respondent that the principles of **res judicata** and **issue estoppel** cited by the Appellant, in fact, bind the Appellant, and he cannot now pretend that they do not exist.

I agree that in matters of licensing under the **Act,** the history of the proposed licensee must be considered including all previous recommendations, reports and decisions relating thereto. To do otherwise would make a mockery of the requirements of the **Act** which I find to be in the public interest when it comes to the licensing of agents.

In this case the Deputy Superintendent adopted the report and recommendations of the Advisory Board which gave clear reasons. I find no procedural error or violation of procedural fairness by either the Board or the

Deputy Superintendent. There was no bias and, in my opinion, the report was impartial. Accordingly, I find no merit in grounds (a) and (b) of the Grounds of Appeal.

At the hearing of this Appeal, grounds (b) and (c) relating to Sections 7 and 15(1) of the **Canadian Charter of Rights and Freedoms** were argued together by the Appellant. Dealing firstly with s. 15(1) of the **Charter**, which reads:

> **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.

I do not accept the Appellant's arguments in respect to a suggested breach of s. 15(1) of the **Charter**. The whole question is answered very succinctly in the case of **Municipal Contracting Ltd. v. I.U.O.E. LOCALE 721 et al**, (1989), 91 N.S.R. (2d) 16 (N.S.S.C.A.D.), where Chief Justice Clarke stated at p. 29 of the decision;

> The protection afforded to individuals under s. 15 prohibits discrimination on the basis of personal characteristics. The enumerated grounds in s. 15(1) are indicative, but not exclusive, of the characteristics upon which discrimination may be based. Membership in a particular industry, in this case the constructions industry, cannot be said to be a personal characteristic as contemplated by s. 15(1).

In **Municipal**, Chief Justice Clarke applied the principle established by the Supreme Court of Canada in **Andrews v. Law Society of British Columbia et al**, (1989), 567 L.R. (4th) l. In my opinion, there is no "personal characteristics" herein which could be contemplated by s. 15(l) of the **Charter**.

Section 7 of the **Charter** provides:

> '7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

What are the principles of fundamental justice which the Appellant alleges were breached in this case? The Appellant submits that he was subjected to and experienced administrative sanctions, first in 1989 and again in 1991, being a denial of the privilege to hold a life insurance agent's license. In my opinion he was properly denied a license in 1989 and again in 1991.

There is no evidence, in my opinion, to suggest that Mr. Martin categorized arbitrarily applicants for licenses into more than one group, being those who apply after previously being refused and those who apply who have never been refused.

The Appellant argues that the right under s. 7 of the **Charter** is based upon an accusatorial and adversarial system, and that this system requires the right of cross-examination. It is alleged that the inclusion of Court decisions, and the earlier record, effectively denied the Appellant of the opportunity to cross-examine witnesses as judges cannot be called upon to be cross-examined on their decisions.

This allegation has no merit. The previous decisions are public record and cannot now be contested by the Appellant on the basis of **res judicata** and **issue estoppel** as previously stated herein.

I agree with counsel for the Respondent when he states that there is nothing per se contrary to s. 7 about legislation which places restrictions on the practice of individuals in their chosen occupation, and the Appellant has not raised the constitutional validity of the restrictions contained in the **Insurance Act.**

The test is, in my opinion, whether the procedural implementation of those restrictions are reasonable and accord with principles of fundamental justice. I have no hesitation in answering both these questions in the affirmative, having regard to the circumstances of this case.

Accordingly, I find no merit in any of the grounds of appeal as set out in the Notice of Appeal or upon any other ground which may have become apparent on the hearing of this appeal.

I dismiss the appeal with costs to the Respondent. If the parties cannot agree on costs, I am prepared to hear submissions therein.

A Judge of the County Court of District Number One