



FINANCIAL SERVICES TRIBUNAL

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.fst.gov.bc.ca
E-mail:
financialservicestribunal@gov.bc.ca

July 5, 2017
Via EMAIL

Appeal File: 2017-RSA-001

Cai Ming Yang

Sugden, McFee & Roos LLP
700-375 Water Street
Vancouver BC V6B 5N3

Attention: Jean Whittow, Q.C.

Dear Mr. Yang and Ms. Whittow:

**Re: Appeal to the Financial Services Tribunal ("FST") -
Cai Ming Yang v. Real Estate Council of British Columbia ("RECBC")**

Mr. Yang, the appellant, appeals the conditions placed on him as a term of his licence, made pursuant to the *Real Estate Service Act*.

Three preliminary issues are before me for decision:

1. Can Jean Whittow, QC continue as counsel for the Real Estate Council?
2. Will the appellant be permitted to introduce new evidence?
3. Will the appeal be expedited?

Jean Whittow, QC as counsel

On June 15, 2017 the Financial Services Tribunal ("FST") was advised by Ms. Whittow that she would be joining the law firm of Sugden, McFee & Roos, LLP as associate counsel. Mr. Patrick Lewis is a partner in Sugden, McFee & Roos, LLP and is the Vice-Chair of the FST.

Ms. Whittow was asked to provide the FST and the appellant with a statement as to what steps she intended to take to ensure that there was no potential for, or perception of, a conflict of interest, or reasonable apprehension of bias, in relation to her becoming an associate at the same firm as Mr. Lewis. The appellant was given an opportunity to respond to the submissions of Ms. Whittow.

Ms. Whittow has indicated that Mr. Lewis will have no involvement in this appeal as counsel or as a witness, and will make no submissions to the FST on behalf of the Real Estate Council. Mr. Lewis is a part time member of the FST and has had no involvement to date in this appeal. The appellant Mr. Yang, has indicated that he is agreeable to Ms. Whittow continuing as counsel, particularly as he wishes to have this matter resolved quickly.

Ms. Whittow provided authority relating to the question of whether an adjudicator should be disqualified from hearing a case for bias. Of course, the other issue before me is whether Ms. Whittow's move to Sugden, McFee & Roos LLP has created a conflict of interest for Ms. Whittow in that she now practices at a firm in which the Vice-Chair of the FST is a partner. No authorities have been provided in this respect.

I am satisfied that Ms. Whittow's movement to Sugden, McFee & Roos does not create a reasonable apprehension of bias on the part of me as adjudicator. I have no association with either Ms. Whittow or Sugden, McFee & Roos. Mr. Lewis has no role in the determination of this appeal.

There is a risk of a conflict of interest or unfairness arising from Ms. Whittow joining Sugden, McFee & Roos, as without precautions, she may have access to materials relating to the FST which would not be available to the appellant. As such, notwithstanding the appellant's consent to Ms. Whittow continuing as counsel, I do require Ms. Whittow to confirm that all materials relating to the appeal are kept in a manner such that Mr. Lewis does not have access to them, including creating the appropriate firewalls on her computer system, if it is shared with other members of the firm. In addition, Ms. Whittow must also provide assurance that she will have no access to any files or materials, electronic or otherwise, which are held by Mr. Lewis or Sugden, McFee & Roos relating to his involvement with the FST.

Introduction of New Evidence

Pursuant to s. 242.2(8)(b) of the *Financial Institutions Act*, I may admit new evidence on appeal if I am satisfied that new evidence has become available or been discovered that is substantial and material to the decision and did not exist or could not have been discovered with reasonable diligence at the time of the decision.

Pursuant to s. 242.2(11) of the *Financial Institutions Act*, I am able to confirm, reverse or vary the decision under appeal, or I can send the matter back for reconsideration to the Discipline Committee constituted under the *Real Estate Services Act*.

The decision under appeal answered the question of whether Mr. Yang was of good character and suitable to be licenced at the level and in the category for which he was applying, in accordance with s. 10 of the *Real Estate Services Act*. Certain terms were imposed on Mr. Yang as a condition of his license.

The appellant Mr. Yang, seeks to introduce in this appeal certain new documents. These can be categorized as follows:

1. Letter from the Real Estate Council dated October 31, 2016 that a hearing regarding his application for licencing would be held pursuant to s. 13 of the *Real Estate Services Act* and advising the date of the hearing would be March 9 and 10, 2017.
2. Communications with staff of the Real Estate Council after the hearing.
3. Communications with various brokerages regarding employment, all of which post-date the decision.
4. Income tax returns, and mortgage and employment records of Mr. Yang and his family.
5. Internet pages setting out a dictionary definition of the word "notice", and the incomes of property managers.

The introduction of this material is opposed by the Real Estate Council.

Much of the new evidence sought to be introduced by the appellant did not exist at the time of the hearing, such as the correspondence between the Real Estate Council and the appellant after the decision, and the interactions of the appellant with the various brokerages after the decision. However, this material is not material to the decision under appeal. What is relevant to the decision under appeal, is material which has bearing on the question of whether Mr. Yang was of good character and suitable to be licenced at the level, and in the category for which he was applying. Evidence which relates to the impact of the decision on Mr. Yang, including his efforts to find employment, the questions regarding the decision which he raised with the Real Estate Council, the financial information relating to him and his family, and the internet page setting out incomes of property managers, are not relevant or material to the decision under appeal and I decline to permit Mr. Yang to introduce such evidence on this appeal.

The letter from the Real Estate Council dated October 31, 2016, did exist before the hearing, and was known to Mr. Yang before the hearing. As such, this letter is not "new evidence" that I can admit on appeal in accordance with s. 242.2(8) of the *Financial Institutions Act*. In any event, I do not find the October 31, 2016 letter to be substantial and material to the decision under appeal. I have reviewed the documents before the Discipline Committee and have found numerous documents which make it clear that the appellant was given notice that a hearing may be held, and ultimately that a hearing was scheduled to be held. For example, in the email dated October 31, 2016 at Tab 38 of the Documents before the Discipline Committee, Ms. Whitlow advises Mr. Yang of the date of hearing (March 9 and 10, 2017) and states: "A hearing is the proper forum for an inquiry into suitability for licensing under s. 10 and 13 of the *Real Estate Services Act*." The October 31, 2016 letter adds no more substance to the information set out in the October 31, 2017 email. As such, even if the October 31 letter was "new evidence" I would not admit it on appeal as it is not substantial or material to the decision under appeal.

Finally, I decline to admit as new evidence the internet page which sets out the dictionary definition of the word "notice". Mr. Yang is entitled to provide me such a definition as an authority, in the same way he can rely on case law, when arguing his case, but it is not "evidence" which is properly admitted on an appeal.

In the result, I decline to admit any of the new evidence as proposed by Mr. Yang.

Will the appeal be expedited?

Mr. Yang seeks to have the appeal expedited and says that he will only require one week to provide his argument on appeal. The Real Estate Council does not agree to an abridged hearing process, but also states that it will do its best to provide its reply submissions 14 days after receipt of the appellant's submissions.

I am prepared to order an expedited hearing with the following timeframes:

- The appellant will provide his submissions no later than July 12, 2017.
- The Real Estate Council will provide its submissions no later than July 26, 2017.
- The appellant will provide any reply submissions no later than August 8, 2017.

In summary, I make the following orders and directions:

1. Ms. Whittow is to confirm that all materials relating to the appeal are kept in a manner such that Mr. Lewis does not have access to them, including creating the appropriate firewalls on her computer system if it is shared with other members of the firm;
2. Ms. Whittow must also provide assurance that she will have no access to any files or materials, electronic or otherwise, which are held by Mr. Lewis or Sugden, McFee & Roos relating to his involvement with the FST;
3. The application to admit new evidence is dismissed; and
4. The appeal will proceed on an expedited basis as set out above.

Yours truly,

“Wendy A. Baker”

Wendy A. Baker, Q.C.
Panel Chair