

BC FINANCIAL SERVICES AUTHORITY
IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended

AND

IN THE MATTER OF

TRACY XIAOMEI LI (178286),
TRACY LI PERSONAL REAL ESTATE CORPORATION (178286PC),
DAVID CHIAN WEI YANG (043031),
DAVID C.W. YANG PERSONAL REAL ESTATE CORPORATION (043031PC),
LOK CHI ANNIE FONG (173995),
ANNIE FONG PERSONAL REAL ESTATE CORPORATION (173995PC),
LO-MING LEE (125608)

AND

PACIFIC EVERGREEN REALTY LTD. (X030719)

REASONS FOR DECISION ON APPLICATION FOR WITNESS SCHEDULING

[This Decision has been redacted before publication.]

1. On August 9, 2023 a Third Amended Notice of Discipline Hearing was issued in this matter.
2. That Third Amended Notice of Hearing alleges professional misconduct and conduct unbecoming, as described in section 35 of the *Real Estate Service Act*, on the part of the respondents Ms. Li, Mr. Yang, Ms. Fong, and Mr. Lee¹, and professional misconduct on the part of the respondent Pacific Evergreen Realty Ltd. ("Pacific"); relating to alleged real estate activities which occurred in November 2019.
3. The hearing of this matter is scheduled to proceed, virtually, from November 20 through December 8, 2023.
4. BCFSFA applies, pursuant to section 42(2) of RESA and section 34(3)(b) of the *Administrative Tribunals Act* (the "ATA"), to have a witness, [Witness 1], attend the hearing, virtually and outside of regular business hours, from 4:30pm to 9:00pm, from November 27 through November 29, 2023.

¹ As well as their respective Personal Real Estate Corporations.

Issues

5. The issue is whether a direction should be issued that [Witness 1] attend the hearing of this matter on November 27 through November 29, 2023, from 4:30 to 9:00 pm.

Background

6. The Third Amended Notice of Hearing sets out allegations regarding the sale of a property, located at [Property 1], Richmond, BC (the "Property"), which occurred in November 2019.
7. In general terms, BCFSA alleges that Ms. Li was contacted by a person identifying themselves as [Seller 1] ("[Seller 1]"), who indicated that they had power of attorney regarding the Property, and who asked Ms. Li to find a buyer for the Property. BCFSA alleges that Ms. Li found a buyer for the Property through Mr. Yang, and that Ms. Li and Mr. Yang provided real estate services in respect of the sales transaction of the Property.
8. BCFSA submits that it intends to call [Witness 1] as a witness to confirm that any powers of attorney regarding the Property held by [Seller 1] were not executed on her instructions or with her knowledge, and that [Witness 1] did not hold the Property in trust for any other individual.
9. BCFSA indicates that [Witness 1]'s ownership and the nature of her interest in the Property is at issue, and that [Witness 1] says that:
 - She was the owner of the Property in November 2019;
 - She did not hold the Property in trust for anyone else;
 - She did not know [Seller 1];
 - She did not authorize [Seller 1] to deal with the Property; and
 - She did not sign a power of attorney.
10. As part of its application, BCFSA provided an affidavit from [Individual 1], a paralegal, dated September 6, 2023. In that affidavit [Individual 1] indicated that she had spoken to [Witness 1] on July 26, 2023 and that [Witness 1] had advised her that:
 - [Witness 1] resides in Chengdu, China, and had no plans to travel to Vancouver, Canada in the next year;
 - [Witness 1] was not willing to travel to Vancouver, Canada for the hearing of this matter, even if BCFSA pays her travel and accommodation expenses;
 - [Witness 1]'s business would be negatively affected if she were to attend the hearing in November and December 2023;
 - [Witness 1] was willing to provide evidence, virtually, after 4:30pm in Vancouver, Canada, and was willing to attend the hearing virtually for more than one day if necessary;
 - [Witness 1] is the person who was named as the owner on title to the Property from 2004 to November 2019;
 - [Witness 1] owned the Property prior to its sale in November 2019, did not hold the Property in trust for anyone else, and was the only one legally authorized to deal with it;
 - [Witness 1] did not sign a power of attorney granting anyone the right to sell the Property, nor did she sign any other power of attorney regarding the Property;
 - [Witness 1] was not in Canada in November 2019;

- [Witness 1] does not know [Seller 1], or [Seller 2].

Submissions

BCFSA

11. BCFSA takes the position that the Superintendent of Real Estate (the “Superintendent”) has the ability to control its own procedures in respect of hearings, subject to any procedures set down in RESA and its related regulations. As a result, BCFSA submits that the Superintendent’s implied authority to control its own processes must include the authority to address the timing of witness testimony, which would be similar to and in the same nature as the power to order adjournments.
12. BCFSA notes that section 48 of the ATA provides broad jurisdiction for the Superintendent to make orders and directions regarding the maintenance of order during disciplinary hearings, and, in BCFSA’s submission this jurisdiction includes:

...orders and directions regarding the timing of witnesses because orders and directions regarding the timing and order in which witnesses will give evidence concerns the just, efficient, effective, and fair running of the proceeding. BCFSA submits that the same considerations that lead to the conclusion that the implied authority of the Superintendent includes the power to make the direction sought lead to the conclusion that the authority is included under the ATA, s 48 authority.
13. BCFSA submits that issuing the direction sought to have [Witness 1] attend the hearing of this matter virtually and outside of regular business hours is the most convenient, efficient, and cost effective method to have [Witness 1]’s evidence tendered.
14. BCFSA points to the fact that [Witness 1] resides in Chengdu, China, and has no plans to travel to Canada in the next year, and that although [Witness 1] has indicated that she is not willing to travel to provide in person evidence in this hearing, she was willing to attend to provide evidence virtually after 4:30pm, which corresponds to 8:30am in Chengdu, China.
15. BCFSA noted that [Witness 1] had further advised that the end of the year was a very busy time in her industry, and that travelling to Canada at the time of the hearing would cause her to lose business or put at risk her ability to generate business.
16. BCFSA further noted that it would take approximately 18 hours of travel time for [Witness 1] to fly to Vancouver, with more time for a return flight.
17. Given the above, BCFSA submits that as the hearing is scheduled to proceed virtually, the accommodation to have [Witness 1] provide evidence at a later time than the usual business hours in Canada, while an inconvenience for the parties who are located in Canada, could be seen as having a net neutral or potential benefit for hearing efficiency.
18. In BCFSA’s submission, the order to have [Witness 1] attend as requested would not impair the respondents’ ability to conduct cross examinations, make oral submissions, challenge evidence, object to admissibility, or argue about the weight of evidence. Rather, BCFSA submits that this application is merely a matter of scheduling.
19. BCFSA summarizes its position as follows:

In this case, if this matter is proceeding virtually, BCFSA likely cannot submit [Witness 1]'s evidence and present her for cross examination at the hearing unless the accommodation is made to allow her to appear in the evenings. [Witness 1] resides in China. She has no plans to travel to Vancouver, Canada in the near future. BCFSA has no ability to compel her attendance and she has indicated she is not willing to do so. Requiring her to travel to Vancouver, Canada or to give evidence overnight in Chengdu, China are unreasonable impositions on [Witness 1] as a witness. BCFSA submits that denying this direction imposes a far greater inconvenience on [Witness 1] than on the respondents, who only have to give up a few evenings.

Ms. Li

20. Ms. Li takes the position that the underlying issue in this case is one of proving "who is the real [Witness 1]", or more specifically who was the beneficial owner of the Property in the November 2019 transaction.
21. In those circumstances, Ms. Li questions how it would be possible to verify [Witness 1]'s identity, other than to have her hold up an identification to the video camera at the hearing.
22. Ms. Li further submits that the Hearings Division should not accept the hearsay evidence set out in [Individual 1]'s affidavit from [Witness 1], on the basis that it has been "translated and packaged in a series of conclusions by [BCFSA] staff".
23. Ms. Li takes the position that the reasoning behind [Witness 1]'s not wanting to attend the hearing in person as it related to her business was trivial. Ms. Li suggested that [Witness 1]'s unwillingness to attend the hearing in person suggested that she was so disinterested in the proceedings as to cast doubt on the claims she made in respect of the Property.
24. Finally, Ms. Li submitted that it could not be seen as fair to the respondents, who were facing jeopardy under RESA, to determine that the temporary inconvenience of [Witness 1] was more important than providing the respondents the opportunity to cross examine [Witness 1] in person.

BCFSA Reply

25. BCFSA reiterated its position that this was merely a scheduling application, and submitted that as [Witness 1] was not a party to the proceeding, her unwillingness to undertake multi-day international travel for the purposes of the proceeding did not bear on her credibility in this matter.

Reasons and Decision

26. Having considered the submissions before me, I am of the view that BCFSA's application should be granted. My reasons for having reached this conclusion follow.

Nature of RESA Disciplinary Hearings

27. RESA, at section 42(3), sets out that the Superintendent may conduct a discipline hearing by way of written submission or oral hearing, or a combination of both.
28. Section 42(2) of RESA provides that certain sections of the ATA apply to the Superintendent for the purposes of a discipline hearing, including section 48 of the ATA.

29. Section 48 of the ATA relates to the maintenance of order at a hearing, and provides that:

48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

30. As counsel for BCFSA has noted in its application materials, BCFSA has published Virtual Proceeding Procedures² regarding the conduct of virtual proceedings.

31. Those procedures were published in 2021, during the period of time that the COVID-19 pandemic created particular difficulty for the holding of in-person hearings. While the COVID-19 pandemic is no longer an issue in the same manner it was in 2021, the procedures further indicate the following:

It has been determined that, even upon re-opening of the BCFSA office, oral (in-person) proceedings will not be necessary or appropriate for all proceedings, and it will be desirable to provide alternative proceedings formats, addressing convenience, costs, and efficiencies, in the form of Virtual Proceedings.

32. Since the re-opening of BCFSA's offices in 2021, discipline hearings under RESA have been conducted by way of virtual hearing, via video conference.

33. The Virtual Proceeding Procedures sets out, at item 10, that a party or their legal counsel or agent may bring an application for a change in the form of a proceeding by filing a request with the BCFSA hearing coordinator.

34. BCFSA's website further provides information on the way a discipline hearing will proceed³. This includes information regarding the potential that a party may be required to give evidence at the hearing, the right to cross-examine any witness called on relevant matters, and the right of a party to call witnesses.

² <https://www.bcfsa.ca/public-protection/hearings/real-estate-professional-hearings>

³ <https://www.bcfsa.ca/public-protection/report-concern/report-real-estate-concern/discipline-procedures#what-to-expect-during-a-formal-discipline-hearing>

35. Section 42(3) of RESA and the information provided on BCFSA's website as to the general manner in which a hearing will proceed does not form the end of the matter regarding the nature of a disciplinary hearing under RESA.
36. Rather, there remains the overarching requirement that the Superintendent, as the administrative tribunal, provide procedural fairness to the parties affected by the disciplinary hearing. The requirement that the administrative tribunal provide procedural fairness does not, however, inhibit the tribunal from devising:
- ...flexible procedures adapted to their needs in order to "achieve a certain balance between the need for fairness, efficiency, and predictability of outcome"
Knight v. Indian Head School Divison No. 19, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653 at 685.

British Columbia (Securities Commission) v Pacific International Securities Inc,
2002 BCCA 421 ("*Pacific International*"), at para 6

The Application

37. BCFSA seeks a direction that [Witness 1] be permitted to attend the hearing virtually, and to provide her evidence outside of regular business hours.
38. Ms. Li is the only party to this matter who has objected to the application. In objecting, Ms. Li generally appears to be taking the position that there is insufficient reason to permit [Witness 1] to attend virtually. Ms. Li does not appear to take any particular position with respect to the scheduling of [Witness 1] to provide evidence outside of regular business hours.
39. As set out above, the Superintendent has a discretion on how to hold hearings under RESA, whether by way of written submissions or oral hearing. As such, there is no specific requirement that a discipline hearing, including this one, proceed by way of an oral hearing.
40. Further, the Superintendent, as an administrative tribunal, has the ability to control its own procedures, provided those procedures comply with the rules of fairness⁴.
41. Discipline hearings held pursuant to RESA have been proceeding by way of video conference since 2021. Those video conference proceedings afford parties with procedural fairness by providing an opportunity to cross-examine witnesses, call evidence, and an opportunity to make submissions.
42. As set out in the Virtual Hearing Procedures, if a party wishes to seek a different format of hearing other than a virtual oral hearing, it is open to a party to apply for such a change in format. I consider that such an application could be made in respect of a single witness, or a hearing as a whole.
43. While the ability to make such an application is open to all parties to a discipline hearing, I do not consider Ms. Li to have made such an application in this case, at this time. It remains open to her to do so.

⁴ *Sparwood (Re)*, 2007 CanLII 2529 (BC IPC), at para 12 citing *Prassad*, at 568-569

44. As this hearing has been scheduled to proceed virtually, by way of video conference, I agree with BCFSa that its application regarding the timing of [Witness 1]'s evidence is an application regarding the scheduling of the hearing, and nothing more.
45. While I accept that there is an inherent degree of inconvenience in scheduling a witness to be heard outside of regular business hours as BCFSa is seeking in this application, I note that none of the parties to this matter (including Ms. Li who was the sole party to have provided a reply to BCFSa's application) have raised any issue with respect to the timing sought by BCFSa.
46. Given the fact of the time change between Chengdu, China and Vancouver, Canada, the fact that [Witness 1] is not willing to attend the hearing in Canada which would obviate the issue created by the time change, and the fact that none of the parties have opposed the time proposed for [Witness 1] to attend the hearing virtually and to provide her evidence, I am of the view that the application should be granted.
47. I consider that granting this application is consistent with the need to provide an efficient and flexible hearing process, and, given that the hearing is currently scheduled to proceed virtually, does not create a procedural unfairness for the respondents.

General Comment

48. As set out above, it remains open to the respondents to make an application that the method of hearing, or the hearing of a particular witness, be changed from virtual to in person. In making such an application I would expect the respondents to indicate their reasons for requiring an in person hearing or witness, and specifically how the application relates to the procedural fairness the respondents must be accorded in the disciplinary process under RESA.

Conclusion

49. The application to have [Witness 1], attend the hearing of this matter outside of regular business hours, from 4:30 to 9:00pm, by way of videoconference, from November 27 through November 29, 2023, is granted.

Dated this 7th day of November, 2023, at the City of Kelowna, British Columbia

"Original signed by Andrew Pendray"

Andrew Pendray
Chief Hearing Officer