

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*,
AND IN THE MATTER OF
CUI ZHU (DANIELLE) DENG

REASONS FOR DECISION
REGARDING PENALTY

DATE AND PLACE OF HEARING:	The penalty hearing proceeded by way of written submissions Office of the Real Estate Council Vancouver
DISCIPLINE HEARING COMMITTEE:	Richard J. Swift, Q.C. (Chair) Sukh Sidhu John Daly
Counsel for the Real Estate Council:	David T. McKnight Alexander Holburn Beaudin & Lang LLP
Counsel for the Respondent:	Ms. Deng was self-represented for the penalty hearing
Court Reporter:	N/A

INTRODUCTION

[1] The Committee convened to consider submissions from the parties about what orders are appropriate under s. 43(2) of the *Real Estate Services Act* (“RESA”), and also under RESA s. 44(1) respecting expenses, following the Committee’s decision that Ms. Deng committed professional misconduct by failing to disclose material information to a client respecting a property.

[2] With consent of the Committee, the parties agreed for the penalty hearing to proceed in writing. The Committee was advised that Ms. Deng is no longer represented by counsel, and that her submissions with respect to penalty have been made by her directly. The Discipline Committee had the opportunity to review the submissions of the Real Estate Council of British Columbia (the “Council” or “RECBC”) and Ms. Deng as follows:

- a. Submission of Mr. McKnight on behalf of RECBC, dated May 31, 2018;
- b. Submission of Ms. Deng, dated June 15, 2018;
- c. Reply Submission of RECBC dated June 18, 2018; and
- d. Further Reply Submission of Ms. Deng dated June 22, 2018.

Although the Committee addresses only some of the content of the submissions below, the Committee considered all of these submissions.

LEGISLATIVE PROVISIONS

[3] RESA s. 43(2) allows the Committee to make a variety of orders, including “(a) reprimand the licensee”, “(d) impose restrictions or conditions on the licensee’s license or vary any restrictions or conditions applicable to the licence”, “(f) require the licensee to enroll in and complete a course of studies or training specified in the order”, “(h) require the licensee to pay amounts in accordance with section 44(1) and (2) [recovery of enforcement expenses]”, and “(i) require the licensee to pay a discipline penalty in the amount of... (ii) not more than \$10 000...” (The Council notes that the relevant events occurred in 2013, at which time s. 43(2) provided for a maximum penalty of \$10,000 for a licensee other than a brokerage or former brokerage. Section 43 has since been amended, effective September 30, 2016, to provide for a maximum penalty of \$250,000.)

[4] RESA s. 43(3) and (4) allow an order to provide that if the licensee fails to comply with the order, or with one or more specified restrictions or conditions of the licensee’s licence, a discipline committee may suspend or cancel the licence without further notice or an opportunity to be heard.

SUBMISSIONS OF THE COUNCIL

[5] The Council quoted extensively from the Sanction Guidelines published by the Council, effective February 27, 2018, and noted that while the Guidelines were a new publication, they were informed by and consistent with well-established authority.

[6] The Guideline clarifies that sanctions serve several purposes, including denouncing misconduct, rehabilitating respondents through corrective measures, discouraging future misconduct by specific respondents through punitive measures (i.e., specific deterrence), discouraging future misconduct by other licensees (i.e., general deterrence), educating respondents, licensees and the public about rules and standards, and maintaining public confidence in the real estate industry.

[7] The Committee will not recount all of the principles set out in the Guideline, except to note that the Committee may consider various factors as mitigating or aggravating factors, including the respondent’s age, experience and discipline history; the nature and gravity of the misconduct; any extent the respondent obtained or attempted to obtain a financial benefit; the extent of harm to clients, other persons, or the general public; if the respondent has, prior to or during investigation, acknowledged and accepted responsibility for misconduct; the impact that different forms of corrective, preventative or punitive sanctions might have on a respondent; and so on.

[8] The Council made various submissions, including the following:

- a. The Council suggested that the misconduct was serious, in that the licensee failing to disclose the availability of Unit 59, the buyers lacked opportunity to fully consider their legal options relating to Unit 134, and

may have impacted their ability to negotiate a reduction of price for Unit 134.

- b. The Council noted the Licensee had no prior disciplinary record but submitted that since the Licensee had been licensed for just over two years (at the time), and given her experience, the absence of a disciplinary record was not sufficient to mitigate against a substantial penalty.
- c. The Council emphasized that the Licensee had denied misconduct throughout. She “maintained throughout” that the client fabricated much of her complaint. The Council also noted that while the Committee may not discipline the Licensee for forcing the Council to prove the case against her, or because the Committee disbelieved her evidence, the Committee could consider the continuing wrongful denial as material to a serious penalty that will adequately protect the public from future misconduct.
- d. The Council noted a particular public concern of licensees “putting their own interests ahead of those of their clients” as set out in a 2016 report of the Independent Advisory Committee on the real estate industry.

[9] The Council also provided the Committee with various precedents involving failures by licensees to disclose material information: *Thompson* (2018 CanLII 26046 (RECBC), which led to a reprimand and a \$2,500 penalty; *Zhang*, 2017 CanLII 77270 (RECBC), which led to a reprimand, a \$3,000 penalty, coursework and supervision; *Raine*, 2017 CanLII 1352 (RECBC), which led to a reprimand, a \$2,500 penalty and coursework; and *Mok*, 2017 CanLII 51312 (RECBC), which led to a reprimand, a \$1,000 penalty, coursework, and supervision.

[10] In the context of the precedents, the Council pointed to aggravating factors. Specifically, the Licensee refused to acknowledge that the information she failed to disclose was, or may have been, important to her clients. In an effort to discredit the client, she also accused her client of forgery, fraud and criminality, which the Council submits is conduct worthy of admonishment.

[11] The Council sought a discipline penalty of \$7,500; enhanced supervision by the Licensee’s supervising broker for not less than 12 months, on terms set out as Schedule 1 to the Council’s submission; a requirement that the Licensee successfully complete, at her own expense, the Real Estate Trading Services Remedial Education Course, and also Ethics REIC2600 – Ethics in Business Practice; and enforcement expenses totalling \$50,285.52. It also sought a condition that if the Licensee fails to comply with any term of the order, RECBC may suspend or cancel her licence without further notice to her.

RESPONSE SUBMISSIONS OF THE LICENSEE

[12] The Licensee agreed to complete the two courses, but opposed a penalty of \$7,500 given the following factors:

- a. The proposed penalty was unreasonable, being in the upper range of the maximum of \$10,000 at the time.
- b. While she may have been persistent in pursuing a fair decision, “there was no seriousness of misconduct involved in this case”.
- c. The proposed penalty is not proportional, compared to the case of *Behroyan*, which provided for the same penalty but involved deceptive dealing.
- d. Lesser fines are supported by isolated and less serious misconduct.

[13] The Licensee also opposed supervision for at least 12 months given the following factors:

- a. The Licensee did consult with her manager at the time, and her conduct was not due to lack of supervision.
- b. She has been at her current brokerage for almost eight years now, without issues with the managing broker’s supervision.
- c. Without enhanced supervision for the last five years after the incident, she has had no similar complaints.
- d. She objected to specific provisions of the supervision terms in Schedule 1.

[14] Given that a first hearing had been quashed due to a lack of procedural fairness, the Licensee objected to her paying enforcement expenses, on the basis that the Financial Services Tribunal did not specify enforcement expenses for the second hearing; she should not be punished by paying expenses originating from the Council’s own misconduct; and she should not have to pay for outside counsel only retained because of the Council’s failures on the first hearing.

[15] The Licensee made submissions about various mitigating and aggravating factors, which the Committee has considered. Without recounting all of her submissions, these factors included her having only two years of experience, the absence of a discipline history, the isolated nature of the conduct, the absence of any financial benefit. Notably the Licensee submitted that she was “not able to find the seriousness of her conduct”, and also that the client had access to the public MLS site if she had any interest in Unit 59 before she removed subjects on Unit 134. She submitted she is entitled to defend herself from the client’s accusations.

[16] As part of her submissions, the Licensee asserted various factual errors in the Committee’s findings (at paragraphs 28-44). The Licensee also asserted that the transcripts do not match with her recordings during the hearing (at paragraph 45).

REPLY SUBMISSIONS OF THE COUNCIL

[17] The Council submitted that many of the Licensee's submissions did not relate to penalty but were instead attempts to re-argue evidentiary findings of the Committee, to deflect responsibility for her failing to disclose material information to her clients, and to continue to attack the credibility of one particular client.

[18] On the need for enhanced supervision, the Council submitted that at the relevant time, the Licensee was not able to identify what information was material. She did not understand her obligation to disclose the material information. She also did not inform her managing broker that she had come into possession of the material information until after the client lodge a complaint.

[19] On the issue of expenses, the Council noted that the FST ordered a rehearing, and was silent on the issue of costs relating to the rehearing. As RESA s. 44(1) allows the Committee to require that a licensee pay expenses incurred by the Council in relation to either or both of the investigation or the hearing, and as the Council was successful, there is no basis for the Licensee to argue that the Council is not entitled to its costs associated with prosecuting the matter. The Council's entitlement for the re-hearing is the same whether it employs in-house lawyers or external legal counsel.

[20] Respecting the authenticity of transcripts, Council submitted that the Licensee received a complete copy, and has not identified any errors in the transcripts.

SUR-REPLY SUBMISSIONS OF THE LICENSEE

[21] The Licensee submitted that the Committee's power to impose restrictions or conditions under RESA s. 43(2)(d) is limited by RESA s. 15(2), which limits the power of the Council to impose conditions or restrictions as conferred by RESA s. 15(1) to being exercised only "on or before the date on which the licence is issued," or on the written application or with the written consent of the licensee.

[22] The Licensee submitted that the transcript omits her testimony that, "really... my concern is that, on the one hand, she was telling me that her husband would sign documents, on the other hand, she was saying that I already know what's going on," which was followed by questions from the Committee. The Licensee submits further that this omission was *intentionally* caused by the Council, to the disadvantage of the Licensee.

[23] The Licensee also submitted that the Council should be denied enforcement expenses, in part because it altered transcripts to its own benefit.

[24] The Licensee asserted that section 3-3 of the Rules was repealed on February 26, 2013 and substituted effective July 1, 2013, such that sections 3-3(1)(a) and (f) did not exist at the time she received the initial investigation letter dated July 23, 2013. This assertion is not supported by the Rules, which include the following annotation: "[02/26/2013 section 3-3 repealed and the above section 3-3 substituted effective 07/01/2013]" This annotation indicates a resolution dated February 26, 2013 to both repeal and replace section 3-3 on July 1, 2013.

DECISION

[25] Ms. Deng's misconduct by her failing to disclose material information is of serious concern to the Discipline Committee. This concern is increased, however, by the fact that the Licensee, having heard all of the evidence against her, the submission of the Council, and the decision of this Discipline Committee, does not concede that she had done anything wrong. The Committee agrees that it should not discipline the Licensee for requiring that the Council prove its case, or impose a greater penalty based on a lack of remorse. Remorse may be a mitigating factor, but lack of remorse is not an aggravating factor. The Licensee shows, however, a continuing lack of insight or understanding about her obligation to disclose material facts to clients, five years after the event.

[26] The Licensee has asserted one specific omission in the transcript, intentionally brought about by the Council. The Licensee has not, however, provided any evidence that the Council interfered in the integrity of the transcript, intentionally or otherwise. With respect to the asserted omission, legal counsel for the Council advised the Committee, by letter dated August 2, 2018, that the reporting service was willing to release the original recording only to the Committee. In a responding letter, also dated August 2, 2018, the Licensee objected to the recording being released only to the Committee. She also advised that she would be seeking an order from the Financial Services Tribunal for access to the original recordings, "when the time comes". As the Licensee asserts only one specific error, and objects to the means by which the Council and the Committee may investigate that assertion, the Committee is not satisfied of any inaccuracy in the transcript that is material to the Committee's findings.

[27] In arriving at an appropriate decision as to penalty, the Discipline Committee is hopeful that the penalty and the coursework it has decided to impose will be sufficient to convince Ms. Deng of the seriousness of her misconduct, and also give her the opportunity to improve her understanding of her role as a professional realtor, and, in particular, her obligation to her clients.

[28] This Committee has taken into consideration the provisions of RESA s. 43, and the alternative sanctions enumerated therein. As noted above, the Committee has also considered the submissions of the Council, and the submissions of the Licensee. The Committee disagrees that its power to impose restrictions or conditions under RESA s. 43(2)(d) is limited by RESA s. 15(2). RESA s. 43(2)(d) confers a power on a discipline committee. That power is distinct from the power that RESA s. 15(2) confers on the Council to impose restrictions or conditions prior to its issuing a licence, or by consent.

[29] The Committee accepts the submissions of the Council about the relevant considerations. The Committee found the jurisprudence that the Council provided helpful. Although the Licensee referred to lesser fines being supported by less serious misconduct, the Committee concludes that Ms. Deng does not truly appreciate that she has acted inappropriately. Her conduct brings into question for the public both the loyalties and the competence of real estate professionals. The Committee must make

clear to Ms. Deng, and to the public as a whole, that her conduct was unacceptable, and that it fell short of the expectations that the public at large ought to be able to rely upon, when dealing with licensees.

[30] The Committee considers a discipline penalty of \$7,500 excessive but agrees a significant discipline penalty is needed for specific deterrence. The Committee considers both the courses and enhanced supervision necessary for public confidence. The Committee notes that the Licensee was agreeable to the two courses, and that the Licensee did not inform her managing broker that she had come into possession of the material information until after the complaint. Enhanced supervision addresses the Licensee's continuing lack of insight. Finally, the Council was successful, and the Committee sees no basis for depriving the Council of enforcement expenses. The Committee's jurisdiction to address enforcement expenses for a re-hearing does not depend on any order of the Financial Services Tribunal. The enforcement expenses were necessitated by the Licensee's misconduct, but they do not relate to the first hearing, which eliminates any issue of the expenses relating to invalidated proceedings.

[31] It is in this context, then, that the Committee orders that:

- a. Ms. Deng must pay a discipline penalty of \$5,000.00, pursuant to Section 43(2)(i) of the RESA;
- b. Ms. Deng will be subject to enhanced supervision by her managing broker for a period of not less than 12 months, on the terms sought by the Council (attached as Schedule 1);
- c. Ms. Deng must, at her own expense, register for and successfully complete the Real Estate Trading Services Remedial Education Course and Ethics REIC2600 – Ethics in Business Practice pursuant to s.43(2)(f)(g) of the RESA; and
- d. Ms. Deng must pay enforcement expenses in the amount of \$50,285.52, calculated as set out in the Schedule prepared by the Council (attached as Schedule 2), pursuant to Regulation 4.2 to the RESA.

[32] The Committee further orders that in the event that Ms. Deng fails to comply with any of the above terms, RECBC may suspend or cancel her license without further notice to her.

[33] The Respondent has a right to appeal to the Financial Services Tribunal under RESA section 54(1)(d). The Respondent will have 30 days from the date of the penalty decision: *Financial Institutions Act*, R.S.B.C. 1996, ch. 141, section 242.1(7)(d) and *Administrative Tribunals Act*, S.B.C. 2004, section 24(1).

DATED at VANCOUVER, BRITISH COLUMBIA this 8th day of August, 2018.



Richard J. Swift, Q.C.
Discipline Hearing Committee Chair



Sukh Sidhu
Discipline Hearing Committee Member



John Daly
Discipline Hearing Committee Member

LIST OF EXHIBITS

- Exhibit 1 - RECBC - Book of Documents
- Exhibit 2 - Respondent's Document Book for Hearing
- Exhibit 3 - Ponderosa Estates Strata Plan (16080 – 82nd Avenue, Surrey, B.C.)
- Exhibit 4 - Hazelwood Lane Strata Plan (16318 – 82nd Avenue, Surrey, B.C)
- Exhibit 5 - Map showing location of Walnut Road Elementary in relation to Ponderosa Estates and Hazelwood Lane.
- Exhibit 6 - E-mail from The Complainant to Ms. Deng dated February 8, 2013
- Exhibit 7 - Real Estate MLS Listings
- Exhibit 8 - E-mail from Ms. Deng dated Mach 19, 2013

SCHEDULE 1

- 1) Licensee and PREC's licence will be restricted to Brokerage, or another brokerage acceptable to Council (the "Brokerage"), for a period of not less than time frame following completion of their licence suspension.
- 2) Licensee and PREC will be subject to enhanced supervision by their managing broker, as set out in these conditions, for a period of not less than time frame following completion of their licence suspension (the "Enhanced Supervision Period").
- 3) Licensee and PREC must remain under the direct supervision of Managing Broker, the managing broker of the Brokerage, or a successor managing broker acceptable to the Council (the "Managing Broker"), during the Enhanced Supervision Period.
- 4) Licensee and PREC must keep the Managing Broker informed on a timely basis of the real estate services that they are providing and other activities they are engaging in and must consult with the Managing Broker in advance of taking any action regarding any questions or concerns they may have regarding compliance with the RESA, the Regulations, the Bylaws, the Rules and all other applicable legislation and the Brokerage's policies and procedures.
- 5) Licensee and PREC must report all their transactions to the Brokerage promptly, and ensure that no such transactions are conducted outside the Brokerage.
- 6) Licensee and PREC must ensure that all documents relevant to each transaction are provided to the Brokerage and contained in the deal file, including the contract of purchase and sale, all offers received for the listing, assignment agreements, addendums, trade records sheets, disclosure statements, releases and other pertinent information.
- 7) The Managing Broker must provide a final report to the Council confirming:
 - a. that Licensee and PREC's real estate services have been conducted under their direct supervision;
 - b. that Licensee and PREC's activities have been carried out competently and in compliance with the RESA, the Regulations, the Bylaws, the Rules and all other applicable legislation, and in accordance with Brokerage's policies and procedures;
 - c. that they have reviewed all documents signed by Licensee's clients and that all documents relevant to the transaction have been provided to the client and are contained in the trade records file; and
 - d. the number of real estate transactions that Licensee has conducted and details regarding the client(s), the agency offered; and any customer relationships.
- 8) The Report will be reviewed by the Chair of the Council, who will determine if the requirement for enhanced supervision for the period set by Council has been met, and if not, will so advise the Managing Broker and Licensee and Licensee may elect to:
 - a. continue with enhanced supervision until the Chair of the Council is satisfied by further evidence that the required period and purpose of enhanced supervision has been met; or

- b. have his/her licence suspended until a further order is made by the Council under section 43(4) or (5) of the RESA.
- 9) The Managing Broker must immediately report to the Council anything of an adverse nature with respect to Licensee's real estate services, including failure on his/her part to observe the requirements of the RESA, the Regulations, the Bylaws, the Rules and all other applicable legislation, complaints received by the Brokerage, the nature of the complaint and the parties, and how it was resolved.
- 10) The Managing Broker must ensure that Licensee and his/her unlicensed or licensed assistants, if any, receive adequate, appropriate and ongoing training with respect to their obligations under the RESA, Regulations, Bylaws, and Rules, and in accordance with the Brokerage's policies and procedures.
- 11) The Managing Broker must be provided with a copy of these conditions and, prior to the commencement of the Enhanced Supervision Period, must confirm in writing to the Council that they have read these conditions, are aware of their duties under these conditions, and agree to accept those duties. Any acceptable successor managing broker will also be provided with a copy of these conditions and must provide the same confirmation within 14 days of assuming the Managing Broker's duties.
- 12) If for any reason the Managing Broker is unable to perform any of the duties imposed herein, they must immediately advise Council of this inability.
- 13) If the Managing Broker is unable or unwilling to perform any of these duties and/or fails to meet their obligations under these conditions, Licensee's licence is suspended and will remain suspended until all conditions herein are met or a further order is made by Council under section 43(4) or (5) of the RESA. Any suspension of Licensee's licence under this paragraph does not limit the Council's ability to take further disciplinary action for breach of the conditions or of the RESA, the Regulations, the Bylaws, the Rules and all other applicable legislation.

SCHEDULE 2

In The Matter of the *Real Estate Services Act*
S.B.C. 2004 c. 42
Real Estate Council of B.C.
and
Cui Zhu (Danielle) Deng

ENFORCEMENT EXPENSES REGULATION 4.2

<u>Regulation Tariff Item</u>	<u>Tariff Amount</u>
4.2(c)(a) Investigation	
15 hrs x \$100.00 = \$1,500.00	\$1,500.00
4.2(c)(i) Legal Services:	
In-house counsel	10 hrs x \$150.00 = \$1,500.00 \$1,500.00
Outside counsel	
Up to March 21, 2018	86.7 hrs x \$350.00 = \$30,345.00
Post March 21, 2018	12.2 hrs x \$350.00 = \$4,270.00
(Penalty Submissions)	<u>\$34,615.00</u> \$37,615.00
4.2(d) Disbursements by outside legal counsel	
Up to March 21, 2018 \$1,999.37 +5% (\$99.97) = \$2,099.34	
Post March 21, 2018 \$167.10 +5% (\$8.36) = <u>\$175.46</u>	\$2,274.80
4.2(e)(ii) Administrative Expenses:	
Three member discipline committee (4 days (inc. penalty))	\$6,000.00
4.2 (i) Other Costs- Allwest Reporting:	
Court Reporter (att) 00180473 =	\$1,050.00
Court Reporter (TS) 00180472 =	\$824.46
Court reporter (TS) 00180314 =	\$2,324.70
Photocopies 160822 =	<u>\$196.56</u>
	\$4,395.72
TOTAL	<u>\$50,285.52</u>

These Enforcement Expenses in the amount of \$ 50,285.52 ordered this 8th day of August, 2018.



Discipline Hearing Committee Chair