

**DECISION OF HEARING PANEL
OF THE DISCIPLINE COMMITTEE WITH RESPECT TO FINDING OF FACT**

In the matter of a Discipline Committee Hearing held pursuant to Section 23(1) of *An Act to Incorporate the New Brunswick Real Estate Association*.

BETWEEN

The New Brunswick Real Estate Association
("The Association ")

- and -

Bryan Hardy
(" Respondent")

Date of Hearing: December 10, 2019

Place of Hearing: NBREA Boardroom, 22 Durelle St., Fredericton, NB

Members of Panel: Anne Smith, Chair
Jeff Sherwood
Nancy Thome
Chris Drysdale
Paul Blanchard, FCNB Appointee

Appearances: John Townsend, Q.C., Counsel for the Association
Bryan Hardy, Respondent (representing himself)

UPON the following charges submitted by John Townsend, Q.C., Prosecutor appointed by the Association:

On April 12, 2019, Bryan Hardy being a member, as defined by *The Act to Incorporate the New Brunswick Real Estate Association*, Chap 115, S.N.B., 1994 (the *Act*):

Engaged in conduct that is disgraceful, unprofessional, or unbecoming a REALTOR®.

All as set out in the complaint of [REDACTED], dated May 6, 2019, thereby committing an act of professional misconduct, in violation of Article 21 of the REALTOR® Code (effective March 2016), and punishable under subsections 23(4) and 23(5) of the *Act*.

Mr. Townsend presented on behalf of the Association.

Mr. Hardy, the Respondent, represented himself.

Mr. Townsend and Mr. Hardy acknowledged the jurisdiction of the Committee to hold the hearing.

The Chair explained the distinction between single hearing and dual hearing format and stated the intention of the Committee was to conduct the hearing in the single hearing format. Mr. Townsend requested the dual hearing format for reasons which he stated would become apparent as the proceeding unfolded. The Chair confirmed the Committee would conduct the hearing to make a determination of the evidence on the merits and, if necessary, a penalty hearing would be held at a later date to hear arguments and decide an appropriate penalty.

The Committee accepted exhibits as follows:

- a. Exhibit 1 Notice of Hearing
- b. Exhibit 2 Book of Relevant Documents

In addition to the documentary evidence noted above, the committee heard witness testimony from:

- Complainant [REDACTED]
- Respondent Bryan Hardy

Unless otherwise noted, Exhibit 2 - Book of Relevant Documents was the source of all documents referenced during testimony.

Summary of Witness Testimony:

[REDACTED]

The Complainant, [REDACTED], was called as a witness by Mr. Townsend.

[REDACTED] stated that she knows Mr. Hardy personally. In particular, [REDACTED] and her husband were previously represented by Mr. Hardy in selling a home in 2017. Ultimately the [REDACTED] chose not to be represented by Mr. Hardy in purchasing a new home and purchased through a different Realtor. In connection with that sale, the [REDACTED] filed a complaint of professional misconduct against Mr. Hardy with NBREA (separate and unrelated to the present complaint). Mr. Townsend asked that [REDACTED] not discuss any details in relation to that

complaint, but ██████████ confirmed that this was sufficient involvement with Mr. Hardy such that she knew him.

Mr. Townsend referred ██████████ to Tab 1, and she confirmed that the document was a complaint form dated May 6, 2019, which contained her signature. Mr. Townsend then referred ██████████ to the second page of Tab I, which she confirmed was a typed summary of her complaint which she also signed.

██████████ stated that following his representation in 2017, she had no further interactions with Mr. Hardy until April 12, 2019. On that date, ██████████ was carrying out her job as a mail carrier. At around 11:30 am, she was inside the Blue Cross Center in Moncton, NB, sorting out mail to be delivered to various businesses inside the center. She heard a voice from behind her state " Jesus Christ, you' ve really put on the pounds!" ██████████ turned to see Mr. Hardy looking directly at her. She stated that she saw no one around other than Mr. Hardy who could have made that statement to her and there was no one else near her who Mr. Hardy could have been speaking to. After seeing Mr. Hardy, she observed him turn and walk away without further interaction.

██████████ stated that she was shocked and upset by Mr. Hardy' s statement. Later that day, she called Carolyn Cameron at NBREA to express her concern, but Ms. Cameron was out of the office. She was able to speak to Victoria at NBREA, who referred her to Dwayne Hayes.

Also, on April 12, 2019, ██████████ called Mr. Hardy' s employer, Exit Realty Associates Moncton, to express her concern with Mr. Hardy' s behaviour. She spoke to ██████████, who told her she would speak to Mr. Hardy and get back to her. The following Monday, ██████████ called ██████████ back. She informed ██████████ that Mr. Hardy told her he did attend the Blue Cross Center around 11:30 am on April 12, 2019, but he did not see ██████████ nor did he say anything of that nature to anyone.

Mr. Townsend referred ██████████ to Tab 6. ██████████ stated that this was a letter dated May 16, 2019 from lawyer ██████████, informing her and her husband that Mr. Hardy denied the allegations she had made, and that any further allegations would result in legal action for defamation. ██████████ confirmed she received this letter. She and her husband were upset by it and felt it was aggressive.

Mr. Townsend referred ██████████ to Tabs 3 and 4. ██████████ stated that these documents were Mr. Hardy' s written response to the complaint, which enclosed the May 16, 2019 letter from ██████████ to the ██████████. Tab 3 stated that ██████████' s letter "constitutes my answer to the complaint" and appeared to be signed by Mr. Hardy. ██████████ stated that she became aware of these documents in the lead up to this hearing.

██████████ stated that she had no doubt in her mind that Mr. Hardy made the alleged statement to her. She had " no question" of what he said to her. She stated that she had heard Mr. Hardy use the exclamation "Jesus Christ" in the past and that his statement to her in the Blue Cross Center on April 12, 2019 was consistent with his manner of speaking.

██████████ stated that she made her current complaint to NBREA because she was offended by Mr. Hardy's statement to her and felt that it was inappropriate behaviour for a real estate agent. Mr. Townsend again referred ██████████ to Tab 1, and particularly to her statement in the complaint form that "This type of harassment + bullying is definitely an undesirable trait for a realtor". ██████████ stated that she continued to believe this was an accurate statement. She felt that Mr. Hardy's behaviour was unprofessional, especially because it was unprovoked, and that as a Realtor he is supposed to behave in a professional manner.

Mr. Hardy cross-examined ██████████. He asked her if she was 100% sure that he said those words. ██████████ stated that she was 100% sure. Mr. Hardy also asked ██████████ to state another time that he had used the exclamation "Jesus Christ". ██████████ did not provide a specific example but stated that it is part of Mr. Hardy's "lingo". ██████████ was excused.

Bryan Hardy

Mr. Hardy testified on his own behalf.

Mr. Hardy stated that he was upset and shocked when he received the complaint against him. He stated that the complaint came as a surprise because he did not see ██████████ at the Blue Cross Center on April 12, 2019 and did not make any statements to her as alleged.

Mr. Hardy stated that he is a friendly person and would never say anything like the statement that ██████████ has alleged. He stated that he has been fighting weight his whole life, describing himself as struggling with being "scrawny", and would never put someone down over their weight. He also stated that he is a religious person and would not use the phrase "Jesus Christ" as an exclamation. Mr. Hardy expressed that he felt very upset for ██████████ that she believed someone had insulted her but insisted he did not do so.

He stated that once he became aware of the complaint, he spoke with the security department at the Blue Cross Center to obtain security camera footage, which he believed would show that he did not interact with ██████████. Mr. Hardy said that the Blue Cross Center told him their cameras only save footage for a 2-week period, and that the footage of April 12, 2019 had been overwritten. Mr. Hardy also stated that he attempted to identify any witnesses who were present at the Blue Cross Center at 11:30 am on April 12, 2019 but could not find anyone.

After receiving the complaint, Mr. Hardy showed it to his manager at Exit Realty, who recommended that he consult with a lawyer. Mr. Hardy did so and was ultimately referred to ██████████. He stated that ██████████ drafted the May 16, 2019 cease & desist letter on his behalf and recommended that he send it. Mr. Hardy did not think too much about whether it was appropriate to send or not, but trusted ██████████ as a legal professional that it was the right course of action.

With regard to the previous complaint made by the ██████████ against him, Mr. Hardy stated it was as a result of a mistake made early in his career as a Realtor and that he has learned his lesson from it. He stated that early on he tried to treat all his clients like friends and family, which he did with the ██████████. He became upset when they decided to retain another Realtor

and left them a bad message, which he now regrets. He has now been able to establish boundaries with his clients and has learned from his mistakes. He expressed "no remorse feelings" about this earlier incident because he has learned from it and moved on.

Mr. Hardy stated that during his representation of the ██████████ in 2017, he interacted with them a handful of times in person. As of April 12, 2019, he would not have recognized ██████████ while walking down a hallway in the Blue Cross Center.

Mr. Townsend cross-examined Mr. Hardy. He put to Mr. Hardy that while he referred to himself as a "friendly guy", the letter sent on his behalf on May 16, 2019 to the ██████████ was a threatening letter and not friendly. Mr. Hardy stated that he sought the advice of his managers, who told him to get a lawyer, and then followed the advice of his lawyer in sending the letter.

Mr. Townsend referred Mr. Hardy to Tab 3, which was his letter to NBREA stating that the May 16, 2019 letter to the ██████████ (reproduced at Tabs 4 and 6) constituted his written response to the complaint. Mr. Hardy stated that he did sign the letter at Tab 3 but did not draft it. It was drafted by his lawyer who recommended that he sign it. He again trusted his lawyer's advice. Mr. Hardy stated that he is not apologetic about the alleged statements because he cannot apologize for something he didn't do.

Mr. Townsend put to Mr. Hardy that his written response to the complaint is inconsistent with his testimony before the Committee. Mr. Hardy stated that he misunderstood the nature of the response letter, which his lawyer drafted for him and which he signed on the lawyer's advice. He stated that his testimony before the Committee is his actual response to the complaint. Mr. Townsend put to Mr. Hardy that he had been through the complaints process before and understands how it works. Mr. Hardy again stated that he relied on his lawyer's advice in submitting the written response at Tabs 3 and 4. He confirmed that he did not submit any other written response.

Mr. Hardy was excused as a witness.

Summary of Submissions:

Mr. Townsend made submissions on behalf of NBREA. He stated that there are two issues the Committee must decide.

First, the Committee must decide whose testimony to accept. ██████████ and Mr. Hardy gave two diametrically opposed versions of events. It is up to the Committee to determine on a balance of probabilities which version should be accepted as fact.

Mr. Townsend submitted that ██████████ testimony had all the hallmarks of credibility. Her version of events has never changed. She gave her evidence to the Committee in a clear and straightforward manner. Her evidence that she called NBREA and Exit Realty after hearing Mr. Hardy's statements is consistent with the way a person would behave in those circumstances. ██████████ called her back the following Monday, after speaking to Bryan Hardy, which Mr. Townsend submitted was corroboration that ██████████ did in fact make those calls.

Mr. Townsend submitted that Mr. Hardy' s evidence was not reliable. In particular, his evidence before the Committee was not consistent with the written response, he submitted to NBREA.

Mr. Townsend reiterated that the decision of whose testimony to accept must be made on a balance of probabilities. The Committee does not have to be certain that one version of events or the other is accurate but must determine which one is more likely y than not to be accurate.

The second issue the Committee has to consider is, if [REDACTED] version of events is accepted, does the alleged statement made by Mr. Hardy constitute professional misconduct? The question to be answered is whether it is behaviour that the Committee would expect from a professional Realtor. In Mr. Townsend's submission, the alleged behaviour falls below the standard that the profession should expect from its members and should be discouraged.

Mr. Hardy gave submissions to the Committee on his own behalf. He emphasized that upon receiving the complaint, he followed the advice of people he trusts and respects. In particular, he relied on his lawyer' s advice to send the May 16, 2019 cease and desist letter. He is now being portrayed as aggressive but submitted that he merely relied on the advice of a professional to send the letter.

Mr. Hardy professed his innocence in making the alleged statement to [REDACTED] on April 12, 2019. He stated that it simply did not occur. He was shocked and speechless upon receiving the complaint because he did not make the statement and would not do something like that.

The Chair noted that both parties would receive the Committee ' s written decision within a reasonable time period and adjourned the Hearing at 10:45 am.

Findings:

The Committee was unable to reach any findings of fact in this matter. The Committee determined that it could not prefer the evidence of either witness over the other. Both [REDACTED] and Mr. Hardy provided clear, forthcoming, straightforward evidence. The Committee was not able to discount the evidence of either witness or take issue with their credibility.

The onus to prove the alleged offence rests with the prosecution throughout. The Committee finds that the prosecution did not lead sufficient evidence to prove the alleged offence on a balance of probabilities. There were no other witnesses who observed the alleged interaction between [REDACTED] and Mr. Hardy. The Committee did not accept that the documentation in evidence corroborated [REDACTED] version of events such as to justify a finding of guilt as required by the *Act*.

In light of the lack of available evidence, and the Committee's determination that it cannot accept either witness's evidence over the other, the Committee is unable to find that the alleged offence has been proven on a balance of probabilities.

After considering all of the evidence and the submissions of the parties, the Committee determined that Bryan Hardy is not guilty of professional misconduct as stated in the charges contained in the Notice of Hearing.

In accordance with s. 25(I) of the *Act*, NBREA may appeal this decision within thirty (30) days from the date of the decision by application to the Court of Queen's Bench of New Brunswick.

Dated at Fredericton, New Brunswick, this 3 day of January 2020.



Anne Smith

Chair; on behalf of the Discipline Committee, File 2019-009