



Complaint 2021-070/071

NBREA v. David Shawn Arbeau & Marcella Poitras

A Discipline Decision produced by the Discipline Committee of the New Brunswick Real Estate Association in accordance with "*An Act to Incorporate the New Brunswick Real Estate Association*". This decision is published and distributed by the Office of the Registrar under the direction of the Discipline Committee of the NBREA.

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Recitals

DECISION OF THE DISCIPLINE COMMITTEE WITH RESPECT TO MERIT AND PENALTY

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* (the “Act”):

BETWEEN

The New Brunswick Real Estate Association (the “Association”)

-and-

David Shawn Arbeau & Marcella Poitras

RESPONDENT

Date of Hearing: July 20th, 2022, 1:30 pm

Place of Hearing: Teleconference

Members of Committee: Karl Merrill, Chair
Gordon Breau
Don Ketchum
Alexandre Bellefeuille
Andrea Steirle-MacNeil, Government Appointee

Appearances: Dominic Caron, Counsel for the Association
David Shawn Arbeau, Self-Representing Respondent
Marcella Poitras, Self-Representing Respondent

The Chair noted persons attending the hearing:

Present: N/A

Via Teleconference: Mr. Karl Merrill, Mr. Breau, Mr. Ketchum, Mr. Bellefeuille, Mrs. Steirle-MacNeil, Mr. Caron, Mr. Arbeau, Mrs. Poitras, Mr. Mitchell McLean (Registrar), Mr. Simon-Pierre Godbout (Discipline Committee Legal Counsel) and Mrs. Christine McLaughlin (Court Reporter).

Executive Summary

In the Spring of 2021, the complainant retained the services of Mr. David Shawn Arbeau of Exit Realty Elite of Grand Falls, to assist her in purchasing a residential property in Plaster Rock, New Brunswick. The Complainant was purchasing the property while being in Ontario and given the Public Health Protection measures in place under the Mandatory Order, was not permitted to enter the province to view the property in advance of the closing without staying in a designated covid hotel. Mr. Arbeau, while acting in a dual agency capacity representing both the buyer and seller, provided the Complainant with a video tour of the property where she would not be permitted to conduct an in person viewing due to Covid restrictions. These videos were presented in evidence and reviewed as part of the Complaint review.

According to the property listing found in the Local Boards MLS® System, the property was a four-bedroom home with two bathrooms with one having a full jetted tub. The property is also cited as having two heat sources, to include oil and wood with a forced air system.

Mr. Arbeau was also the listing salesperson for the property which meant that the parties to the Agreement of Purchase and Sale had entered into a Dual Agency Agreement. All of which was agreed to in writing, pursuant to the transaction documents presented to the Discipline Committee. The house was listed at \$74,900 and sold for \$72,000.

The original Complaint submitted to the Office of the Registrar contained the virtual showing videos, the listing photos, and upwards of 130 pictures documenting the patent defects in the house that had not been disclosed by Mr. Arbeau. The virtual showing videos and listing photos presented are stark in comparison to the photographic evidence of patent defects found by the Complainant after closing. Additionally, there was found to be no functioning heat sources in the property contrary to the information contained in the listing and the main sewer pipe in the property was seeping raw sewage into the basement which presented a strong odor throughout the house. All of which, were not disclosed by Mr. Arbeau to his buyer, the Complainant.

Where Mr. Arbeau was representing both the buyer and the seller, he was obligated to “disclose to the buyer defects about the condition of the Property known to the Agent” as contained in the dual agency agreement signed by the parties. Considering the disparity between the virtual walkthrough videos and the photos demonstrating the defects with the property, Mr. Arbeau failed his Buyer client in this regard and nearly exclusively represented the Seller in this transaction. In a dual agency relationship, the Agent is required to represent both Buyer and Seller impartially, which wasn’t the case.

As the Licensed Manager of Exit Realty Elite of Grand Falls, Mrs. Marcella Poitras had the duty and obligation to supervise the actions of Mr. Arbeau in the conduct of his duties as a manager. In this regard, Mrs. Poitras allowed the property to be falsely advertised as having two heat

sources and allowed Mr. Arbeau to misrepresent the condition of the property to the Complainant.

Mrs. Poitras met with the Complainant after the closing date and acknowledged that the property had no functioning heat sources, and that the property was not in the condition in which it was advertised. By way of representation or promise, Mrs. Poitras agreed to provide a heat source to the Complainant through an electrician that she knew, and that the lacking heat source would be remedied. After several attempts to secure an electrician by Mrs. Poitras, she eventually reneged on her commitment to provide a heat source to the Complainant and a heat source was not provided.

Prior to the hearing date, Mr. Arbeau, Mrs. Poitras, and Mr. Dominic Caron, prosecutor for the Association agreed to proceed on the basis of a Joint Submission to the Committee. In accordance with the Joint Submission, an amended notice of hearing was issued with a reduction or amalgamation of the charges contained in the original notice of hearing.

Under the Joint Submission:

Mr. David Shawn Arbeau was charged with five (5) counts of professional misconduct under the REALTOR® Code of Ethics on behalf of the New Brunswick Real Estate Association. The Discipline Committee accepted his admission of guilt on all counts and ordered that David Shawn Arbeau:

1. Pay a \$2500 fine;
2. Pay \$1000 in costs to the Association;
3. Publish the Decision to the NBREA Website with names; and
4. Publish the Executive summary of this decision to the membership by way of electronic dispatch with a link to the full decision on the website.

Mrs. Marcella Poitras was charged with two (2) counts of professional misconduct under the REALTOR® Code of Ethics on behalf of the New Brunswick Real Estate Association. The Committee Accepted her admission of guilt on all counts and ordered that Mrs. Poitras:

1. Pay a \$1000 fine;
2. Pay \$500 in costs to the Association;
3. Publish the Decision to the NBREA Website with names; and
4. Publish the Executive summary of this decision to the membership by way of electronic dispatch with a link to the full decision.

Introduction

This complaint concerns the Complainants claims that while they were being represented by Mr. David Shawn Arbeau, he misrepresented the condition of the property and falsely advertised that the property had two functioning heat sources when it in fact had none. Additionally, the Complaint against Mrs. Marcella Poitras concerned her failure to supervise the conduct and actions of one of her salespeople operating under her Agent (Company) as the manager for the Agent. All of which, constituting acts of professional misconduct under the REALTOR® Code of Ethics.

The Complaint was submitted to the Office of the Registrar primarily to ascertain if the complaint met the threshold required for professional misconduct, for Real Estate Professionals within the province of New Brunswick. Following an exchange of information between the Complainant and the Respondents as part of the information gathering process, the Complaint Committee reviewed the evidence presented for their review on 27th of April 2022 and rendered a decision to forward the matter to the Discipline Committee pursuant to s. 21(3)(a) of *the Act*.

In preparation for the hearing commenced before the Discipline Committee, the Registrar confirmed that the members were members of the New Brunswick Real Estate Association at or during the time of the alleged offences. The Respondents were provided with a list of the panel members in advance of the hearing and were given a reasonable amount of time to object to the composition of the committee. No such objections were received.

Before the decision of the Complaint Committee had been rendered in April, Mrs. Poitras and Mr. Arbeau were represented by legal counsel. Following the decision of the Complaint Committee, and before the pre-hearing conference with the Association's appointed prosecutor, the Respondent parties were contacted to ascertain if they were still being represented by legal counsel. The Registrar was informed by Mrs. Poitras, that neither party would be represented by legal counsel, and that they wished to proceed as self-represented parties in the Discipline process.

Jurisdiction

Under section 23(1) of the Act, the Discipline Committee shall, when so directed by the Complaints Committee, hear and determine allegations of professional misconduct or incompetence against a member of the Association. On 27 April 2022, the Complaints Committee rendered its decision in complaint matter 2021-070/071 so ordering the Discipline Committee to commence such a proceeding.

The Discipline Committee exists in legislation as an administrative legal body and is therefore not bound by the same rules of court as a court of law, and as such, may admit evidence that might not otherwise be deemed admissible in other courts. Where the Discipline Committee is

not bound by the Rules of Court, they are bound by the Complaints and Discipline Procedures Manual as approved by the Board of Directors of the New Brunswick Real Estate Association.

Legal Test

The standard of proof required in a hearing before the Discipline refers to the level of proof that must be met in order for the Discipline Committee to find a member guilty of an alleged offence. That level of proof, or threshold, is the civil standard of a “balance of probabilities” which is 51% or higher (i.e., is it more likely than not that the Respondent is guilty of one or more of the alleged offences).

The Association has the onus of providing the allegations against the Respondent, on a balance of probabilities, through documentation, submission and testimony given under oath or affirmation.

In the case of the Discipline Committee of the Association we may find a member guilty of professional misconduct or to be incompetent. Pursuant to s. 23 of *the Act*, a finding of professional misconduct or incompetence must meet the following criteria:

1. A member may be found guilty of professional misconduct if:
 - a. The member has been convicted of an offence which in the opinion of the Committee, is relevant to the member’s suitability to trade in real estate; or
 - b. The member has been guilty, in the opinion of the Committee, of professional misconduct.
2. A member may be found to be incompetent if:
 - a. The member has displayed in carrying out the members’ professional responsibilities a lack of knowledge, skill, or judgement, or disregard for the welfare of the public of such a nature or extent to demonstrate the member is unfit to carry out the responsibilities of a person engaged in trading in real estate; or
 - b. The member is suffering from a physical, or mental condition or disorder of such a nature or extent as to render the member unfit to engage in trading in real estate.

Where the parties have presented the Discipline Committee with a Joint Submission whereby the respondents have admitted guilt on the charges contained in the amended notice of hearing, the Committee must decide if based on the documentary evidence they were presented, the Joint Submission represents a just result for the parties and that such a result would not offend the carriage of justice. For the Committee to refuse a Joint Submission, the Committee must prove in their decision that the acceptance of such a Submission would be offensive to their decision-

making authority, and further bring the credibility of the Committee to such a state of disrepute as to render their credibility ineffective.

Issue

The issue in this complaint matter is whether the Discipline Committee supports the Joint Submission of the parties and find in favour that the Joint Submission does not offend the Committee and the carriage of justice.

Charges

Mr. Dominic Caron, representing the Association as the appointed prosecutor presented the following charges against Mr. David Shawn Arbeau:

Between June 2, 2021, and September 23, 2021, both dates inclusive, David Shawn Arbeau, being a member, as defined by *An Act to Incorporate the New Brunswick Real Estate Association*, Chap. 115, S.N.B., 1994 (the Act):

1. Did not promote the interests of the Complainant;
2. Did not deal fairly with all parties to the transaction including the Complainant;
3. Did not discover facts which a prudent REALTOR® would discover in order to avoid error or misrepresentation;
4. Failed to render skilled and conscientious service; and
5. Failed to accurately advertise 225 Main Street.

All as set out in the complaint dated September 23, 2021, thereby allegedly committing acts of profession misconduct, in violation of, *inter alia*, Articles 3, 4, 12, and 13 of the REALTOR® Code of Ethics and punishable under ss. 23(4) and 23(5) of *the Act*.

Mr. Caron further presented the following charges against Mrs. Marcella Poitras:

Between June 2, 2021, and September 23, 2021, both dates inclusive, Marcella Poitras, being a member, defined by *The Act to Incorporate the New Brunswick Real Estate Association*, Chap. 115, S.N.B., 1994(the Act):

1. Did not protect and promote the interests of the Complainant; and
2. Did not adequately supervise and control the activities of REALTOR® David Shawn Arbeau.

All as set out in the complaint dated September 23, 2021, thereby allegedly committing acts of professional misconduct, in violation of, *inter alia*, Articles 3 and 22 of the REALTOR® Code of Ethics and punishable under ss. 23(4) and 23(5) of *the Act*.

Background and Evidence

In the Spring of 2021, the complainant retained the services of Mr. David Shawn Arbeau to assist her in purchasing a house in Plaster Rock, New Brunswick. Mr. Arbeau was also the listing salesperson for the property which meant that the parties to the Agreement of Purchase and Sale had entered into a Dual Agency Agreement. All of which was agreed to in writing, pursuant to the transaction documents presented to the Discipline Committee.

The Complainant was purchasing the property while being in Ontario and given the Public Health Protection measures in place under the Mandatory Order, was not permitted to enter the province to view the property in advance of the closing without staying in a designated covid hotel. Mr. Arbeau, while acting in a dual agency capacity representing both the buyer and seller, provided the Complainant with a video tour of the property where she would not be permitted to conduct an in person viewing. These videos were presented in evidence and reviewed as part of the Complaint review.

According to the property listing found in the Local Boards MLS® System, the property was a four-bedroom home with two bathrooms with one having a full jetted tub. The property is also cited as having two heat sources, to include oil and wood with a forced air system. The house was listed at \$74 900 and sold for \$72 000.

The original Complaint submitted to the Office of the Registrar contained the virtual showing videos, the listing photos, and upwards of 130 pictures documenting the patent defects in the house that had not been disclosed by Mr. Arbeau. The virtual showing videos and listing photos presented are stark in comparison to the photographic evidence of patent defects found by the Complainant after closing. Additionally, there was found to be no functioning heat sources in the property contrary to the listing and the main sewer pipe in the property was seeping raw sewage into the basement which presented a strong odor throughout the house. All of which, were not disclosed by Mr. Arbeau to his Buyer, the Complainant.

Where Mr. Arbeau was representing both the buyer and the seller, he was obligated to “disclose to the buyer defects about the condition of the Property known to the Agent” as contained in the dual agency agreement signed by the parties. Considering the disparity between the virtual walkthrough videos and the photos demonstrating the defects with the property, Mr. Arbeau failed his Buyer client in this regard and nearly exclusively represented the Seller in this transaction. In a dual agency relationship, the Agent is required to represent both Buyer and Seller impartially, which wasn’t the case.

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Mrs. Poitras met with the Complainant after the closing date and acknowledged that the property had no functioning heat sources, and that the property was not in the condition in which it was advertised. By way of representation or promise, Mrs. Poitras agreed to provide a heat source to the Complainant through an electrician that she knew, and that the lacking heat source would be remedied. After several attempts to secure an electrician by Mrs. Poitras, she eventually reneged on her commitment to provide a heat source to the Complainant and a heat source was not provided.

As part of the Complaint, we also reviewed the Transaction Documents inclusive of the Agreement of Purchase and Sale, the Listing Agreement, the Sales Record Sheet, Working with a REALTOR® Form, Dual Agency Agreement, Extension of Conditional Offer, Inspection Waiver Form, Fullfillment and/or waiver of conditions Form, and the Final Inspection Form. We understand that the Complainant signed a final inspection form, and a waiver for a property inspection, however, we also note that these forms do not negate the obligation owed to the Complainant by Mr. Arbeau with respect to the Dual Agency Agreement to disclose patent defects with the property.

Prior to the hearing date, Mr. Arbeau, Mrs. Poitras, and Mr. Dominic Caron, prosecutor for the Association met to hold a pre-hearing conference to present the possibility of a Joint Submission to the Committee. The parties negotiated a Joint Submission, whereby an amended notice of hearing was issued with a reduction or amalgamation of the charges contained in the original notice of hearing.

As part of the Discipline file presented by the Registrar to the parties, and to the Committee, we reviewed the listing photos, the virtual walkthrough videos, the pictures of the defects in the property, the Complaint, and the subsequent responses from the Respondents' legal counsel, inclusive of texts between the parties. We also reviewed the notice of hearing presented to the parties, and the amended notice of hearing as a result of the prehearing conference between the parties.

Findings and Reasons

Having regard for the information presented to the Committee as evidence, the Committee accepts the Joint Submission agreed to by the parties. It is our view that the Joint Submission reflects the carriage of justice and is not offensive to the Committee or our role as a decision maker and is consistent with previous complaint matters presented and heard by this committee.

Decision

Pursuant to s. 23 of *the Act*, we accept the Joint Submission of the parties in that the parties agree that the actions of Mr. Arbeau and Mrs. Poitras in this transaction constitute Professional Misconduct.

Order

In light of the above and in accordance with the Joint Submission, we hereby order the following pursuant to s.23(4) of *the Act* for Mr. David Shawn Arbeau:

1. Mr. Arbeau is directed to pay a fine of \$2,500 CAD to the Association and is further directed to pay costs to the Association in the amount of \$1,000 CAD as reimbursement for costs incurred in the prosecution of this complaint matter.
2. Mr. Arbeau is further directed to pay the total amount of the fine and hearing costs (\$3,500 CAD) on or before the 30th day of September 2022.
3. Pursuant to s. 23(4) of *the Act*, we direct the Registrar to publish this decision in redacted form to protect the identity of the witnesses to the Association's website: www.nbrea.ca
4. Pursuant to s.23(4) of *the Act*, we further direct the Registrar to publish the Order of this decision including a link to the website decision to all members of the Association by way of electronic dispatch.

Given our findings, reasons, and decision, we hereby order the following pursuant to s. 23(4) of *the Act* for Mrs. Marcella Poitras:

1. Mrs. Poitras is directed to pay a fine of \$1 000 CAD to the Association and is further directed to pay costs to the Association in the amount of \$500 CAD as reimbursement for costs incurred in the prosecution of this complaint matter.
2. Mrs. Poitras is further directed to pay the total amount of the fine and hearing costs (\$1 500 CAD) on or before the 30th day of September 2022.
3. Pursuant to s. 23(4) of *the Act*, we direct the Registrar to publish this decision in redacted form to protect the identity of the witnesses to the Association's website: www.nbrea.ca
4. Pursuant to s.23(4) of *the Act*, we further direct the Registrar to publish the Order of this decision including a link to the website decision to all members of the Association by way of electronic dispatch.

In accordance with s. 25(1) of *the Act*, the respondent may appeal this decision within thirty (30) days from the date of the decision by application to the Court of King's Bench of New Brunswick.

Dated at Fredericton, New Brunswick this ^{15TH} day of September 2022

A handwritten signature in blue ink, appearing to read 'Karl Merrill', is written over a horizontal line.

Karl Merrill, Chair

Chair; on behalf of the Discipline Committee,

Complaint 2021-070/071