



Complaint 2021-075

NBREA v. Brad Thomas

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-

Brad Thomas

RESPONDENT

Date of Hearing: September 21st, 2022, 9:30 am

Place of Hearing: Teleconference

Members of Committee: Jean LeBlond, Chair
Don Ketchum
Shannon Auffrey
Alexandre Bellefeuille
Raphael Daigle, Government Appointee

Appearances: Dominic Caron, Counsel for the Association
Brad Thomas, Self-Representing Respondent

The Chair noted persons attending the hearing:

Present: N/A

Via Teleconference: Mr. Jean LeBlond, Mr. Ketchum, Mrs. Auffrey, Mr. Bellefeuille, Mr. Daigle, Mr. Caron, Mr. Thomas, Mr. Mitchell McLean (Registrar), and Mrs. Angie Buchanan (Court Reporter).

Executive Summary

In the spring of 2021, the Complainants retained the services of Mr. Brad Thomas of Colpitts Realty Ltd., to assist in their purchase of land in Fredericton, New Brunswick. Mr. Thomas presented the Complainants with three different lot plans, all located on the same street. The Complainants decided to place an offer on one of the lots, then entering into a Dual Agency Agreement with Mr. Thomas, where he represented both the buyers and sellers of the transaction. The Complainants expressed concern to Mr. Thomas regarding the clarity of the lot plans they were provided.

In the fall of 2021 after the closing date of their property, the Complainants were informed by their lawyer's office that their lot was only accessible by a 'Right of Way', an easement that they would be responsible for maintaining, sharing the maintenance cost with the other two lots originally shown to them by Mr. Thomas. All of which was not disclosed to the Complainants prior to their closing date. The Lot plans they had been provided as part of the transaction were in tentative form, and it wasn't until after closing that they were provided with the certified copy which outlined the Reciprocal Easement and Right of Way.

Prior to the hearing date, Mr. Thomas, and Mr. Dominic Caron, prosecutor for the Association mutually agreed to present a joint submission to the Discipline Committee. In accordance with the Joint Submission, an amended notice of hearing was issued to the respondent to reflect the agreement between the parties.

Under the Joint Submission:

Mr. Thomas was charged with Three (3) 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 in accordance with the Joint Submission, ordered that Mr. Thomas:

1. Pay a \$1,000 fine;
2. Pay \$500 in costs to the Association; and
3. Publish the Decision to the NBREA Website with names.

Introduction

This complaint concerns the Complainant's claims that during their real estate transaction to purchase land for the construction of a new home, Mr. Thomas of Colpitts Realty failed to protect and promote their interests, accurately advertise the lot they purchased, and did not discover facts which a prudent REALTOR® would discover to avoid error or misrepresentation. All of which constitutes an act 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 Complaints Committee reviewed the evidence presented for their review on 5th of May 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 Mr. Thomas was a member of the New Brunswick Real Estate Association at or during the time of the alleged offences. The Respondent was 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.

Mr. Thomas elected to proceed to the Discipline Committee's hearing without legal representation and participate in the Discipline process as a self represented party.

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 5 May 2022, the Complaints Committee rendered its decision in complaint matter 2021-075 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 Committee refers to the level of proof that must be met 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 respondent has 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. Thomas:

Between March 17, 2021, and October 19, 2021, both dates inclusive, Brad Thomas, 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 protect and promote the interests of his clients;
2. Did not discover facts which a prudent REALTOR® would discover in order to avoid error or misrepresentation; and
3. Failed to accurately advertise the subject property.

All as set out in the complaint dated October 20, 2021, thereby allegedly committing acts of professional misconduct, in violation of, *inter alia*, Articles 3, 4, 13, and 15 of the REALTOR® Code of Ethics and punishable under ss. 23(4) and 23(5) of *the Act*.

Background and Evidence

In the late Winter/Early Spring of 2021, the complainants retained the services of Mr. Brad Thomas for the purposes of purchasing a piece of vacant land for the construction of their new home in the Fredericton, New Brunswick. Mr. Thomas was also the listing salesperson for the vacant lot 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 listing for the vacant lot in question was listed with a description that the property “will have shared right of way. Culvert, ditching and crushed rock roadway is done. The original listing also included a blurred plot plan in tentative form of the property dated January 15th, 2020.

On or around the 26th of March, the complainants presented an offer on the vacant lot with the condition that they could secure a building permit on the lot. At that time, they requested that Mr. Thomas also provide them with the PID number for the lot where the plot plan provided to them

was too blurry to decipher the PID number or any other relevant details. Mr. Thomas followed up and provided them with a clearer tentative plot plan in electronic form that was easier to read.

On the 16th of April 2021, the parties entered into an Agreement of Purchase and Sale. The APS included a closing date of 29 July 2021, the Restrictive Covenants for the property, and included Schedule B, which was the undecipherable plot plan included in the original listing.

After closing on 29 July 2021, the Complainants reached out to the lawyer representing them in the transaction to obtain the transaction documents on the 7th of September 2021. On 1 October 2021, they received a note from their lawyer regarding the burdens of the right of way, and a certified copy of the plot plan for their lot dated February 10th, 2021. This was the first instance that the complainants had the opportunity to review the certified plot plan.

The notable difference between the tentative and certified plot plans produced in the transaction was that the certified plan included a Right of way note in the upper right-hand corner of the document that was not included in the tentative copy. The right of way note read as follows:

- 1. The right of way is to benefit and burden [the three lots].*
- 2. The right of way shown on this plan is not suitable for a public street. The Department of Transportation will not upgrade or maintain this right of way in the future. All maintenance services and improvements to the right of way are the responsibility of the property owners.*

Where the complainants were not given the most recent copy of the certified plot plan dated 10 February 2021 until after closing, there is a reasonable understanding that the complainants would not have otherwise known of the Reciprocal Easements on the property until after the transaction had been completed. Given that the plot plan was certified on 10 February 2021, it would not be unreasonable to expect that a copy of the certified plan could have been provided by Mr. Thomas to his buyer clients prior to the closing date of 29 July 2021.

Prior to the hearing date, Mr. Thomas and Mr. Dominic Caron, prosecutor for the Association met to hold a pre-hearing conference. The parties negotiated a Joint Submission, whereby an amended notice of hearing was issued.

As part of the Discipline file presented by the Registrar to the parties, and to the Committee, we reviewed the the Complaint, and the subsequent responses between the Complainant and Respondent inclusive of the documentary evidence provided by the parties. We also reviewed the notice of hearing, and the amended notice of hearing as a result of the pre-hearing conference.

Findings and Reasons

Having regard for the evidence and to the submissions made, the Committee accepts the joint submission. It is the finding of the Committee that the Joint Submission is just and is not offensive to the Committee as a decision maker. Further, the acceptance of the Joint Submission is consistent with matters heard by prior Committees.

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. Thomas 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. Thomas:

1. Mr. Thomas is ordered 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. Mr. Thomas is further ordered to pay the total amount of the fine and hearing costs (\$1,500 CAD) within thirty days of the date of this decision. If payment is not received by the prescribed deadline, the member will be suspended as a member of the Association until such time that the fine and costs are paid in full. The member will not be subjected to a reinstatement fee upon reinstatement in the event of a suspension.
3. Pursuant to s. 23(4) of *the Act*, we direct the Registrar to publish this decision with names to the Association's website: www.nbrea.ca.

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 17th day of October 2022

[Original Signed]

Jean LeBlond, Chair

Acting Chair; on behalf of the Discipline Committee,

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