



Complaint 2021-042

NBREA v. Trent Wilkins

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 *The New Brunswick Real Estate Association Act* (the “Act”):

BETWEEN

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

-and-

Trent Wilkins

RESPONDENT

Date of Hearing: November 15th, 2022, 9:30 am

Place of Hearing: Delta Fredericton Hotel

Members of Committee: Karl Merrill, Chair
Kevin MacDonald
Jeff Sherwood
Gordon Breau
Andrea Stierle-MacNeil, Government Appointee

Appearances: Dominic Caron, Counsel for the Association
Trent Wilkins, Self-Representing Respondent

The Chair noted persons attending the hearing:

Present:

Mr. Karl Merrill, Mr. MacDonald, Mr. Breau, Mr. Sherwood, Mrs. Stierle-MacNeil, Mr. Caron, Mr. Wilkins, Mrs. Hache (Respondent’s Manager), Mr. Mitchell McLean (Registrar), and Mrs. Laura Melles (Court Reporter).

Executive Summary

This complaint concerns the complainants' allegations that during the sale of their home, Mr. Wilkins, acting on behalf of the buyers, handed over the keys to the property prematurely. On the original closing day for this transaction, Mr. Wilkins secured the keys to the property for the purpose of having an internet service provider enter the property to initialize internet services. Unfortunately, the transaction failed to close as scheduled and was delayed for 7 days. During this time, Mr. Wilkins failed to secure the keys to the property and left them in the care of the future owners. Prior to closing, the sellers/owners of the property found empty alcohol containers in the home and a case of beer in the fridge indicating that the future owners had gained access to the property prior to closing.

Mr. Wilkins 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 found him guilty on all charges and ordered the following:

1. Pay a \$1000 fine;
2. Pay \$4000 in costs to the Association;
3. Take and successfully pass the REALTOR® Code of Ethics Course;
4. Attend an education seminar delivered by the Director of Education of NBREA to cover modules 1-11 of the 2019 MCPD course;
5. Publish the Decision to the NBREA Website with names; and
6. Publish a Notice to the Profession.

Introduction

This complaint concerns allegations from the Complainant that during the sale of their property, Mr. Trent Wilkins failed to adequately protect their property by allowing his client to have access to the property prematurely, failed to deliver skilled and conscientious service, engaged in conduct that is unprofessional and unbecoming of a REALTOR®, and did not deal with all parties fairly in the transaction. 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 allegations met the threshold required for a finding of professional misconduct for Real Estate Professionals within the province of New Brunswick. Following an exchange of information between the Complainant and the Respondent as part of the information gathering process, the Complaints Committee reviewed the evidence presented for their review on 10th of November 2021 and rendered a decision to direct the prosecutor of the Association to resolve this matter by way of a consent agreement pursuant to s. 21(3)(d) of *the Act*. The Complaints Committee decision contained the stipulation that should a Consent Agreement not be attainable, then the matter shall be forwarded to the Discipline Committee pursuant to s. 23(3)(a) of *the Act*. The Complaints Committee Decision was addressed to the Respondent on 8 December 2021.

Due to delays caused by the COVID 19 pandemic, the Consent Agreement process was not initiated until May of 2022. On the 9th of May, 2022, the Prosecutor for the Association contacted the Respondent and their manager to present the conditions of a consent agreement as ordered by the Complaints Committee. Mr. Wilkins was not available to review the terms and conditions of the Consent Agreement due to personal circumstances, however, his manager accepted the terms acting on his behalf and in his absence. An agreement was not reached between the NBREA Prosecutor and Mr. Wilkins resulting in this matter being referred to the Discipline Committee for a hearing pursuant to s. 21(3)(a) of *the Act*.

In preparation for the hearing commenced before the Discipline Committee, the Registrar confirmed that Mr. Wilkins 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 was given a reasonable amount of time to object to the composition of the committee. No such objections were received.

Mr. Wilkins was presented with a Notice of Hearing, the Record of Documents to be used at the hearing, and an Outline of Procedure for a Discipline Hearing, which included an explanation that the Respondent has the right to be represented by Counsel. Mr. Wilkins elected to proceed to the Discipline Committee's hearing without legal Counsel and participate in the 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 November 10th, 2022, the Complaints Committee rendered its decision in complaint matter 2021-042 ordering that the matter be resolved by way of consent agreement and that should such an agreement not be reached, the matter shall be forwarded to the Discipline Committee; necessitating this hearing.

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 proving 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.

Issue

The issue in this complaint matter is whether the actions of Mr. Trent Wilkins during the transaction subject to this complaint constitute professional misconduct or incompetence as prescribed by s. 23 of *the Act*.

Charges

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

Between June 1, 2021, and June 17, 2021, both dates inclusive, Trent Wilkins, 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 deal fairly with all parties to the transaction;
2. Failed to render skilled and conscientious service; and
3. Engaged in conduct that is unbecoming and unprofessional.

All as set out in the complaint dated July 17, 2021, thereby allegedly committing acts of professional misconduct, in violation of, *inter alia*, Articles 3, 12, and 21 of the REALTOR® Code of Ethics and punishable under ss. 23(4) and 23(5) of *the Act*.

Background and Evidence

Undisputed Evidence

In the winter of 2021, Mr. Trent Wilkins was requested to serve the buyers in this transaction in search of a property to purchase. Prior to this transaction, Mr. Wilkins had shown this property on 7 other occasions. The listing for the property subject to this complaint was situated in the Shediac area with the listing being held by another salesperson working for Creativ Realty. Given that Mr. Wilkins also works for Creativ Realty, the parties entered into a Dual Agency agreement and signed the required Dual Agency Agreement form.

On February 22, 2021, the parties to the transaction signed the Agreement of Purchase and Sale which included a Residential Property Disclosure Statement and stipulated a closing date of 1 June 2021. Under section 20 “Agency Relationship”, the drafter of the Agreement of Purchase and Sale filled in clauses a, b, and c, indicating that the sellers had representation with a REALTOR® of Creative Realty, the Buyers had representation with Mr. Wilkins of Creativ Realty, and that both parties had a Dual Agency Relationship with Creativ Realty.

Despite the closing date in the Agreement of Purchase and Sale listed as June 1, 2021, the property failed to close until 7 days later June 8, 2021.

Complainants Position

The complainants submit that shortly after the initial closing date of June 1, 2021, they re-entered the property to find an ashtray sitting on the front porch, cans and drink containers on the lawn, and a case of beer in the fridge; none of which had belonged to them given the property has been cleaned prior to the initial closing date. After finding the assorted debris and libations, the complainants contacted their REALTOR® to find out how this could have happened. The Complainants REALTOR® confirmed that the keys had been given to the Buyers early.

On cross examination by the Respondent, the witness for the complainants agreed that she was aware that the keys had been authorized to be released on the 1st of June 2021 so that an internet service provider could gain entry for installation. Where the property failed to close on the 1st, the internet was not installed and the complainants maintained that the key should have been collected by the Respondent until such time that the transaction had fully closed. The key handover for the internet service initialization was agreed to verbally.

Following the discovery of the early key handover, the Complainants met with Mr. Wilkins and his buyer clients to obtain the keys and to discuss the matter. The Complainants allege that during this meeting, Mr. Trent Wilkins acted rude and condescending as he was observed to be smirking and giggling during the interaction.

The Complainants maintain that Mr. Wilkins handed over the keys to their property to his clients on the 2nd of June 2021 without their consent. Their concern being that should something happen to their property, they would be held liable pursuant to clause 13 of the Agreement of Purchase and Sale whereby:

The property being purchased shall be and remain at the risk of the Seller pending completion of the sale...

Further, the Complainants opine that they should be entitled to compensation due to their experience of unprofessional behaviour and conduct of the respondent. They therefore ordered their lawyer to withhold 50% of the commission owed to Creativ Realty for the actions of Mr. Wilkins.

During the hearing, the complainants party to the transaction were not able to attend the hearing due to medical reasons. They sent a representative to provide testimony on their behalf where the representative was in attendance for some or part of the conversations had between the

Complainants and the Respondent. The representative was also in attendance at the property between the initial closing day and the date the property closed and witnessed the deficiencies noted with respect to the beverage containers. The representative acting on behalf of the Complainants was also the aunt, and an employee to the Complainants.

Respondents Position

Mr. Wilkins submits this he was retained by his clients in their purchase of their first home. He has 18 years of experience in organized Real Estate and that he has always prided himself by exuding a professional and affable demeanor to those he deals with in the conduct of his business.

During the submission of documentary evidence, Mr. Wilkins maintained that the property failed to close because the Sellers were in arrears on a lease maintained by a church in the local area. Mr. Wilkins opines that this should have been disclosed in section 10 or 14(c) of the Agreement of Purchase and Sale.

Mr. Wilkins confirmed that in preparation for closing on the 1st of June 2021, he obtained authorization from his colleague at Creativ Realty representing the Sellers to provide the key to the buyers for the purposes of installing internet. When the property failed to close, he did not collect the key from his Buyers, which he maintained was a non-issue. He further maintained that his colleague at Creativ Realty verbally agreed that the key could be released. As a matter of due diligence, Mr. Wilkins had his clients agree that they would not return to the property with the key, until they had been notified that the transaction had closed.

The key to the property wasn't returned to the Sellers until the 6th of June 2021, when the Sellers demanded that Mr. Wilkins retrieve the key from his clients. Mr. Wilkins submitted that he did not reach out to his clients prior as he deemed it to be a non-issue. He also maintained that no one gained entry to the property. Given that the property was soon to close, Mr. Wilkins argued that having the key a bit early wasn't a problem if the buyer party did not enter the premises.

When the parties to the transaction met following the discovery of the early key handover, Mr. Wilkins alleges that one of the complainants lunged at him, waving the key about, and demanded that Mr. Wilkins reimburse them \$2000 for the mix up with the key.

In response to the Complainants concerns about maintaining insurance on the property during the delayed closing, Mr. Wilkins argued that it couldn't have been that large of a risk, otherwise the complainants would have changed the locks once they discovered the Buyers had the key to their property.

On the matter of Professional Misconduct, it is Mr. Wilkins's position that the balance of this complaint matter should be assessed on whether the Complainants suffered real harm because of the early release of the key. Given that there are no financial implications of a real nature and there was no harm to the Sellers or their property, it should be concluded that this is not a matter of professional misconduct.

As part of the Discipline file prepared by the Registrar provided to the parties and to the Committee, we reviewed the Complaint, and the subsequent responses between the Complainant and Respondent inclusive of the documentary evidence. We also reviewed the notice of hearing, and the decision of the Complaints Committee. We have compiled the positions of the parties from this evidence, and in conjunction with the oral testimony presented at the hearing.

Findings and Reasons

As part of our review and assessment of the evidence before the Discipline Committee we noted an error in the Agreement of Purchase and Sale. Although this error does not mitigate or aggravate the charges and allegations brought forth by the Prosecution, we feel it necessary to ensure that it is addressed through our decision as a point of education. In the undisputed evidence, the drafter of the Agreement of Purchase and Sale filled out sections a, b, and c of clause 20 regarding “Agency Relationship[s]”. Where this transaction was conducted in a dual agency relationship, only clause 20(c) should have been completed. For greater clarity, clause 20 (a) and (b) are to be used when two separate agents are engaged in a transaction. Clause 20 (c) is reserved for dual agency relationships where only one agent is party to the transaction.

Before we begin to weigh the contested evidence of the parties, we must first address an irregular point. The prosecution presented a witness to the panel on behalf of their case that was not a party to the transaction, or the originator of the Complaint. Instead, the witness providing testimony was the Aunt of the complainant and also their employee. Given what could be construed as a conflict of interest, we must therefore make a finding as to the witness’s credibility with respect to her testimony. Where the complainants were unable to be present due to medical reasons, we accept the irregular witness, however, we do not assign the same weight and credibility to their testimony as we would have otherwise given the Complainants had they been present. Considering that, we still find the witness to be credible and reliable given that they presented no hearsay evidence and stuck to the facts that they were directly aware of.

Upon review of the evidence surrounding the release of a key on June 1, 2021, we conclude that the parties agreed to provide the keys to the buyers for the purposes of installing or initializing internet services. The Complainants maintain that the early disbursement of the keys was never agreed to in writing, however, in light of the testimony of the prosecution’s witness and the Respondent, we find that it is more likely than not that a verbal agreement was made between the parties to this affect. Although we agree this arrangement was agreeable to the parties, as a point of caution to members of the profession, such agreements should be made in writing as an amendment to the Agreement of Purchase and Sale, or at the very least, via email or text so that it can be presented as evidence in matters such as this.

When the property failed to close on June 1, 2021, the Respondent confirmed that he did not reach out to his clients to obtain the key that he had given them earlier in the day. Further, the Respondent’s position is that this was a non-issue where the transaction was set to close the following day. Had the Respondent collected the key from his clients at the earliest opportunity after having been informed the property would not close as scheduled, this incident could have

been avoided completely. It is our position that Mr. Wilkins failed to treat the sellers fairly by allowing his clients to remain in possession of a key to their property before closing. We further find that Mr. Wilkins failed to render skilled and conscientious services, conduct that is unprofessional by allowing this to continue for an additional five days before securing the property.

Where the buyers had access to the property prematurely, and in contradiction to the Agreement of Purchase and Sale, they had every possibility and the freedom to enter the property at will. The Respondent made arguments to the committee that he *specifically* gave them instructions that they were not to enter the property prior to being informed by their legal counsel that the property had closed. Mr. Wilkins further argued that this was him exercising due diligence to protect the sellers. Additionally, Mr. Wilkins argued that his clients hadn't entered the property. This leaves us to consider the evidence of the beer in the fridge and the empty beverage containers in the home.

The pictures provided in the documentary evidence were unclear as to the extent of the beer in the fridge, or the empty beverage containers in the home, however Mr. Wilkins clarified that the beer in the fridge and beverage containers were not left by his clients, but rather, a family member of his clients, therefore, his clients hadn't entered the property. Further, he argued that there were no damages reported to the home, and that this was a non-issue where the sellers had experienced no form of real loss and that it should not be considered professional misconduct.

We reject these notions outright.

Respecting the due diligence purported to be exercised by Mr. Wilkins, proper due diligence would have included retrieving the key to the property and returning or securing it. Providing instructions to his clients not to enter a property and leaving them with the key provided the potential for harm where the sellers were on the hook through their insurance per the Agreement of Purchase and Sale. In our opinion this was unskilled service.

Although the beer cans and libations were left in the property by the Client's parent, Mr. Wilkins is correct, his clients may not have entered the property. However, given the relations of the unauthorized party that entered the premises its abundantly clear that they gained entry to the property using the key they obtained from the buyers, who shouldn't have had access to the property. For added clarity, although not a direct client of Mr. Wilkins, we consider them to be members of the buyers' party through family relation.

For a finding of professional misconduct, it should be thoroughly understood that such a finding does not rely on there being real harm or loss to the complainant. When determining such a finding, real or perceived harm are considered. They can be construed to be either aggravating or mitigating factors, but neither must be present to make a finding of professional misconduct or incompetence. The primary focus in our findings are that of *potential harm* through the actions or inactions of our members.

During an interaction with the Complainants, when the parties attended the property for the return of the key, they felt that Mr. Wilkins acted rude and condescending because he was

smirking and giggling during their exchange. After viewing the Respondent during the hearing, we reject the notion that Mr. Wilkins was acting rude or condescending. We find that his behaviour of smirking and giggling were likely to be because of nervousness, rather than an intentional action.

Having considered the evidence, and our findings with respect to the positions of the parties, we find against the member that he:

1. Did not deal with all parties fairly;
2. Failed to render skilled and conscientious service; and
3. Engaged in conduct that is unprofessional and unbecoming of a professional.

Decision

Pursuant to s. 23 of *the Act*, it is our opinion that the actions of Mr. Trent Wilkins during this transaction constitute professional misconduct.

Order

In light of the above and in accordance with our findings, we hereby order the following pursuant to s.23(4) of *the Act*:

1. Mr. Wilkins 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 \$4,000 CAD as reimbursement for costs incurred in the prosecution of this complaint matter.
2. Mr. Wilkins is further ordered to pay the total amount of the fine and hearing costs (\$5,000 CAD) on or before the 1st day of August 2023. 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 be subject to a reinstatement fee upon reinstatement in the event of a suspension.
3. Mr. Wilkins is ordered to take and successfully pass the REALTOR® Code of Ethics Course as delivered online by the Canadian Real Estate Association. Upon completion of the course, the respondent must furnish the Registrar with a copy of the course completion certificate on or before the 1st day of August 2023. If a course completion certificate is not received by the prescribed deadline, the member will be suspended as a member of the Association until such time that a certificate of completion is furnished to the Registrar. The member will be subject to a reinstatement fee upon reinstatement in the event of a suspension.

4. Mr. Wilkins is directed to attend a three (3) hour Training Session delivered by the Director of Education of the NBREA to cover Modules 1-11 of the 2019 Mandatory Continued Professional Development Curriculum. The respondent must pass a learning comprehension assessment as Directed by the Director of Education following the completion of the Training Session. The training session must be completed by the 1st of August 2023. If a session completion confirmation is not received by the prescribed deadline, the member will be suspended as a member of the Association until such time that a session completion confirmation is furnished to the Registrar. The member will be subject to a reinstatement fee upon reinstatement in the event of a suspension. Modules 1 through 11 are comprised of the following topics:
 - a. Agency Essentials;
 - b. Agency in the Real Estate Industry;
 - c. Client Relationships Under Common Law Agency;
 - d. Introduction of Buyer Agency;
 - e. Concurrent Representation and Conflicts of Interest;
 - f. Exceptions to Dual Agency;
 - g. Alternatives to Dual Agency;
 - h. Agency Implications When a REALTOR® Changes Firms;
 - i. Agency Obligations After Client Relationship Has Ended;
 - j. Multiple Offers – Single Agency; and
 - k. Dual Agency and Multiple Offers.
5. Pursuant to s. 23(4) of *the Act*, we order the Registrar to publish this decision with names to the Association's website: www.nbrea.ca.
6. Pursuant to s. 23(4) of *the Act*, we further order the Registrar to publish a summary of this decision including a website link to the 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 7th day of March 2023

//Original Signed by Mr. Merrill, Chair//

Karl Merrill, Chair

Chair; on behalf of the Discipline Committee,

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