



# Complaint 2022-001

NBREA v. Fran McLean

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 A JOINT SUBMISSION

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-

Fran McLean

#### RESPONDENT

Date of Hearing: April 17<sup>th</sup>, 2023, 10:00 am

Place of Hearing: Teleconference

Members of Committee: Karl Merrill, Chair  
Gordon Breau  
Alissa Lee  
Don Ketchum  
Andrea Stierle-MacNeil, Government Appointee

Appearances: Dominic Caron, Counsel for the Association  
Fran Mclean, Self-Representing Respondent

The Chair noted persons attending the hearing:

Present: N/A

Via Teleconference: Mr. Karl Merrill, Mr. Breau, Mrs. Lee, Mr. Ketchum, Mrs. Stierle-MacNeil, Mr. Caron, Mrs. McLean, Mr. Simon-Pierre Godbout (Committee Counsel), Mr. Mitchell McLean (Registrar), and Mrs. Jodie Yerxa (Court Reporter).

## Executive Summary

In the winter of 2021/2022, Mrs. McLean conducted a showing of a property for a client of the Complainant while also representing the seller. Following the showing, Mrs. McLean, while representing the buyer, prepared an offer and conducted negotiations for the property in the absence of the Buyers' REALTOR<sup>®</sup>, further, she began acting as a Dual Agent for the transaction. Both Buyer and Seller didn't sign a Dual Agency Agreement until after most negotiations had been completed.

The Complainant alleged that these actions amount to the Respondent stealing her clients.

Prior to the hearing date Mrs. McLean and Mr. Dominic Caron mutually agreed to present a joint submission to the Discipline Committee.

Under the Joint Submission:

Mrs. McLean was charged with four (4) counts of professional misconduct under the REALTOR<sup>®</sup> Code of Ethics on behalf of the New Brunswick Real Estate Association. The Discipline Committee accepted her admission of guilt on all counts and in accordance with the Joint Submission, ordered that Mrs. McLean:

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

## Introduction

This complaint concerns allegations from the Complainant that while representing her buyer clients, Mrs. McLean stole her clients so that she might double end a transaction. In doing so she:

1. Failed to deal fairly with all parties to the transaction;
2. Failed to respect the agency or contractual relationship of the Complainant;
3. Has failed to disclose and seek written acknowledgement of her services as a REALTOR<sup>®</sup> through a signed dual agency agreement; and
4. Has failed to ensure that the listing agreement expresses the specific terms, conditions, obligations, and commitments of the parties to the agreement.

All of which constitutes an act of professional misconduct under the REALTOR<sup>®</sup> Code of Ethics.

The complaint was submitted to the Office of the Registrar primarily to ascertain if the complaint 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 29<sup>th</sup> of August 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 Mrs. McLean 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.

Mrs. McLean 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 the 29<sup>th</sup> of August 2022, the Complaints Committee rendered its decision in complaint matter 2022-001 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 and the respondent has admitted guilt on the charges contained in the 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 be satisfied that the acceptance of the Joint 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 Mrs. McLean:

Between December 30, 2021, and January 4, 2022, both dates inclusive, Fran McLean, 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. Failed to deal fairly with all parties;
2. Failed to respect the agency or contractual relationship of the Complainant;
3. Has failed to disclose and seek written acknowledgement of her role and nature of her services as a REALTOR<sup>®</sup> from her clients; and
4. Has failed to ensure that the listing agreement expresses the specific terms, conditions, obligations, and commitments of the parties to the agreement.

All as set out with respect to the transaction found in the complaint dated January 4, 2022, thereby allegedly committing acts of professional misconduct, in violation of, *inter alia*, Articles 2,3,6, and 20 of the REALTOR<sup>®</sup> Code of Ethics and punishable under ss. 23(4) and 23(5) of *the Act*.

## Background and Evidence

In the winter of 2021, the Complainant had been working with a set of buyer clients to secure a home in the Miramichi area. She had been working with these clients for months and was operating on an implied agency relationship with her clients. For clarity, implied agency refers to a relationship between members of the public and an Agent, despite the absence of a signed written contract to that effect. Where the Complainant's Buyers had been working with her for

nearly a year, and the Respondent was aware that the buyer had been working with the Complainant, it was reasonable to assume that the parties had the understanding that they were represented by the Complainant's Agent.

On or about the 30<sup>th</sup> of December 2021, the buyers found a property listed in Miramichi that piqued their interest. The Property was scheduled to be listed on the MLS<sup>®</sup> System of the local real estate board, however, due to the holiday season, the listing hadn't yet appeared on realtor.ca.

The Complainant's buyers reached out to her to schedule a viewing of the property; however, the Complainant was unable to do so as she was otherwise engaged with her sister's wedding. Instead, she organized that one of her colleagues within the same office would stand in her place and conduct the showing in her absence. The showing was scheduled for 1:30 pm 31 December 2023.

Prior to the scheduled showing, the buyers reached out to Mrs. McLean to verify that everything was set for the showing. Mrs. McLean confirmed, and as alleged by the Complainant, indicated to the buyers that the property could be seen earlier at 11:00 am. Following the advanced showing, the Complainant attempted to contact her clients to draft their offer on the property but was informed by the buyers that they "were told if we put in an offer right at 11 ... we were guaranteed the sale, so we didn't want to risk waiting and did that". Meaning that per the Complainant's submission, Mrs. McLean enticed the Complainant's buyers to submit the offer through her instead of the Complainant.

The Complainant submitted that this constituted the stealing or theft of her client by her colleague.

Per the written submission of Mrs. McLean dated 5 January 2022, Mrs. McLean confirmed that she was aware that these buyers had been working with the Complainant.

Following the Complaints Committee meeting on 29 August 2023, the prosecution laid the first charges 1 & 2 as previously outlined in the charges section of this decision. Before the hearing, Mrs. McLean provided a series of documents to the NBREA prosecutor which necessitated an amended notice of hearing to include two additional charges, charges 3 & 4 from the charges section.

From the additional documentation that had not been available to the Complaints Committee, text messages provided by Mrs. McLean showed that she had communicated offers between the complainant's buyers and her seller between December 31<sup>st</sup> 2021 and January 1<sup>st</sup> 2022. In a series of text messages between Mrs. McLean and her Seller, Mrs. McLean's seller indicated on 31 December 2021 that "there were people stopping and writing the number down. Want to see if any more offers come in". Per the same string of text messages later that evening, Mrs. McLean sent texts which stated:

1. MCLEAN: "Do you think we will get an answer tonight? And this one is at 4% that's savings of \$2369";



2. SELLER: “I think that there is going to be other offers”;
3. MCLEAN: “OK it’ only open until 5 pm”;
4. SELLER: “I’m fine with that. It can wait”;

The Mrs. McLean then continued to negotiate the purchase price, chattels and fixtures to be included in the Agreement or Purchase and Sale between the buyer and seller via text. Following the exchange of negotiations by text on 31 December 2021, Mrs. McLean sent her Seller client the following texts:

1. MCLEAN: “You have until tomorrow before 5 to make the decision, I will let them know you need more time. The 4% commission saves you \$2300 and that will cover your lawyer’s fee. We got you top dollar for your furniture that they didn’t need to buy it. They have two weeks to meet condition and if we push the price up too much they could walk if something else comes up as they had fall apart with another [firm] last week due to a bad inspection.
2. MCLEAN: “They were actually going to offer with [complainant’s company] and I swing them to our office to save you the 1%. Just keeping you in the loop.”; and
3. MCLEAN: “\*another firm and I swung them in our office meant to say”.

Mrs. McLean also provided a copy of:

1. Dual Agency Agreement: between Mrs. McLean, her Seller client, and the Complainant’s client dated 1 January 2022.
2. A Listing Agreement: between Mrs. McLean and her buyer client back dated to 30 December 2021 indicating the Commission of the transaction to be 5% or split at 2.5% where a Buyer Agent participated.
3. An Agreement of Purchase and Sale: dated 1 January 2022.

Prior to the hearing date, Mrs. McLean and Mr. Caron negotiated a Joint Submission for presentation to the Discipline Committee. As per the Joint Submission, Mrs. McLean accepted responsibility for her actions for the following:

1. Failing to deal fairly with all parties;
2. Failing to respect the agency or contractual relationship of the Complainant;
3. Failing to disclose and seek written acknowledgement of her role and nature of her services as a REALTOR<sup>®</sup> from her clients; and

4. Failing to ensure that the listing agreement expresses the specific terms, conditions, obligations, and commitments of the parties to the agreement.

As part of the Discipline file prepared by the Registrar and provided to the parties and to the Committee, we reviewed the Complaint, and the subsequent response between the Complainant and Respondent inclusive of the documentary evidence provided. We also reviewed the notice of hearing, and the decision of the Complaints Committee.

## 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 Mrs. McLean 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 Mrs. McLean:

1. Mrs. McLean is ordered to pay a fine of \$2,000 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. McLean is further ordered to pay the total amount of the fine and hearing costs (\$2,500 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](http://www.nbrea.ca).
4. 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 6 day of July 2023

//Original Signed by Committee Chair//

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Karl Merrill, Chair

Chair; on behalf of the Discipline Committee,

Complaint 2022-001