



# Complaint 2021-068

NBREA v. Haiming Niu

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.

Contents

**Recitals** ..... 2  
**Executive Summary** ..... 3  
**Introduction** ..... 4  
**Jurisdiction** ..... 5  
**Legal Test** ..... 6  
**Issue** ..... 7  
**Charges** ..... 7  
**Background and Evidence** ..... 8  
**Findings and Reasons** ..... 15  
**Decision** ..... 19  
**Order** ..... 19

## 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-

Haiming Niu

#### RESPONDENT

Date of Hearing: December 13<sup>th</sup>, 2022, 9:30 am

Place of Hearing: Microsoft Teams (Virtual Hearing)

Members of Committee: Karl Merrill, Chair  
Jeremy Deering  
Sarah Justason  
Chris Drysdale  
Andrea Stierle-MacNeil, Government Appointee

Appearances: Dominic Caron, Counsel for the Association  
Ellen Sterns, Assisting Mr. Caron  
Haiming Niu, Self-Representing Respondent

The Chair noted persons attending the hearing:

Present through MS Teams:

Mr. Karl Merrill, Mr. Deering, Mrs. Justason, Mr. Drysdale, Mrs. Stierle-MacNeil, Mr. Caron, Ms. Sterns, Mrs. Niu, Mr. Gagnon (Respondent’s Manager), Mr. McLean (Registrar), Mr. Zhao (Chinese Interpreter) and Mrs. Jodie Booker-Yerxa (Court Reporter).

## Executive Summary

This complaint concerns the allegations of the Complainants that during the purchase of their business, Mrs. Haiming Niu, acting on their behalf, failed to adequately represent them during the transaction. During the transaction itself, the complainants had been working with the respondent to secure a commercial business/property. During the primary viewings, the complainants noted several issues to be fixed or repaired prior to closing. These repairs of deficiencies were agreed to in two amendments to the Agreement of Purchase and Sale, agreed to by all parties. The complainants were unable to review any of the work completed where the respondent failed to organize and facilitate their closing inspection. Following closing, the complainants discovered that most of the requested work had not been completed per their agreement.

Mrs. Haiming Niu was charged with six (6) counts of professional misconduct under the REALTOR® Code of Ethics on behalf of the New Brunswick Real Estate Association. The Discipline Committee found her guilty on all charges and ordered the following:

1. Pay a \$3,000 fine;
2. Pay \$4,000 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 purchase of their property, Mrs. Haiming Niu failed to:

1. Protect and promote the interests of her clients;
2. Failed to deal fairly with all parties;
3. Failed to discover facts pertaining to the property;
4. Failed to disclose and seek written acknowledgement of her role while acting in Dual Agency;
5. Failed to obtain her clients consent in writing to a Dual Agency Relationship; and
6. Failed to render skilled and conscientious service.

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 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 consideration on the 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. Niu 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. Niu 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. Mrs. Niu elected to proceed to the Discipline Committee's hearing without legal Counsel and participate in the process as a self represented party.

Where the witness for the prosecution was unable to provide testimony under oath in English or French, a Chinese interpreter was assigned to provide consecutive translation. The testimony of the complainants was given in mandarin and translated back to the committee members in English by Mr. Zhao. Mrs. Niu accepted the interpreter and provided no objection to the interpretation services offered, or the accuracy of the translations.

## **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 August 29<sup>th</sup>, 2022, the Complaints Committee rendered its decision in complaint matter 2021-068 ordering that the matter 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 Mrs. Haiming Niu 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 Mrs. Niu:

Between April 1, 2021, and September 22, 2021, both dates inclusive, Haiming Niu, 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 protect and promote the interests of her clients;
2. Has failed to deal fairly with all parties to the transaction, including her clients;
3. Has failed to discover facts pertaining to the property [subject to the complaint];



4. Has failed to disclose and seek written acknowledgement of her role and nature of her services as a REALTOR® for her clients;
5. Has failed to obtain her client's consent in writing to a Dual Agency [Relationship]; and
6. Has failed to render skilled and conscientious service.

All as set out in the complaint dated September 22, 2021, thereby allegedly committing acts of professional misconduct, in violation of, *inter alia*, Articles 2, 3, 4, 5, and 12 of the REALTOR® Code of Ethics and punishable under ss. 23(4) and 23(5) of *the Act*.

## Background and Evidence

### Undisputed Evidence

The Complainants began working with Mrs. Niu in the winter of 2021 in the hopes of securing a commercial property for their new business venture. The respondent provided the complainants with a list of properties to assist them, one of which was the property subject to this complaint. Prior to this, the respondent had also represented the buyers on the purchase of their personal residential property in 2020 upon their arrival in Canada.

The subject property was a multiunit commercial property located in the Moncton area comprised of the following:

1. A convenience store on the ground floor;
2. A basement below the building; and
3. 5 residential rental units.

On April 1<sup>st</sup>, 2021, one of the complainants attended the property to conduct a viewing before submitting an offer. The showing was attended by one of the complainants, the

respondent, the seller, and the listing REALTOR®. The showing included the convenience store and surrounding environment, 2 of the 5 apartments, and the basement, which was notably obstructed due to garbage and debris. Where the listing REALTOR® and buyer's REALTOR® belonged to the same Agent, this was a dual agency transaction.

On April 8<sup>th</sup>, 2021, the buyers submitted an offer on the commercial property through the assistance of Mrs. Haiming Niu. The offer included several standard clauses found in an agreement of purchase and sale, but most notably:

1. Clause #2 – Closing Date

- a. *“...Vacant Possession of the property shall be given to the buyer unless otherwise specified. The Seller shall ensure that the property is available for the pre-closing inspection by 9:00 am on or before the 31<sup>st</sup> day of May, 2021”*

2. Clause #11 – Additional Terms and Conditions:

- a. *“The Seller will provide the buyer all the lease/tenants info for all the 5 apartments on or before April 15th, 2021.”*
- b. *“The seller will clean out the various items in the basement before closing date unless otherwise stated.”*
- c. *“The Seller, at the seller's cost, have all the heat pumps, air exchanger, oil heating system services by profession before closing date.”*
- d. *“The Business (assets, inventory, supplier, training) is not included in the purchase price, will be listed in the amendment.”*

The Agreement of Purchase and Sale was further amended on three occasions. First on April 9<sup>th</sup>, 2021, then on April 23<sup>rd</sup>, and again on April 30<sup>th</sup>. The following series of insertions and deletions were made in the corresponding amendments:

1. April 9<sup>th</sup>, 2021

- a. Insertions:

- i. *The business itself is sold to the buyer for [amount]. The buyer will pay the first [amount] on condition day Apr 23, 2021. The other [amount] will be paid on closing day.*
- ii. *The seller will provide than assets list before April 15, 2021, both parties need to sign it to confirm the items that remained at the store.*
- iii. *The seller will provide 1-2 weeks of training for free to help the buyer continue the business. The training could be starting from the condition day or the closing day.*

b. Deletions:

- i. [none]

2. April 23rd, 2021

a. Insertions:

- i. *The condition for Inspection extends to Apr 30, 2021.*

b. Deletions:

- i. *The inspection condition day set for Apr 23, 2021.*

3. April 30th, 2021

a. Insertions:

- i. *The seller will be responsible for the works listed below to be completed before closing day:*
  - 1. *Repair and paint the side porch roof, ceilings at the store area.*
  - 2. *Clean the sump pit and have a qualified contractor to review and replace the old sump pump.*
  - 3. *Remove old boiler unit, furnace, oil tank and heat pipes.*
  - 4. *Set new electric heater for the apt No. 3 which will use the old oil system.*

ii. *The purchase price for the variety store will be [increased amount], deposit of [increased amount] to be paid by April 30, 2021, balance of [remaining amount] on closing.*

b. Deletions:

i. *The inspection.*

ii. *The purchase price for the variety store of [lower amount].*

The Complainants were also provided with a Residential Property Disclosure Statement (RPDS). The RPDS included several disclosure statements and their corresponding responses from the seller. The following were most relevant to these proceedings:

1. *This property disclosure statement is being made by the seller in his/her capacity as the owner of the property, who has owned the property for approximately 35 years.*
2. *Are there any structural problems, damage, or leakage in the foundation? "NO"*
3. *Are there any structural problems, damage, leakage, or dampness with the walls, roof or roof covering? "NO"*
4. *Is there, or has there been, any damage due to wind, fire, humidity, flooding, pests, rodents or insects? "NO"*
5. *Is there, or has there been evidence of any moisture and/or water damage in the structure? "NO"*
6. *Are there any mould/mildew problems in the property? "NO"*

### **Complainants Position**

The following are the summarized positions of the Complainants:

1. That they were new to the area after moving to Canada from China. The commercial property in question was to assist them in fulfilling the conditions of their immigration application through the Provincial Nominee Program.

2. An inspection was completed on the property on April 21<sup>st</sup>, 2021, however, due to obstructing garbage and debris, the basement and foundation could not be fully inspected. The Complainants allege that Mrs. Niu recommended that they conduct a follow up inspection to be completed after closing.
3. During the Offer process, Mrs. Niu articulated to the Complainants that the roof had been replaced in the last 5 years.
4. One of the Complainants attended the property on closing day to conduct the pre-closing inspection, however, the building was locked and no one else was there. No pre-closing inspection was completed on the property.
5. On the day of the closing inspection, the attending Complainant called the Respondent to request if she or the sellers would be attending the closing. Mrs. Niu informed her that she would have to contact the sellers for the pre-closing inspection as it is not for her.
6. Where the closing inspection could not be completed prior to taking possession of the property, the Complainants were unable to review the conditional work that was to be completed prior to closing.
7. Upon closing, the Complainants found that contrary to the Agreement of Purchase and Sale, the basement had not been cleaned prior to closing, that there had been extensive

water damage to the property, cracks in the foundation, mold, and leaking pipes. This was noted both visually, and through the follow up inspection.

8. The Complainants paid \$4,200 to have the property cleaned and the garbage removed to satisfy the agreed state the property was to be in on closing. It took at least two “FERO” dumpsters to clear the garbage and debris from the property.
9. The approximate cost of repairing the foundation in the property was estimated to be between \$250,000 - \$300,000.
10. That they were never provided a Dual Agency Agreement to provide their written consent to entering a Dual Agency relationship.
11. One of the Complainants did attend the property for two weeks prior to closing, but the Complainants maintain that this period was exclusively for the purposes of training and understanding the convenience store aspect of the commercial property.
12. As their representative, Mrs. Niu failed to ensure that the property was in the condition as stipulated in the Agreement of Purchase and Sale and its subsequent amendments.
13. Mrs. Niu told them that there was nothing she could do to assist them once the property had closed, and that if they were unsatisfied with their purchase, they could attempt to re-sell it while the market was still hot.

14. That the sump pump had not been replaced per the Agreement of Purchase and Sale and its subsequent amendments.

15. That the pictures presented in the Complaint file accurately depict the true state of the property and the issues found after closing.

### **Respondents Position**

The following points summarize the positions of the Respondent:

1. She has been a REALTOR® since 2017.
2. Mrs. Niu maintains that only one of the complainants was her client; not their partner who filed the complaint on their collective behalf.
3. The buyer attended the property for a period of two weeks prior to the closing date and had all reasonable access and ample opportunity to conduct a closing inspection and review the maintenance progress.
4. An inspection of the property was completed on April 21<sup>st</sup>, 2021, and provided the Complainants with adequate disclosure of the areas of concern related to the property.
5. The Seller didn't accurately disclose the condition of the property in the Residential Property Disclosure Statement. Where she represented the Complainant's as buyers, this was outside of her responsibility.

6. The RPDS states that the roof was 5-10 years old.
7. Despite the Complainants allegations, the sump pump was replaced, just not with a “*brand new*” model.
8. Mrs. Niu assisted her clients for 1.5 months following the closing date in coming to some sort of agreement between her clients and the seller.
9. The seller agreed to pay \$4,200 for the cleaning of the property, however, refused to pay \$153,000 + HST for the repairs required to the foundation.
10. Ultimately, Mrs. Niu ceased assistance with the complaints where nothing could be done any further following a break down in post-closing negotiations.

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**

In consideration of the evidence and positions of the parties, we find that where the Complainants were new to Canada, the REALTOR<sup>®</sup> representing them in this transaction owed



her clients a higher standard of care given they were otherwise unaware of how the real estate industry works within this jurisdiction. Further, it is our position that this is the very reason that the Complainant's used the respondent as their REALTOR<sup>®</sup> not only for the purchase of their residential property the previous year, but for this transaction as well.

With respect to the testimony of the complainants we must address that their testimony was given in mandarin and translated by an appointed translator on a consecutive translation basis. In light of the consecutive translation, we find the testimony of the complainants to be credible and reliable. Mrs. Niu called their testimony into question where the wife of the complainant was the only person party to the transaction leading up to closing. Therefore, the complaint should have been submitted by her and not her husband after closing following his return from training in Montreal.

We find this to be unreasonable. Where this transaction was for the mutual benefit of both complainants and their business, it does not restrict one complainant from submitting a complaint over that of another. The testimony provided by each complainant during the hearing was limited to that of only those actions and conversations to which they were a direct party.

Given that this transaction occurred in a Dual Agency capacity with Re/Max Quality Real Estate of Moncton, we searched the file for a Dual Agency Agreement that would demonstrate that the parties agreed and consented to the limitation of representation and disclosure that are necessary in such an agency relationship. To our dismay, no such agreement could be found in the record of evidence. The day prior to the hearing, Mrs. Niu did provide the committee with a Dual Agency Agreement, however, it was the agreement from the purchase of the complainant's residential property that had transpired the year prior. For this reason, we consider this dual

agency agreement to be irrelevant and find that Mrs. Niu failed to inform her clients of the limitations on representation when entering into a Dual Agency Agreement.

This constitutes a failure to disclose and seek written acknowledgement of her role and nature of her services as a REALTOR® in this transaction. Further, it demonstrates the respondent's failure to obtain her clients consent to a Dual Agency Agreement.

Where the positions of the parties differ respecting the closing inspection, we considered the Agreement of Purchase and Sale, and the actions of the Complainant on the day of closing. Per clause 2 of the Agreement of Purchase and Sale, the "seller shall ensure that the property is available for pre-closing inspection by 9 a.m. on or before the 31<sup>st</sup> of May 2021". The Complainant also attended the property at 9 a.m. on the day of closing, per the APS which gives us no reason to doubt that she was of the assumption that this was in fact the date and time that the closing inspection was to be completed.

The Respondent opined that where the complainant had been in the property for the two weeks prior to the closing date, it was a reasonable assumption that she had ample opportunity to view the property prior to closing. Further, the respondent's manager, and listing agent for the property testified under oath to the same effect.

In light of the positions of the parties, we find it unreasonable to expect that the Complainants would have conducted the pre-closing inspection in the property during their business training period. The business training was conducted on the first floor of the property, and the deficiencies noted in the transaction were almost exclusive to the basement, a place which there would be no expectation for business training to transpire. Where the complainant

attended the property on the date and time specified in the APS, we have no reason to believe that there had been any communication between the parties to the contrary.

Further, we want to make it expressly clear that the responsibility to conduct a pre-closing inspection lied with both REALTORS® involved in this transaction. Where the matter at hand is limited in scope to only those actions of the respondent, we must consider and weigh the evidence accordingly. Mrs. Niu was perfectly aware of the state in which the property was to be handed over on closing day given the APS and subsequent amendments. A prudent REALTOR® would have ensured that the agreed requests of the parties would have been remedied prior to closing which included the basement cleaning, replacement of a sump pump, some painting, and additional repairs.

When we considered the evidence regarding the state of the basement of the property, inclusive of water and structural damage, these obvious defects had been hidden from plain view when the Complainants completed their initial walk through and during their subsequent inspection prior to closing. The garbage in the basement was to such a nature or extent to necessitate the purchasers to amend the Agreement of Purchase and Sale to ensure that the property was cleaned prior to closing. This had been confirmed by the property inspector in their inspection report where they recommended that the basement be re-inspected once the garbage had been removed.

It is our firm belief that Mrs. Niu's failure to conduct a pre-closing inspection with her clients could have otherwise prevented this complaint. By not representing her client's best interests in the transaction in neglecting to conduct and organize a preclosing inspection, she failed to discover the garbage in the basement, that the sump pump that had been replaced with a used model, the water damage in the basement, and the structural cracks in the foundation. All of

which constitutes the failure of a professional to render skilled and conscientious service to her clients.

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

1. Failed to protect and promote the interests of her clients;
2. Failed to deal fairly with all parties;
3. Failed to discover facts pertaining to the property;
4. Failed to disclose and seek written acknowledgement of her role while acting in Dual Agency;
5. Failed to obtain her clients consent in writing to a Dual Agency Relationship; and
6. Failed to render skilled and conscientious service.

## **Decision**

Pursuant to s. 23 of *the Act*, it is our opinion that the actions of Mrs. Haiming Niu 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. Mrs. Niu is ordered to pay a fine of \$3,000 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. Mrs. Niu is further ordered to pay the total amount of the fine and hearing costs (\$7,000 CAD) on or before the 15<sup>th</sup> day of February 2024. 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. Mrs. Niu is ordered to take and successfully pass the REALTOR<sup>®</sup> 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 15<sup>th</sup> day of February 2024. 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. Mrs. Niu 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 15<sup>th</sup> of February 2024. 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](http://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 6<sup>th</sup> day of July 2023

//Original Signed by Committee Chair//

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Karl Merrill, Chair  
Chair; on behalf of the Discipline Committee,  
Complaint 2021-068