



Complaint 2022-042

NBREA v. Phyllis Daigle

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..... 5
Issue..... 7
Charges 7
Background and Evidence 7
Findings and Reasons 11
Decision 13
Order..... 14

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-

Phyllis Daigle (the “Respondent”)

Date of Hearing: April 17th, 2024, 9:30 am

Place of Hearing: Microsoft Teams, Virtual.

Members of Committee: Karl Merrill, Chair
Chris Drysdale
Jeff Sherwood
Joan Hayes
Michele Morin, Government Appointee

Appearances: Dominic Caron, Counsel for the Association

The Chair noted persons attending the hearing:

Present: Mr. Merrill, Mr. Drysdale, Mr. Sherwood, Mrs. Hayes, Mrs. Morin, Mr. Caron,
Mr. Mitchell McLean (Registrar), and Mrs. Peggy Blackwell (Court Reporter).

Absent: Mrs. Phyllis Daigle, Self-Representing Respondent.

Executive Summary

[1] This Complaint concerns the actions of a REALTOR® that occurred during a transaction in which the Respondent committed a series of mistakes in representing her clients. Mrs. Daigle, while representing her buyer clients, misrepresented the status of the transaction by congratulating her clients and indicating that they had secured the property that they had submitted an offer on. Unfortunately, their offer was accepted as a “back up” offer and they were not the successful purchasers of the home.

[2] Mrs. Daigle 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 her guilty on all counts and ordered that:

1. Mrs. Daigle pay a \$2,000 fine;
2. Mrs. Daigle pay \$2,000 in costs to the Association;
3. Mrs. Daigle be required to re-take and successfully complete the Pre-Licensing courses of study inclusive of the exam;
4. It recommends to the Director of Consumer Affairs that FCNB impose conditions and limitations on the right to trade in real estate until such time that the Respondent has completed the required courses of study as specified by the Discipline Committee; and
5. The Decision be published on the NBREA Website with names;
6. A Notice to the Profession be published.

Introduction

- [3] This Complaint concerns allegations from the Complainants that during the time in which the Respondent represented them as a salesperson, the Respondent did not protect and promote their interests, did not discover facts that a prudent REALTOR® would be expected to discover, and failed to render conscientious service. All of which constitutes an act of professional misconduct under the REALTOR® Code of Ethics.
- [4] 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. The Complaint and all information presented as evidence supporting the Complainants' Claims were presented to the Respondent, who was provided until July 5th, of 2022 to respond. The exchange of information ensued with a response from the Respondent on July 4th, a response from the Complainants on July 20th, 2022, and a final response from the Respondent on August 9th, 2022.
- [5] The Complaints Committee reviewed the evidence presented by the Complainants and the Respondent on the 27th day of September 2023 and rendered a decision to forward the matter to the Discipline Committee pursuant to para. 21(3)(a) of the *Act*.
- [6] In preparation for the hearing commenced before the Discipline Committee, the Registrar confirmed that Mrs. Daigle 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.

[7] Mrs. Daigle was provided a Notice of Discipline Hearing on March 11, 2024. In response, Mrs. Daigle replied on March 14, 2024 that she was electing to not attend the Discipline Hearing after obtaining legal advice from her independent legal counsel. Mrs. Daigle did not attend the Discipline Hearing held on April 17, 2024.

Jurisdiction

[8] Under subsection 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 September 27th, 2023, the Complaints Committee rendered its decision in complaint matter 2022-042 so ordering the Discipline Committee to commence such a proceeding.

[9] 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

[10] 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).

[11] 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.

[12] 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(2) 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, in accordance with s. 23(3) of the *Act*, if:
 - a. The member has displayed in carrying out the members’ professional responsibilities a lack of knowledge, skill, or judgment, or disregard for the welfare of the public of such 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

[13] The issue in this complaint matter is whether alleged actions of Mrs. Daigle constitute professional misconduct or incompetence as prescribed by s. 23 of the *Act*.

Charges

[14] Mr. Dominic Caron, representing the Association as the appointed prosecutor, presented the following charges against Mrs. Daigle:

Between June 2nd, 2022, and June 14th, 2022, both dates inclusive, Phyllis Daigle, 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 her clients;
2. Did not discover facts which a prudent REALTOR[®] would discover in order to avoid error or misrepresentation; and
3. Failed to render skilled and conscientious service.

All as set out in the complaint dated June 14th, 2022, thereby allegedly committing acts of professional misconduct, in violation of, *inter alia*, Articles 3, 4, and 12 of the REALTOR[®] Code of Ethics and punishable under ss. 23(4) and ss. 23(5) of the *Act*.

Background and Evidence

[15] The Complainants attended the Discipline Hearing and provided oral evidence. As mentioned above, Mrs. Daigle did not attend to provide oral evidence.

- [16] In or about the beginning of June of 2022, Mrs. Daigle was contacted by prospective buyers regarding a property situated in the Summerfield, NB, area of Carleton County. The property was listed by another Agent operating in that same area. Mrs. Daigle had been working with these buyers since March 2022.
- [17] On June 3rd, 2022, Mrs. Daigle was informed by the listing salesperson that there was an accepted offer on the property but that the Complainants could still view the property and that his clients were open to accepting backup offers. This was not communicated to Mrs. Daigle's clients.
- [18] The following day, Mrs. Daigle showed the property to her buyer clients and was directed to create an offer for the subject property with no conditions to be submitted to the vendors with a 24-hour window of acceptance. That evening, they received the completed offer from Mrs. Daigle, and signed it immediately.
- [19] On June 5th, 2022, Mrs. Daigle informed her clients that their offer had been accepted and they would be the new owners of the subject property. This was done via text stating "Are you ready for this bit? CONGRATULATIONS". Following the congratulatory message from Mrs. Daigle, the parties began working on next steps such as the deposit, and timelines.
- [20] Mrs. Daigle went insofar as to begin coordinating the payment of the deposit to be held in trust as part of the transaction. Unfortunately, the first email Mrs. Daigle provided was the wrong email address for the e-transfer, which necessitated a second e-transfer being sent by the buyers. The buyers opine that this was done intentionally, while Mrs. Daigle maintains that this was an honest error.

[21] Following the collection of the deposit from her buyers, Mrs. Daigle sent them an amendment to the Agreement of Purchase and Sale (“APS”). As part of the amendment, the closing date had been pushed back from their initial offer. It was at this time that the buyers began to grow suspicious of their accepted offer. As far as they were concerned, their initial offer had been accepted, but they had yet to see any documents with the signatures of the vendors. At this point, the buyers asked Mrs. Daigle if the vendors had actually signed their initial offer to which she responded via text again stating “yes, they have signed the first closing deal and it’s all finished. The amendment is still not done. But they have until 9 today for the earlier closing :) i.”

[22] As part of her written rebuttal to the Complaint, Mrs. Daigle stated that she got a text from the listing salesperson indicating that “The seller is accepting the backup offer. But it will probably be tonight before I get it signed up.” Mrs. Daigle went on to indicate that she understood this text message to mean that her buyer was becoming the primary offer. This is why she had notified her buyers that they had a successful transaction.

[23] Mrs. Daigle provided the Committee with information that she was not aware that, when sending web forms, some fields auto populate data. As such, she missed that the counteroffer section of the APS had been left open for entry by the vendors. When the original APS was sent, the listing salesperson countered the Complainants’ offer and indicated that “along with the following amendments. This offer is being accepted in the form of a backup offer and will come into effect on June 17, 2022, if the offer in first place becomes null and void. The buyer may rescind this offer at any point while it is a backup offer.” Mrs. Daigle had missed this addition when the APS was signed by the vendors and neglected to inform her clients.

They were also unaware of the counteroffer as they were under the impression that the additional document they had signed was an amendment.

[24] On June 7th, 2022, the listing salesperson informed Mrs. Daigle that he would not accept the \$2000 deposit on the property where the Complainants' offer was only a backup offer, until June 17, 2022.

[25] Shortly thereafter, Mrs. Daigle contacted her clients to inform them of the "misunderstanding" and that they could remain a back up offer for this property until June 17th, or just walk away, or purchase another home at any time, and get their deposit back. As part of this conversation, the Complainants requested all signed documents pertinent to the transaction to date. It was at this time that they pieced together what had occurred.

[26] On June 8th, 2022, Mrs. Daigle articulated that she was directed by her Agent Owner and manager to have no contact with her clients and to delete any personal information about the clients that she may have had in her possession. Mrs. Daigle's written submissions provided that she followed this direction. The same day, the manager of the agent issued the Complainants a cheque for the \$2000 that had been held in trust as a deposit on the subject property.

[27] As part of the Discipline file prepared by the Registrar and provided to the parties and to the Committee, the Complaint and the subsequent responses provided by the parties were reviewed. The Notice of Hearing, the email from Mrs. Daigle indicating she would not be attending the hearing, and the decision of the Complaints Committee were also reviewed.

Findings and Reasons

[28] This complaint file presented the Committee with an unusual situation where the Respondent failed to appear before the Committee pursuant to the Notice of Hearing issued by way of ordinary service. We therefore had to decide whether to continue in the Respondent's absence or not. As a matter of procedural fairness, we confirmed with the Compliance and Finance Assistant of NBREA, Mrs. Kelsey MacNeil, under sworn testimony, that the Respondent had been notified of the Complaint, provided a copy of the Complaints Committee Decision, and that the Notice of Hearing had been issued to the Respondent. Mrs. MacNeil confirmed that the Mrs. Daigle had in fact received the Notice of Hearing, and further, had responded indicating that, after consulting legal counsel, she was advised not to attend.

[29] This matter is further complicated by the fact that Mrs. Daigle had left the industry on December 30th of 2022. Despite Mrs. Daigle no longer being a member of the New Brunswick Real Estate Association, she is not absolved of her responsibility or conduct as she was a member of the Association at the time of the alleged offences. Absolving Mrs. Daigle of her responsibilities when acting as a member simply because she is no longer a member would frustrate the intent of our legislation to protect the public as a measure of consumer protection, and further obfuscate the responsibility for NBREA to ensure that Real Estate Professionals adhere to their Code of Ethics. Further, s. 2 of the *Act* defines a "member" broadly for the purposes of disciplinary action as including a member who has resigned. For these reasons, the matter must be heard in Mrs. Daigle's absence and despite her lack of membership with the NBREA as of the day of the hearing. To interpret our statute

any differently would provide for the ability for members to leave the profession after being referred to the Discipline Committee as a means of avoiding justice or sanction. Such an interpretation would be absurd and contrary to the *Act*.

[30] In review of the information provided by both the Respondent and the Complainants, it is clear that the allegations that Mrs. Daigle intentionally misled her clients as to the status of the transaction is unsupported. Our position as a Committee is that Mrs. Daigle, as confirmed by her written submissions, exercised a lack of skill which led to this Complaint, but that her actions were unintentional. We have no evidence to support that any of Mrs. Daigle's actions were anything but errors and mistakes. As such, we viewed this, as well as her willingness to admit this in her response to the Complaint as a mitigating factor, which is reflected in the recommended sanctions.

[31] After reviewing the timeline of events and the evidence presented by the parties, it was sufficiently clear that the APS was accepted as a back up offer. From the initial text message entered in the record and confirmed by Mrs. Daigle in writing, the Listing Agent was clear that there was already an accepted offer on the property prior to Mrs. Daigle booking a showing for her clients. Mrs. Daigle's failure to communicate that fact to the Complainants was a failure to render skilled and conscientious service to her clients.

[32] Further, when the listing agent corrected her APS through a written counteroffer, to clarify that this was a back up offer, Mrs. Daigle failed to discover the additional commentary noted in the APS. This lapse of discovery clearly demonstrates Mrs. Daigle's failure to discover facts that a prudent REALTOR[®] would discover to avoid misrepresentation or error where she again failed to adequately brief her clients on the counteroffer, they were signing.

[33] The evidence shows that Mrs. Daigle: failed to adequately inform her clients of the written service agreements they were signing; provided inadequate information surrounding the transaction process; and failed to provide her clients with the signed written service agreements until they demanded them. As a result, Mrs. Daigle failed to protect and promote her clients' best interests.

[34] As a decision-making body, we want to make it expressly clear that it is not the position of the Discipline Committee that all mistakes amount to professional misconduct. In this specific circumstance, we see a member of our profession who has represented clients and made a *series* of mistakes that demonstrably show a serious lack of understanding of multiple offer scenarios and back up offers. On their own, these mistakes could be considered simple error, however, given the number of mistakes committed by Mrs. Daigle as a professional, it is our position that this goes beyond simple error and subsequently constitutes professional misconduct. Should we allow this incident to go unchecked, we would fumble our mandate to protect the public from future instances such as this.

[35] For the foregoing reasons, we find in favour of the Association and that Mrs. Daigle failed to protect and promote the best interests of her clients, failed to discover facts that a prudent REALTOR® would discover to avoid error or misrepresentation, and failed to render skilled and conscientious service.

Decision

[36] Pursuant to s. 23 of the *Act*, we are of the opinion that the conduct and actions of Mrs. Daigle during the period specified in charges laid by the prosecution constitute professional misconduct.

Order

[37] In light of the above and in accordance with the submissions of the prosecution, we hereby order the following pursuant to s.23(4) of the *Act* for Mrs. Daigle:

- a. Mrs. Daigle 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 \$2,000 CAD as reimbursement for costs incurred in the prosecution of this Complaint matter.
- b. Mrs. Daigle is further ordered to pay the total amount of the fine and hearing costs (\$4,000 CAD) within thirty (30) days of the date of this decision.
- c. Mrs. Daigle is directed to retake the Pre-Licensing Exam Practicum offered by the education department of the New Brunswick Real Estate Association and pass the pre-licensing exam at 50% cost. The Respondent will be afforded two (2) free attempts to successfully pass the exam before being required to pay for additional attempts.
- d. Mrs. Daigle shall not be eligible for membership reinstatement with the NBREA until such time as she pays all costs, fines, and completes the courses of education so ordered in this decision, and pays the required reinstatement fee.
- e. Pursuant to s. 23(4)(f) of the *Act*, we direct the Registrar to publish this decision with names.
- f. Pursuant to s. 23(4)(f) 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 (Notice to the Profession).

g. Pursuant to s.23(5)(b) of the *Act*, we make the following recommendations to the Director of Consumer affairs at FCNB (the Director) with respect to licensure:

- i. That the Director impose terms, conditions, and limitations on the right to trade in real estate until such time that the Respondent has completed the Pre-Licensing Practicum and successfully passed the Pre-Licensing Exam.

[38] 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 18th day of June, 2024

//Original Signed by Committee Chair//

Karl Merrill, Chair
Chair; on behalf of the Discipline Committee,
Complaint 2022-042