



Complaint 2023-001

NBREA v. Shawn Tucker

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 8
Charges 8
Background and Evidence 8
Findings and Reasons 11
Decision 12
Order 13

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-

Shawn Tucker (the “Respondent”)

Date of Hearing: May 23rd, 2024, 9:30 am

Place of Hearing: Microsoft Teams, Virtual.

Members of Committee: Anne Smith, Acting Chair
Joan Hayes
Chris Drysdale
Alexandre Bellefeuille
Andrea Stierle-MacNeill, Government Appointee

Appearances: Dominic Caron, Counsel for the Association

The Chair noted persons attending the hearing:

Present: Mrs. Smith, Mrs. Hayes, Mr. Drysdale, Mr. Bellefeuille, Mrs. Stierle-MacNeill, Mr. Caron, Ms. Duguay (Student at Law, with counsel for the Association), Mr. Tucker, Mr. Mitchell McLean (Registrar), Mrs. Brittany Trafford (Committee Legal Counsel) and Mrs. Jill Witlock (Court Reporter).

Executive Summary

- [1] This Complaint concerns the advertising activities of a REALTOR[®] who, while operating an advertising contest and promotion, failed to include the contest details to entrants.
- [2] Prior to the hearing date, Mr. Tucker and Mr. Caron mutually agreed to present a joint submission to the Committee.
- [3] Under the joint submission, Mr. Tucker admitted guilt to the charge laid against him on behalf of the Association which amounted to one (1) count of professional misconduct under the REALTOR[®] Code of Ethics. The Committee accepted his admission of guilt and, in accordance with the joint submission, ordered that:
1. The Respondent pay a \$500 fine;
 2. The Respondent pay \$500 in costs to the Association;
 3. The Decision be published with names; and
 4. A Notice be published to the Profession.

Introduction

- [4] This complaint follows a promotional contest of a \$10,000 giveaway offered by the Respondent's real estate team. The Complainants alleged, at the time of the complaint, that though they had used a REALTOR[®] with the Respondent's real estate team for the sale of their property, they were informed that they were no longer eligible to be entered into the promotional contest as their REALTOR[®] had left the Respondent's team subsequent to the sale. There were no contest exclusions or terms and conditions included in any advertisement for the promotional contest, save and except, the requirement to list with the Respondent's team.
- [5] The Association's position is that, under the REALTOR[®] Code of Ethics, the failure to include the details of an advertisement initiative such as a contest constitutes an act of professional misconduct.
- [6] 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 January 23rd, 2023, to respond. The exchange of information ensued with a response from the Respondent on January 13th, a response from the Complainants on February 15th, and a final response from the Respondent on February 21st, 2023.

- [7] The Complaints Committee reviewed the evidence presented by the Complainants and the Respondent on April 20th, 2023, and rendered a decision on June 23rd, 2023, to forward the matter to the Discipline Committee pursuant to subsection 21(3)(a) of the *Act*.
- [8] In preparation for the hearing commenced before the Discipline Committee, the Registrar confirmed that Mr. Tucker was a member of the New Brunswick Real Estate Association at or during the time of the alleged offence.
- [9] 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.

Jurisdiction

- [10] Under subsection 23(1)(a) 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 June 23rd, 2023, the Complaints Committee rendered its decision in complaint matter 2023-001 ordering the Discipline Committee to commence such a proceeding.
- [11] 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 *New Brunswick Rules of Court*, they are bound by the *Complaint and Discipline Procedures Manual* as approved by the Board of Directors of the New Brunswick Real Estate Association.

Legal Test

[12] 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).

[13] 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.

[14] In the case of the Discipline Committee, it may find a member guilty of professional misconduct or to be incompetent. Pursuant to subsections 23(2) and 23(3) 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.

[15] Where the parties have presented the Committee with a joint submission and the Respondent has admitted guilt on the charge contained in the notice of hearing, the Committee has a duty to consider the joint submission.

[16] In the decision of *R. v. Anthony*¹ the Supreme Court adopted a high standard for rejecting joint submissions explaining that, “*rejection [of a joint submission] denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.*” In the context of administrative law, the Committee must decide whether the mutual agreement with regard to sanctions is appropriate, reasonable and fitting, consistent with the range of sanctions imposed in similar circumstances and that the agreement is not contrary to the public interest.² The Committee must approach the joint submission from a position of restraint

¹ *R. v. Anthony-Cook*, 2016 SCC 43 at para 34.

² *Rault v. Law Society of Saskatchewan*, 2009 SKCA 81 (CanLII) at para 28.

but may refuse a joint submission should be it so unreasonable as to bring the administration of justice into disrepute or otherwise be contrary to the public interest.

Issue

[17] The issue in this complaint matter is whether the Committee accepts the joint submission of the parties.

Charges

[18] Mr. Dominic Caron, representing the Association as the appointed prosecutor, presented the following charge against Mr. Tucker:

Between January 25th, 2022, and January 2nd, 2023, both dates inclusive, Shawn Tucker, 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 include all details and exclusions in a promotional advertisement.

All as set out in the complaint dated January 2nd, 2023, thereby allegedly committing acts of professional misconduct, in violation of, inter alia, Article 15 of the REALTOR[®] Code of Ethics and punishable under ss. 23(4) and ss. 23(5) of the Act.

[19] It was noted that though there had initially been another charge against Mr. Tucker referred to the Committee, that charge had been dropped by the Association prior to the hearing.

Background and Evidence

[20] The Complainants in this matter listed their home with a REALTOR[®] working with the Shawn Tucker Premium Real Estate Team on January 25th, 2022, and accepted an offer on January 26th, 2022. The Complainants allege that they had chosen to work with the unnamed REALTOR[®] because her real estate team was offering a \$10,000 giveaway contest at the time of listing; however, the contest had not been advertised until February 2nd, 2022. Per the contest advertisement provided by the Respondent, the following text was the only contest details provided:

The excitement is like having Bob Barker yell "COME ON DOWN" Except this isn't price is right and my name isn't bob. Either way you can read this and let the joy start surging through your veins because this \$10,000 is as good as yours! We have done \$3000 in the past and that was fun but my team and I are excited to up it to TEN THOUSAND DOLLARS this time around! All you have to do to get entered in is list with me, buy through me or refer someone who becomes a client! Like a Hillbilly at a Tractor pull, I'm Revved up for this one!

[21] A few months after listing their property, the Complainants reached out to their REALTOR[®] to see when the draw was happening for the \$10,000 giveaway. At this time, their previous REALTOR[®] informed them that they were no longer eligible to be entered into the draw because she was no longer working with the Shawn Tucker Premium Real Estate Team. The Respondent confirmed with the Complainants' REALTOR[®] that in order for the Complainants to be added to the draw, their REALTOR[®] would have to pay him a sum of \$500 for their entry. This news prompted the Complainants to file a complaint with NBREA and the Saint John Real Estate Board.

[22] Per the Respondent's submissions, the contest was intended to be a sort of "thank you" to their clients for business over the year. From a contest design standpoint, all team members of the Shawn Tucker Real Estate Team would evenly contribute to the contest. When the unnamed REALTOR® on the Respondent's team left, he took the position that the Complainants, and all other clients of the unnamed REALTOR®, were no longer eligible to be entered in the draw, and as such, should the Complainants be entered, the unnamed REALTOR® was responsible for their cost of entry.

[23] On November 22nd, 2022, the Saint John Real Estate Board involved itself in the resolution of this matter, despite it being a potential case of professional conduct. The Complainants outlined a series of demands they wished to have honoured by Mr. Tucker to the local Board and said that if such demands were not met, then they would file a complaint with NBREA's Registrar.

[24] In an attempt to resolve the matter to keep the Complainants from filing a complaint with NBREA, Mr. Luke Moffett, CEO of the Saint John Real Estate Board, drove to the Respondent's office to articulate the Complainants' demands. Mr. Moffett conveyed a summary of the Complainants' demands, which were accepted by the Respondent on November 28th, however, after Mr. Moffett articulated the Complainants' revised demands on the 6th of December, the Respondent rejected the updated terms. The actions of the Saint John Real Estate Board were captured by emails and were submitted as documentary evidence for this hearing.

[25] The evidence is unclear on when the draw took place, only that it had occurred before January 13th, 2023. The evidence further demonstrates that the draw was attended by

Mr. Luke Moffett, who ensured that the Complainants' names were entered in the draw regardless of knowing whether the Complainants were eligible for the draw given the timeline of the sale of their home. There is no evidence to support that any other clients of the unnamed REALTOR® were entered in the draw, along with the Complainants'.

[26] At the hearing, Counsel for the Association submitted that it had come to a resolution with the Respondent and was making a joint submission. The Respondent admitted that he failed to look into the rules for advertisements and had not thought ahead about what would happen if REALTOR® was no longer working with the Shawn Tucker Real Estate Team at the time of the draw for the prize. As part of the joint submission, the Respondent admitted to the charge laid against him by the Association.

[27] As part of the discipline file prepared by the Registrar and provided to the parties and to the Committee, the Committee reviewed the complaint, and the subsequent response between the Complainants and Respondent inclusive of the documentary evidence provided. The Committee also reviewed the Notice of Hearing, and the decision of the Complaints Committee.

Findings and Reasons

[28] Having regard for the evidence and for the submissions made, the Committee accepts the joint submission. It is the finding of the Committee that the joint submission is appropriate, reasonable and in accordance with the public interest. Further, the acceptance of the joint submission is consistent with matters heard by prior Committees.

Decision

[29] The Committee accepts the joint submission of the parties in that the parties agree that the actions of Mr. Tucker constitute professional misconduct and finds that the Respondent is guilty of professional misconduct pursuant to section 23(2)(b) of the *Act*.

[30] Further, the Committee makes the following non-binding recommendation:

- a. Mr. Tucker is encouraged to ensure that any future contests, promotions, or advertisements contain the required details and exclusions as they may from time to time so exist.

Order

[31] In light of the above and in accordance with the joint submissions of the parties, we hereby order the following pursuant to subsection 23(4)(d), 23(4)(f) and 23(4)(g) of the *Act* for Mr. Tucker:

1. Mr. Tucker is ordered to pay a fine of \$500 CAD to the Association and is further directed to pay costs to the Association in the amount of \$500 CAD as reimbursement for costs incurred in the prosecution of this complaint matter.
2. Mr. Tucker is further ordered to pay the total amount of the fine and hearing costs (\$1,000 CAD) within thirty days of the date of this decision. If payment is not made within 30 days, the Registrar is directed to suspend Mr. Tucker from the Register until such time that payment is made.
3. Pursuant to subsection 23(4)(f) of the *Act*, we direct the Registrar to publish this decision with names.
4. Pursuant to subsection 23(4)(f) of the *Act*, we further order the Registrar to distribute 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).

[32] In accordance with subsection 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 27th day of August, 2024.

//Original Signed by Acting Chair//

Anne Smith, Acting Chair
on behalf of the Discipline Committee,
Complaint 2023-001