

Complaint File 2016-003

**DECISION OF THE DISCIPLINE COMMITTEE
WITH RESPECT TO PENALTY**

In the matter of a Discipline Committee Hearing held pursuant to Section 23(1) of *The Act to Incorporate the New Brunswick Real Estate Association* (the “Act”):

BETWEEN

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

- and -

Gerald Webster

Date of Hearing: August 25, 2016 10:30 am via Teleconference

Place of Hearing: NBREA Boardroom, Fredericton

Members of Committee: Alan VanWart, Chair
Jacques Piché
Mona Payne
Joan Hayes
Edouard Allain, Government Appointee

Appearances: John Townsend, QC, Counsel for the Association

On June 8, 2016, a Discipline Hearing was held to consider evidence in a complaint of professional misconduct against Gerald Webster. The charge was included in the Notice of Hearing, which was identified as Exhibit 1. The charge, directly quoted from the Notice of Hearing, is as follows:

1. While acting in a Limited Dual Agency capacity you accepted a deposit cheque (the “deposit”) in the amount of \$5,000 from B. K. Sabharwal (“Mr. Sabharwal”) in connection with the purchase of a business (gas station) located at Millstream, NB known as PID 00119339 and deposited it to your trust account on September 14, 2014.
2. The Agreement of Purchase and Sale entered into by Mr. Sabharwal provided for a closing date of October 31, 2014, and that an environmental assessment, satisfactory to the buyer must be provided by September 26, 2014.

3. You informed Mr. Sabharwal that this closing date and date for the completion of the environmental assessment were to be extended to April 29, 2015 and April 24, 2015, respectively, and Mr. Sabharwal signed an agreement to such effect dated April 9, 2015.
4. Ultimately the seller could not provide a satisfactory environmental assessment and Mr. Sabharwal requested the return of the deposit.
5. By email dated December 7, 2015, you informed Mr. Sabharwal that the seller would not consent to the return of the deposit and you would be referring the matter to the “the law court” to “sort it out”.
6. By trust account audit conducted on November 30, 2015, by Stewart Rogers, Trust Inspector for the New Brunswick Real Estate Association he determined that on June 10, 2015, you transferred the deposit from your trust account to your general account.
7. As a result you:
 - i. Misappropriated the deposit and breached the provisions of section 20 of the *Real Estate Agents Act*, Chap 215, S.N.B, 2011; and
 - ii. Misled your client as to the status of the trust deposit and failed to protect his interests in violation of Article 3 of the REALTOR® Code (Primary Duty to Client).

After considering all of the evidence and the submissions of the parties, the Committee, in their decision of June 21, 2016, determined that Gerald Webster is guilty of professional misconduct as stated in the charges contained in the Notice of Hearing (Exhibit 1). This decision on merit was entered into the record as Exhibit 3.

Jacques Piché assumed the role of Chairperson of the Discipline Committee as Alan VanWart was unable to continue with the hearing process. Mr. Piché noted for the record, Section 22 (4) of the *Act*, which addresses circumstances when a member of the Discipline Committee is unable to continue to participate in the hearing :

22(4) Where the Committee commences a hearing and not more than two members become unable to act, the remaining members may complete the hearing and shall have the same authority as the full committee.

As the purpose of this hearing session was to determine sanctions further to the Committee’s decision on merit (Exhibit 3), Mr. Piché confirmed that the Hearing Process would continue with the remaining Discipline Committee members.

Mr. Piché noted that Gerald Webster was not in attendance. The Registrar, Carolyn Cameron confirmed that Mr. Webster received proper notice of the hearing. Mr. Townsend requested the

Registrar testify on this issue. After being sworn in, Mrs. Cameron confirmed that Mr. Webster received proper notice of hearing and a copy of the Affidavit of Service provided by the Process Server, Leslie Gillet, was provided to the Committee. This document was entered in to evidence as Exhibit 4. Mrs. Cameron then confirmed a letter dated July 27, 2016 (received by the Registrar on July 29, 2016) from Mr. Webster stated that he would not be attending the hearing (“meeting”) on August 25, 2016 and a copy of the Notice of Penalty Hearing was attached to this correspondence. This document was entered into evidence as Exhibit 5. Mr. Townsend stated there was ample proof that Mr. Webster received the notice of the penalty hearing and that he had provided a response.

Mr. Townsend presented on behalf of the Association.

Submissions:

Mr. Townsend stated the Discipline Committee, in their decision of June 21, 2016, found Mr. Webster guilty of misappropriation of trust account monies which is considered to be one of the more serious definitions of REALTOR® professional misconduct. Mr. Townsend said Mr. Webster, as a REALTOR®, accepted deposit monies in trust and placed these funds in a trust account created for this purpose, which confirms the money did not belong to him. He then withdrew these funds from the trust account and kept them for himself, despite having no authority or permission.

Mr. Townsend stated Mr. Webster compounded the situation by misleading his client, a scenario further exasperated by the fact his client was a recent immigrant to Canada and was not familiar with Canadian real estate practices. Mr. Townsend said Mr. Webster lied to his client, telling him the Seller disputed the release of the deposit, to which no evidence has been produced. Mr. Webster also told his client the deposit would be paid to court, however no evidence has been produced to this effect.

Mr. Townsend noted that Mr. Webster attempted to buy his way out of the issue by offering to pay the Complainant \$5000 (the amount of the deposit), if the complaint registered with the Association was withdrawn. Mr. Townsend explained the Association’s legislated obligation to protect the public interest would not be served if complaints could be withdrawn by complainants after receiving incentives. Consequently, the complaint was not withdrawn, and the Complainant did not receive the money.

On June 29, 2016, the Financial and Consumer Services Commission suspended Mr. Webster’s Manager’s license and on July 12, 2016, both his manager’s license and the Unity Realty Inc. dba Realty Executives Saint John’s agency license were cancelled. Mr. Townsend noted the Commission’s reasons for doing so stemmed from the incidents central to the complaint addressed by this hearing process.

Regarding sanction, Mr. Townsend recommended the following, citing the applicable sections of the *Act*:

- Mr. Webster's Association membership be revoked, s. 23 (4)(a).
- The Committee impose a fine of \$5000, s. 23 (4)(d).
- The Committee use their discretion to fix cost assessment which Mr. Townsend recommended should be on the higher scale due to the degree of professional misconduct (costs are estimated to be in the \$8500 range), s. 23 (4)(g). Mr. Townsend did not suggest an amount, but reminded the Committee of a comparable decision (Mawhinney 2011-005) which resulted in cost assessment of almost one hundred percent.
- Publish the decision on the Association website in both official languages.

Again referring to Mawhinney (2011-05), Mr. Townsend submitted that the Committee recommend to the Director of the Financial and Consumer Services Commission the following, s. 23 (5):

- Mr. Webster's manager's license remain revoked.
- Mr. Webster be deemed forever ineligible to hold a manager's license.
- Should Mr. Webster successfully obtain a salesperson's license, he not have access to trust accounts and all his activities relating to handling deposits be strictly supervised by a licensed manager.

Findings:

After reviewing the evidence and considering the Prosecutor's submissions, the Committee hereby orders as follows pursuant to s. 23(4) of the *Act*:

1. Respondent Gerry Webster shall pay to the Association the sum of \$5000 as a penalty for the preceding violation. Payment in full must be received at the Association office within sixty (60) days of the signing date of this decision.
2. Respondent Gerry Webster shall pay to the Association the sum of \$5500 towards costs incurred by the Association during the prosecution of the preceding violation. The Committee took into account that the dual hearing format was requested by the Prosecutor, thereby incurring additional costs to the process. Payment in full must be received at the Association office within sixty (60) days of the signing date of this decision.
3. Pursuant to s. 23(4)(f) of the *Act*, the Discipline Committee directs the Registrar to publish this decision on the Association website: www.nbre.ca.

In accordance with s. 23(5) of the *Act*, the Committee recommends to the Director, Financial and Consumer Services Commission, that, should Mr. Webster ever apply to be licensed to trade in real estate, he must meet the following conditions:

1. Mr. Webster must be a member of good standing of the Association, pursuant to s. 18(1), having paid all penalty and cost assessment fees and fulfilling applicable education requirements.
2. The Director impose restrictions on Mr. Webster's real estate trading activities as follows:
 - a. Mr. Webster be deemed ineligible to hold a manager's license.
 - b. Should Mr. Webster successfully obtain a salesperson's license, he not have access to trust accounts and all his activities relating to handling deposits be strictly supervised by a licensed manager.

As determined by s. 25(1) of *the Act*, the Respondent may appeal this decision within thirty (30) days from the date of the decision.

DATED this 7th day of September, 2016.



Jacques Piché, Chair, on behalf of the Committee