

**DECISION OF THE DISCIPLINE COMMITTEE  
WITH RESPECT TO FINDING OF FACT**

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 -

Fernand Levesque

Date of Hearing: June 10, 2015

Place of Hearing: NBREA Boardroom, 22 Durelle St., Fredericton, NB

Members of Committee: Jacques Piché, Chair  
Lise Allen  
Maria Taylor  
Anne Smith  
Marc Richard, Government Appointee

Appearances: Trisha Gallant, Counsel for the Association  
Andrée Poitras, Counsel for the Respondent

UPON the following charges submitted by Trisha Gallant, Prosecutor appointed by the Association:

Between June 24, 2013 and August 15, 2013, dates inclusive, Fernand Levesque, being a member as defined by the *Act*:

1. Failed to protect and promote the interests of his clients by failing, as a dual agent, to deal fairly with all parties to the transaction, as required by Article 3 of the REALTOR® Code;
2. Failed to encourage parties to a transaction to seek the advice of outside professionals where such advice is beyond the expertise of the REALTOR®, by advising them to waive the requirement of a home inspection before making an offer to purchase real estate, as required by Article 10 of the REALTOR® Code; and

3. Failed to render skilled and conscientious service, in conformity with standards of competence which are reasonably expected of a REALTOR®, as required by Article 12 of the REALTOR® Code.

All as set out in the Complaint, thereby committing acts of professional misconduct, in violation of the said Articles of the REALTOR® Code (effective December, 2011), and punishable under subsections 23(4) and 23(5) of the *Act*.

Ms. Gallant presented on behalf of the Prosecution.

Ms. Poitras presented on behalf of the Respondent.

Both Parties acknowledged the composition and jurisdiction of the Committee to hear and determine the complaint.

The Chair explained the distinction between a single hearing and a dual hearing format and stated the intention of the Committee to conduct the hearing in the single hearing format. Ms. Poitras indicated Mr. Levesque wished to proceed in a dual hearing format therefore the Chair confirmed that the Committee would make a determination of the evidence on the merits and, if necessary, conduct a hearing to determine penalty at a later date.

The Committee accepted the following documentary evidence:

- Exhibit 1 – Notice of Hearing;
- Exhibit 2 – Book of Relevant Documents;
- Exhibit 3 – Listing/Photos
- Exhibit 4 – Information List (supplier names)

In addition to the documentary evidence noted above, the committee heard witness testimony from:

- Complainant Mr. D.
- Complainant Ms. B. (sequestered until testifying)
- Respondent Fernand Levesque

### **Summary of Witness Testimony:**

The Complainant, Mr. D., was first to testify. He stated that in June, 2013, he contacted the Respondent, Mr. Levesque, after seeing his name on a real estate sign for a property in New Denmark, New Brunswick. Mr. Levesque offered to show them one of his listings if, after having a drive-by look, they were interested. On Saturday, Mr. D. went to the property by himself. As the Vendor was outside conducting a yard sale, he took the opportunity to meet her and had a quick showing (10 – 15 minutes) of the house and property. On Monday, June 24 at

approximately 9:30 am, both Complainants returned to the home with Mr. Levesque for an official viewing. The Vendor remained on the premises throughout the showing.

Mr. D. testified that during either viewing, he did not note any damage and that the property looked as indicated in photos (Exhibit 3). He said he did not look behind curtains and the house was full of furniture but he did inquire about the condition of the windows and if there were any leaks. The Vendor replied that there were no problems, it was a good house. When both Complainants viewed the exterior of the house from the front, Mr. Levesque noted the roof looked good and that in his opinion there was nothing wrong with the house.

At this time, the Complainants made the decision to try to purchase the property, and they relocated to the kitchen to prepare the offer with Mr. Levesque. The Vendor stayed outside. Mr. D. stated his intention was to offer lower than asking but was told by Mr. Levesque that they did not want to insult the Vendor with a low offer, as she had already lowered her price considerably to the current asking price of \$159,900. Mr. Levesque did not recommend a price. The Complainants decided to offer \$158,000, with the inclusion of furniture, which Mr. Levesque communicated verbally to the Vendor who was still outside. The Agreement of Purchase and Sale was written up with an offer of \$159,000, including furniture and was subject to successful financing. No water test or property inspection were required. It was signed by all parties at 11:00 am.

When asked why they did not request a water test, Mr. D. stated a water test was not mentioned, there was no discussion regarding water testing. A water test was eventually completed as it was requested by the bank.

When asked why they did not require a property inspection, Mr. D. stated he had purchased a number of properties, none of which had property inspections. He said they trusted their REALTORS® and never had any problems. He stated Mr. Levesque said the \$500 cost of an inspection could be put toward paint and he did not recommend or encourage them to have an inspection completed.

When asked if he had seen a property condition disclosure statement (PCDS), Mr. D. stated one was not provided. He said he later found out, while he was listing the house for sale in 2014, that the Vendor had declined to sign a PCDS prior to his purchase of the home.

Mr. D. was shown a form entitled 'Dual Agency Agreement' which he had signed. He stated he did not recall Mr. Levesque explaining this document but he understood that Mr. Levesque was working for both the Purchaser and the Vendor. Furthermore, he did not recall any explanation of duty of disclosure or signing a Working with a REALTOR® form. Mr. D. stated the whole process of preparing and signing the documents went very quickly and they were on their way to Moncton shortly after 11:00 am.

Mr. D. said he spoke with Mr. Levesque at least three times during the period between June 24 and August 15 (closing day). On August 13, the Wednesday before closing, he asked Mr. Levesque to do the closing inspection to spare them the drive from Moncton. Mr. Levesque did the inspection and reported that the Vendor was still in the process of moving and cleaning and

that the house was acceptable and all of the purchased appliances, air exchange etc. were working.

On the date of closing, the Complainants arrived with their furniture to move into their house in New Denmark. They arranged to pick up the keys from Mr. Levesque near his office in Grand Falls. As they approached the house, they noticed the doors were all open. Mr. D. stated he was first to enter and found the house was a mess, with flies everywhere, many items left behind and the home smelled badly. It was far from the clean condition they had expected, nor was it ready to move into. They called their lawyer in Moncton to halt the sale but were informed it was too late, the closing had been completed.

Mr. D. explained a series of photos documenting the poor conditions of the house (Exhibit 2). He stated an air exchange system, one of two in the house, did not work and two days after moving in, a substantial leak appeared in the ceiling of the den/office. When contacted, Mr. Levesque immediately came to look at the damage. Mr. D. stated he was told by Mr. Levesque it would not be worth going to court over the poor conditions of the house as he knew someone who had tried and it had cost more than it was worth. He gave the Complainants a list of contractors which Mr. D. testified was page 4 of Exhibit 4. A contractor determined only the roof at the front of the house had been replaced and the back side was in dire need of repair, at an estimated cost of \$2500.

Throughout the following winter, the Complainants determined that further repairs were required. Mr. D. estimated they spent \$16,000 on unexpected necessary repairs, including the roof, air exchange and window replacements. They spent an additional \$14,000 to get the house to the state they desired.

Under cross-examination, Mr. D. agreed that, since Mr. Levesque had never lived in the house, he had to rely on the Vendor's word regarding its condition. When asked why he did not go after the Vendor for repair costs, he stated he relied on Mr. Levesque to tell the truth and that Mr. Levesque said he was unable to reach the Vendor as she did not leave a forwarding address or contact information.

Mr. D. said they did not think to ask family to perform the closing inspection, they trusted that Mr. Levesque had the expertise to do the inspection for them.

Co-complainant Ms. B. was the second witness. She said, as far as she could tell from their first viewing, the home's condition at that time was reflected in the photos identified as Exhibit 3. She stated Mr. Levesque told them the house was perfect, a good house with nothing wrong. Throughout the viewing of the home interior, the Vendor actively engaged in conversation and as a result of her presence, the Complainant did not look as closely as she would have liked.

She said while they were sitting at the kitchen table preparing the offer, Mr. Levesque told them the price of the house was dropped to \$159,900 and they did not want to insult the Vendor. During the discussion, the Vendor was in and out of the house.

Ms. B. stated Mr. Levesque said why pay \$500 for a property inspection which could be put towards paint and it would be like taking money and throwing it in the garbage. She concurred with Mr. D. as to why they did not request an inspection and that Mr. Levesque never recommended or encouraged them to do so.

Ms. B. stated she did not know what a PCDS was and was told by Mr. Levesque that the Vendor did not know much about the condition of the house because her late husband had taken care of everything. Ms. B. did not recall having a discussion regarding the intent of the dual agency document, nor one on disclosure.

Her testimony concurred with that of Mr. D. regarding why they requested Mr. Levesque to perform a closing inspection, and his resulting response regarding the home's condition.

Ms. B. described their discovery of the state of the property on the day of closing. The doors were open, they found flies, pet food, old shoes, coffee cans full of cigarette butts, a fridge containing rotting food and dirty walls. The carpet had obvious pet stains and dried feces were under the bed. The mattress, which had been part of the bedroom suite included in the sale, had to be thrown out. Appliances that Mr. Levesque said were in working order were not working, some windows had obvious and serious defects and it was evident that the Vendor had smoked inside the home, despite claiming not to have done so.

Ms. B. stated they filed a complaint to ensure no one else went through the same experience. She felt Mr. Levesque was not honest with them and confirmed they did not go after the Vendor as Mr. Levesque could not find her. Ms. B. said her health suffered as the result of the stress created by this house purchase.

Mr. Levesque testified that the Complainants contacted him and, after showing them properties, he mentioned another one he had listed. He was later informed by the Vendor that Mr. D. viewed the home with her on Saturday (at the same time as the Vendor was holding a yard sale). A viewing appointment was set up by Mr. Levesque for Monday at 9:30 am. He understood the Complainants were in a hurry as they were returning to Moncton. He brought an Offer to Purchase form because the Complainants had indicated when scheduling the appointment that they wanted to make an offer.

Mr. Levesque stated the Vendor was downsizing. The Complainants were very interested in specific chattels and said the Vendor could leave behind anything she did not want. He said the Complainants did not ask questions about the condition of the house and he denied saying the house was in perfect condition.

While preparing the Offer, Mr. Levesque said he told the Complainants that there would be no PCDS as the Vendor was a widow and did not know anything about the condition of the home or work that had been completed. He said he told them the purchase price, which had been recently lowered and he never said anything about insulting the Vendor with a low offer. The Complainants asked that a bedroom suite be included and he included that condition in the offer. Regarding a property inspection, Mr. Levesque stated that he was told by the Complainants that they had never had one completed on any of their previous property purchases. To his

suggestion that they should have one, they replied that their nephew might be able to do an inspection for them. However, by the end of the discussion, the Complainants made the decision not to have an inspection because of time constraints. Mr. Levesque responded that, in his experience, usually everyone wants an inspection and only two clients have declined inspections during the past five years. Mr. Levesque anticipated that the problems with the house would have been discovered during an inspection.

Mr. Levesque denied that he said the house was perfect, nor did he say not to throw money away on an inspection. Between the time of the offer and the closing date, he was never contacted by the Complainants to have an inspection completed.

Mr. Levesque testified that he explained the Offer to Purchase contract, including the conditions. Mr. Levesque admitted that he explained dual agency, but did not read through everything on the form. He stated that the Complainants appeared to be at ease with the terms in the Offer to Purchase as they had been involved in numerous property sales.

Mr. Levesque stated that he inspected the home prior to closing at the request of the Complainants. His purpose was to confirm that the appliances were in good working order and that everything listed in the Offer to Purchase remained at the home. The Vendor was still packing and cleaning but he was able to examine various appliances to confirm they were working. The water softener was leaking and the Vendor promised to have it fixed. He admitted that while he went into every room, he did not check under the beds or behind the curtains. He admitted it was not a common practice for a REALTOR® to conduct the closing inspection, but he did it as a favour to the Complainants. While the house was in a condition expected when occupants are moving, he did not feel it was a mess.

Two days after closing, Mr. Levesque said he visited the Complainants on his own and was told the house was very dirty. In his opinion, Mr. Levesque said the house did not look any different than when he had taken the photos to list the property. He was aware the Vendor smoked, but she had never smoked in the house during the many visits he had made while the property was listed. He accompanied Mr. D. to more closely view the roof on the back of the house, and was surprised to find it was not in the same condition as the front.

Regarding Exhibit 4, Mr. Levesque stated he usually gives clients this list containing names of local tradesmen, but forgot to on June 24 when dealing with the Complainants. He provided the list when the roof leaked two days after closing.

Mr. Levesque stated he has never had problems with clients before. He felt he performed his duty as a REALTOR® and he felt bad when he saw the roof was only half replaced.

On cross-examination, Mr. Levesque stated that when he prepared the listing details, he was aware of only one issue at the house and that was the leaking water softener, which the Vendor promised to fix. Everything appeared to be in working order and he did not notice any defects. The Vendor refused to sign the PCDS. He admitted he did not remind the Complainants that the property was 21 years old, nor did he inform them a PCDS was not available.

When preparing the offer, Mr. Levesque said the Complainants stated they did not want to insult the Vendor when considering their offer. He agreed that the document preparation was rushed due to the Complainants wanting to get on the road and that while it is important that clients understand the documents they are signing, he did not know of any REALTOR® who would go through an agreement line by line.

Regarding the closing inspection, Mr. Levesque said it was not common for him to do this inspection but he did so in good faith, as a favour. He admitted such inspections are usually done the night before closing. When asked why he did not accompany the Complainants to their new home on the day of closing, Mr. Levesque replied that the lawyer would normally have given the client the keys and it was not general practice to go to the house with a new owner.

### **Submissions:**

Ms. Gallant stated that the intention of the REALTOR® Code (May 2011) is to define the high standards the public has a right to expect regarding the professional conduct of a REALTOR®. Mr. Levesque's actions must be evaluated with consideration to these standards.

Ms. Gallant made the following observations:

**Article 3:** Even in the difficult dual agency situation, a REALTOR® must deal fairly with all parties to a transaction. Mr. Levesque violated this article as follows:

- 1) If the Committee believes the Complainants regarding the determination of the amount of the offer, then Mr. Levesque did not promote their best interests.
- 2) Mr. Levesque failed to do a thorough pre-closing inspection, in fact, he should have recommended that someone else do it.
- 3) He performed the inspection two days before closing, when the Vendor had not completely moved out. He should have returned a second time, to ensure the property was in good condition.

**Article 10:** Mr. Levesque should have encouraged the Complainants to get professional advice, in particular regarding a property inspection.

**Article 12:** Mr. Levesque did not act in a conscientious manner when he quickly processed the transaction documents and did not adequately explain details, in particular the Dual Agency Agreement.

Ms. Poitras submitted that this is a case of buyer beware. Mr. Levesque did suggest a property inspection, but time restraints affected the Complainants' decision. Mr. D. was an experienced buyer who admitted he never spent money on inspections despite the fact property inspections are common practice. Mr. Levesque did not tell them to waive the inspection and they should have known an inspection was important.

She stated Mr. Levesque acted in good faith by performing a pre-closing verification of the state of the appliances. He worked with the information he had and did not mislead the Complainants.

Ms. Poitras said that if the document preparation and signing was rushed, it was because the Complainants were in a hurry to get back to Moncton. The Complainants admitted they understood the terms of dual agency.

In conclusion, Ms. Poitras stated Mr. Levesque acted in good consciousness in his efforts to serve both parties.

**Findings:**

After considering all of the evidence and the submissions of the parties, the Committee determines that Fernand Levesque is guilty of all counts of the charges contained in the Notice of Hearing (Exhibit 1). The Committee concurred with Ms. Gallant's observations, as stated in her final submission and determines that Mr. Levesque's actions constitute professional misconduct.

The Committee accepts the testimony of the Complainants as evidence that Mr. Levesque did not promote their best interests and did not demonstrate his impartiality despite his obligations under dual agency. Mr. Levesque expressed an opinion as the purchase offer was considered and he processed the transaction documents in a hasty manner. He did not strongly encourage the Complainants to have a property inspection completed, particularly since there was no available PCDS, nor did he ensure a proper final inspection was completed on the house after it was vacant. Mr. Levesque failed to ensure all aspects of the transaction were completed in a professional and fair matter to both parties.

In accordance with s. 25(1) of *the Act*, may appeal this decision within thirty (30) days from the date of the decision.

DATED this 10<sup>th</sup> day of July, 2015.



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Jacques Piché, Chair, on behalf of the Committee