



THE PERFECT SOLUTION
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JUNE 2014

Often, condominium Boards of Directors are hesitant to take action that may be viewed as giving into, or accommodating, a unit owner or resident out of concern that such will establish a “precedent” within the community. As a result, we often see disputes before the courts because a condominium corporation takes a position for the sake of principle and/or to set an example. Directors may convince themselves that the cost of doing so is justifiable in view of the greater cost to the community IF the single accommodation were extended to everyone within it.

While it can be important for Boards to establish policies to ensure that everyone within the community is treated equally, there may be occasion where it makes sense to consider individual circumstances and attempt to work with an owner or resident to resolve an issue amicably. Doing so can save cost, time, reduce ill will and serve the greater good of the condominium as a whole. Where there is concern about establishing a community precedent, mediation can offer a solution - mediated settlement agreements can contain confidentiality clauses.

While confidentiality terms may often be overlooked or undervalued, a recent circumstance drew attention to just how powerful they can be. Patrick Snay filed a complaint of age discrimination against Gulliver Preparatory School when his headmaster contract was not renewed. The parties eventually reached an out of court settlement which contained a confidentiality provision. A mere four days after reaching settlement, Snay’s daughter posted the following on Facebook to her 1200 friends, including many with ties to Gulliver: *“Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.”* Gulliver Preparatory School took issue with the post and used it to successfully argue that, notwithstanding that it was not Mr. Snay who posted to Facebook, the confidentiality provision of the agreement had been breached. This cost Snay his \$80,000 settlement.

While the Snay circumstance highlights the power of confidentiality clauses in settlement agreements (and serves as a reminder of just how dangerous the Internet can be), the recent Supreme Court of Canada decision of *Union Carbide Canada Inc. v. Bombardier Inc.* suggests that confidentiality clauses should go beyond a standard format to explicitly set out expectations – particularly if there are specific or abnormal confidentiality requirements at hand. While this case involved a party ultimately failing in an attempt to utilize a basic confidentiality clause to override Quebec’s Code of Civil Procedure, it does suggest that there

is merit to expanding upon generic confidentiality clauses to ensure that expectations are clearly set out.

Applying this to the condominium context, consideration could be given to having confidentiality clauses speak specifically to concern about the resolution becoming widely known to others within the community.

In fact, such clauses can provide a detrimental impact upon any party who discloses details of the resolution, speak to specific behavioural expectations of those involved (i.e. that one not even disclose particulars of the settlement to his/her spouse) and provide a procedure to be followed in the event that a concern about a breach of confidentiality were to arise in the future (i.e. the right to call for affidavits sworn by all parties to the agreement to verify that they have honoured the confidentiality terms of the agreement).

Such provisions can serve as a deterrent against resolution details becoming known to the broader community and as a means to clarify that the intention was at no time to establish a new practice applicable to everyone within the condominium.

It is understandable for Boards to be cautious about establishing standards or expectations within their communities that could be abused; however, exercising caution does not mean that condominiums are required to proceed to court without attempting to find resolution in a more efficient, effective and timely manner, particularly if confidentiality is sufficiently considered and expectation of such is expressly set out.

Cases cited: Gulliver Schools Inc. et al. v. Snay, 2014 WL 769030

Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35

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