

## Member's Quarterly

Winter 2020 Edition

### Feature

# Keeping Quiet: Enforceability of Confidentiality Clauses

*Monitor social media activities of former employees*

Confidentiality clauses are common place in the settlement of a legal dispute. Whether they are included in a release or the settlement agreement itself, they are a useful tool in an employer's dispute resolution arsenal. The recent case of *Acadia University v Acadia University Faculty Association*, 2019 CanLII 47957 (ON LA), shines a light on the value of confidentiality clauses in the employment context.

Dr. Rick Mehta was a tenured professor at Acadia University ("Acadia"), represented by the Acadia University Faculty Association (the "Union"). On August 31, 2018, Dr. Mehta's employment was terminated for cause relating to his social media activities. The Union grieved Dr. Mehta's termination. The parties voluntarily agreed to mediation and the matter was resolved. Acadia, the Union and Dr. Mehta voluntarily executed Minutes of Settlement which set out the terms and conditions of the settlement. The Minutes of Settlement included a clause stating that the matter was resolved without any admission of liability or culpability by any of the parties; a payment clause whereby Acadia was to provide payment of an amount to Dr. Mehta; and a confidentiality clause that required the parties "to keep the terms of these Minutes strictly confidential except as required by law or to receive legal or financial advice." The Minutes of Settlement also included an undertaking that "if asked, the parties will indicate that the matters in dispute proceeded to mediation and were resolved, and they will confine their remarks to this statement. Stated somewhat differently, it is an absolute condition of these Minutes that no term of these Minutes will be publically disclosed."

Following the execution of the Minutes, Dr. Mehta took to social media to express his views on the matter, posting the following on Twitter: "Vindicated former professor! Advocate for free speech and institutional transparency in universities." A follower responded to his tweet saying that he hoped he received a nice amount of money. Dr. Mehta responded " All I will say is that I left with a big grin on my face." Not long after, Dr. Mehta tweeted again about the settlement saying "Because I got the vindication that I was seeking. In other words, I have left the university on my term, as opposed to the administration's or union's terms. The NDA that I was required to sign by law is not for my protection."

As a result of the tweets, the Arbitrator directed Dr. Mehta to comply with the terms and conditions of the settlement and delete the tweets, but Dr. Mehta continued to tweet about the settlement. He even went so far as to threaten to release the Minutes of Settlement to the media unless certain conditions were met, before deleting the tweets.

Again, the matter came before the Arbitrator, this time with Acadia arguing that it should not be required to make any payment to Dr. Mehta because of his repeated breaches of the Minutes of Settlement. The Arbitrator agreed, finding that Dr. Mehta repeatedly broke his promise of confidentiality, and noted that settlements in labour



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law are “sacrosanct” and ruled that Acadia was no longer required to honour the payment provision in the Minutes of Settlement.

This decision confirms the inviolable nature of confidentiality clauses when properly executed. In this case, it paid (literally) for the employer to keep a close watch on the social media activities of its former employee following the settlement of a dispute.

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