Cornwall Public Inquiry
Phase 2 Workshop
Confidentiality Agreements in Civil Settlements
December 4, 2008
Presentation Summary

INTRODUCTIONS

Colleen Parrish welcomed the audience to the workshop on behalf of Commissioner Glaude, who looks forward to reading the record of the evening's activities.

Colleen expressed thanks to Citizens for Community Renewal for recommending holding this policy workshop. She stated that she has had several people come to her for counselling support intake who have wondered about the effects of a confidentiality clause in their civil settlements. They have expressed concern that they would not be able to tell their therapist about the abuse because of the agreement. There is also concern about not being able to tell one's partner or family members. Given the fact that sexual abuse is usually a "secret" the fact that one must keep it a secret is distressing and can affect personal recovery for some people.

On the other hand, she stated that the reality is that confidentiality clauses in settlement agreements are common and that there are good reasons to promote settlements in society as a whole, in terms of reducing litigation. And sometimes, those who were abused want confidentiality about aspects of their settlement.

Colleen then thanked the exceptional panel for coming to share their expertise. She introduced Professor Erik Knutsen from the Faculty of Law at Queen's University, Steven Gaon, a mediator and lawyer from Ottawa and Simona Jellinek, a lawyer from Toronto who has a particular expertise in childhood sexual abuse cases.

ERIK KNUTSEN

Professor Knutsen thanked the Inquiry for inviting him to speak. He explained that he would provide the 30,000-foot view about confidentiality agreements in civil lawsuits, while the other two panelists would provide more specific comments about the agreements themselves.

He outlined his presentation:

1. What are confidential settlements?
2. Enforcement
3. An important pre-question
4. Problems
5. Benefits
6. Possible options

Professor Knutsen stated that there has been little regulation and writing about confidentiality agreements in Canada and wondered whether a new framework is needed in Canada.

He explained that confidentiality clauses are "value creation tools"; they add something to the settlement dynamic. Both plaintiffs and defendants can theoretically benefit from them. One of the main issues with respect to confidentiality agreements is enforcement: who is responsible for the enforcement, and can these agreements actually be enforced?

What is a confidentiality clause in the context of a settlement agreement? It is a clause in a settlement contract in civil litigation where the parties promise to keep some or all of the settlement details secret. It can be a simple clause, such as saying that keeping the terms of the settlement shall remain confidential, or it can be more complex. Only rarely do the clauses have certain conditions providing for when the confidentiality can be broken. If a confidentiality clause is breached then technically, there can be a court review or other legal obligations, such as the payment of money. But most often, most agreements simply state that the information must be kept confidential, with no specifications as to the consequences in the case of breach.

Professor Knutsen then explained that confidentiality clauses are often used to create value; they are used as a bargaining tool to maintain secrecy. Those who want these agreements tend to want to avoid negative publicity, to avoid further lawsuits or to protect proprietary information. They are common used in cases of products liability and medical malpractice. He noted that sometimes plaintiffs want to use them as well, perhaps to keep identities a secret, to keep health information secret and to alleviate victimization concerns. He stated that sometimes plaintiffs want to keep the amount of the settlement secret in order to stop people from looking to them for financial assistance, as well as to stop others from thinking they settled for too little.

In his view, people do not often think about confidentiality clauses in settlement agreements. They are typically agreed to and signed with little thought, as "routine paperwork". This is a missed opportunity to create value. Confidentiality clauses should be talked about or bargained over. In addition, people need to think about the future implications of signing the agreement.

Professor Knutsen then addressed issues of enforcement. What happens if a confidentiality clause is breached? The fact is that no one really knows what will happen. Technically, the breach is within the realm of contract law. The standard legal response to a breach of contract is to go to court. However, going to court is often at cross-purposes with the original intent of the confidentiality clause, as the settlement then becomes a public document.

While an action for a breach of contract may be brought, it is unclear what the appropriate remedy would be. Typically, unless there is a fundamental breach of contract, the whole contract will not be thrown out. Contractual terms may also be

voided for reasons of unconscionability, if they are against public policy, for reasons of illegality or mistake, but this is a difficult thing to do.

Professor Knutsen then stated that the evaluation of confidentiality clauses should be an important pre-settlement question. In asking this question, one must consider what the role and purpose of the civil law justice system is.

1. If the civil law system is a party-driven mechanism for effectively resolving disputes between parties, then we should generally be in favour of the ability to bargain away the right to secrecy if the parties so desire.

2. If the civil law system is a publicly funded open system operating with transparency to engineer greater social good, then we probably won't be in favour of confidentiality clauses, as it takes important information about justice outside of the public sphere.

The reality of the civil justice system is that it works through individual initiative and only starts if one party takes action against another. By filing a claim against another person, there is instant public access. The "bedrock tenet" of our civil justice system is that the parties control the process, they decide whether or not to sue, whether or not to defend and whether or not to settle. Courts generally favour party- driven settlements in order to get matters out of the public court system. The system is designed to foster settlement and already has a lot of secrecy built into that system, such as in mediations, in settlement negotiations, with juries and with solicitor/client privilege.

Professor Knutsen then addressed some of the problems with this secrecy in the civil justice system. Given that the court system is public, information should be public in a public system. When things are kept secret, safety information goes undisclosed, product failures go undisclosed and the identity of criminals is kept secret. If no one gets to know this information, is this right? Victims also face an informational and resource power imbalance. Knowledge of similar cases can assist others in their own cases. However, most confidentiality clauses are not clear as to what the rights and limits of disclosure are. In addition, victims are usually vulnerable and just want to sign the agreement and move on.

On the other hand, civil litigation is not being done for the benefit of the public and there is no link between settlement information being made public and general product safety, for example. In addition, public settlements may encourage litigation and do we, as a society, really want more lawsuits or for lawsuits not to settle?

The benefit of confidentiality clauses is that they are a value creation tool to foster settlements. They can also speed up settlement, which saves on litigation costs. In addition, many settlements do not contain information that would be beneficial to the public.

Professor Knutsen then discussed the options for Canada with respect to confidentiality clauses. First, legislation banning/restricting confidential settlements could be

implemented in order to make new legal rules about what to do and to restrict confidentiality clauses for certain types of settlements, such as in those of childhood sexual abuse. However, doing this creates its own set of problems, in that it takes a "bargaining chip" off the table and disrupts the whole bargaining aspect of the civil justice system: "It is important to be careful that we are not hurting those we mean to protect by banning certain kinds of clauses." If there is a total ban on confidentiality clauses in the court system, then people will move to private dispute resolution systems instead of using the public system.

For example, he explained, in Florida and Texas they have sunshine laws, that require anyone making a settlement to disclose details if there is an issue of public safety; however, there are no court cases interpreting what "public safety" means. The law does not appear to be used.

Another potential option is to require judicial approval of confidential settlements, to make sure it is in the best interests of the parties, however this appears to "beg the question". If something is confidential, then it should not be made public through the system. In addition, it adds another expensive step in a procedure driven system,

A third option is to regulate the lawyers who negotiate settlement agreements, in order to ensure that they have full and frank discussions with their clients about what the clause means and what its ramifications would be for the future. However, lawyers already have to abide by the rules of professional conduct. This option puts the onus of policing the system onto lawyers when it is potentially already being done within the confines of the solicitor/client relationship.

The final option is to create a party driven solution, using the confidentiality clause as a creative tool to settle. Parties can then think of how to incorporate a clause that meets their particular needs, instead of using a "boilerplate" confidentiality clause. In most cases, a blanket confidentiality clause will not be needed, so they should be tailored for each specific case, for example, allowing discussions with therapists.

In closing, Professor Knutsen stated that there should be more attention paid to what confidentiality means for both parties in civil litigation cases. He believes that parties should be more creative in using them. In addition, he called for more clarity on what would happen if a confidentiality clause was breached. He thought that some model clauses could be created, as well as providing more lawyer education on what confidentiality clauses mean to different clients.

STEVEN GAON

Steve Gaon thanked the Inquiry for inviting him to speak. He stated that he would explain his approach to confidentiality clauses as a mediator. Although he is a lawyer, he is a mediator now and he deals mostly with mediations under the mandatory mediation procedure in Ottawa. He stated that in some cities, notably Ottawa and Toronto, it is mandatory to mediate civil litigation cases within 90 days of an action being commenced.

He stated that in a typical mediation, the two parties would sit across the table from one another, which is problematic in abuse cases. The issues of settlement, the non-admission of liability, confidentiality and release provisions raise whole different set of issues in abuse cases.

Mr. Gaon stated that typically, a settlement agreement is drafted at the end of a three-hour mediation. His focus is to have the parties sign the agreement at the end of the mediation. In an abuse case, his practice may vary, in order to allow the parties to have a "cooling-off" period. In other words, his goal, especially in abuse cases, is not to have a settlement made at any cost.

In his view, a successful mediation can be a "lose-lose" situation, but is most often a better alternative than having no agreement at all. Confidentiality clauses are typically added automatically and plaintiffs will usually sign the settlements without reading them carefully.

Release agreements are typically signed after the agreement has been reached (the settlement being set out in the Minutes of Settlement). The release is a promise by the person being paid money to never pursue the defendant with respect to this matter again.

Mr. Gaon then provided examples of confidentiality clauses typically seen in a release agreement.

Example 1:

Full and Final Release

I FURTHER AGREE to keep the terms of the Superior Court Action, the settlement terms and this Release strictly confidential, except that I may discuss these matters with my immediate family members and legal and financial advisors.

I ACKNOWLEDGE that the settlement herein does not represent any admission or recognition of liability on the part of the Releasee.

He noted that this clause is very broad, allowing the matter to be discussed only with immediate family members, legal and financial advisors. It also includes a non-admission of liability. In essence the settlement is the payment of money so the defendant does not have to admit liability. He stated that there might be a monetary premium on confidentiality clauses, however this can be distasteful for clients. Given that secrecy in cases of abuse is prevalent, it makes the issue of confidentiality even more problematic. One potential solution for plaintiffs is to command a larger settlement in return for the confidentiality agreement.

In Mr. Gaon's view, the civil justice system is not about social engineering, anything can be negotiated as long as it is not against public policy. The system is not meant to achieve justice.

Example 4 in the PowerPoint presentation contains an example of an even more stringent confidentiality clause:

I solemnly promise that the terms of this Agreement will be kept strictly confidential by me and, without restricting the generality of the foregoing, will not be communicated to or discussed with, directly or indirectly, representatives of the media or any other person whosoever. It is understood, however, that I may discuss the terms of this Agreement with my legal advisor and one member of my immediate family on the condition that such person agrees to abide by the same terms of confidentiality regarding this information as I am agreeing to in this Release. It is further understood that any breach of these terms will, at the option of the Releasee, void the within settlement and/or give the Releasee the right to commence legal proceedings against me to prohibit me from divulging the terms of this Agreement, including injunctive relief, without notice, and to seek legal costs from me on a substantial indemnity scale.

In this agreement, a solemn promise is given by the promisee that s/he will not discuss the settlement. In addition, they may only discuss the matter with one family member.

Mr. Gaon told the audience that he had a discussion with a lawyer who represents an institution that has been involved in abuse cases. This lawyer stated that he represents both the institution and insurance companies. He indicated that the institution would not require a confidentiality agreement or a non-admission of liability clause, but that insurance companies will always want these to be included in settlement agreements. He thought that this may just be a habit, in order to protect against future litigation, but stated that many defendants will sign settlement agreements without confidentiality clauses if not impeded by insurers.

Example 3 in the PowerPoint is a clause that has involved some negotiation:

I FURTHER AGREE to keep the sum of money paid to me in settlement of the Superior Court Action, strictly confidential, except that I may discuss these matters with my immediate family members and legal and financial advisors. Notwithstanding the foregoing, nothing in this Release shall prohibit me from discussing all other matters related to the Superior Court Action or the matters pleaded therein with anyone.

The plaintiff is entitled to discuss everything except the amount of money. In fact, the amount of money and the existence of the settlement are usually the two biggest things that a defendant will want kept private.

In closing, Mr. Gaon stated that the focus in a mediation is on achieving a settlement, but that he wants to ensure that everyone feels as though they have been fairly treated. He

stated that he handles abuse cases in a different manner; for example, the parties are not in the same room.

SIMONA JELLINEK

The final speaker for the evening was Simona Jellinek. She thanked everyone in the audience for coming to the workshop. She stated that these workshops are an important part of what the Inquiry is doing.

Ms. Jellinek stated that on the first day of law school, her dean gave a speech in which it was stated that it was a law school and not a school of justice. The message was that the students were not necessarily there to learn about justice. She stated that this message has bothered her to this day.

In her view, sexual abuse settlements are the kinds of cases where there is an ability to achieve some form of justice. She stated that when a person comes to her for legal help, that she is often the first person they have told of the abuse. This step itself is inspirational, as it shows resilience and courage. This is the opportunity that some people take to achieve some kind of justice for what happened to them: some do nothing, some report in the criminal system and/or some seek civil remedies.

She explained that she advises her clients that civil remedies are not a value judgment on how much your life is worth, but rather that it is a symbolic recognition in response to what happened. The civil cases where a settlement can be negotiated allow for more creativity and for some "justice" to be infused.

In Ms. Jellinek's view, civil settlements for sexual abuse cases are not about the money, but an attempt to fix a problem. Often the process of achieving the settlement is more important to the client than the money itself. Clients may be willing to give up some money in order to get something else, such as the opportunity to confront someone. Confidentiality agreements are part of this negotiation process.

Her belief is that confidentiality agreements are bad if they are requested by the defense, but may be good if it is what the plaintiff wants. Part of the healing for sexual abuse clients is to decide what will happen to them, and agreeing to the confidentiality clause or not is part of this. What these clients do not want, however, is for confidentiality to be imposed on them.

Ms. Jellinek stated that there are generally fewer confidentiality clauses in settlements today, which has come with the understanding by defendants that they can be damaging to victims of sexual abuse.

In 2000, the Law Commission of Canada, in its report on sexual abuse in government institutions, stated that confidentiality agreements should not be imposed upon plaintiffs. They are bad because sexual abuse is inherently a secret crime. There is a lot of guilt and

shame for survivors having kept the secret for so long. Imposed confidentiality agreements only perpetuate these feelings and prevent survivors from healing and growing.

When negotiating confidentiality, one of the things that defendants will generally agree to when it is raised in negotiation is giving the plaintiff the right to talk to a therapist about everything. This is generally not a practical problem as the therapist is bound by confidentiality regardless.

With respect to the public having a right to know about settlements, Ms. Jellinek stated that the public does have a certain right to know as one of the side benefits of our tort system is that you get people to change how they behave as a result of being held liable, for example, clearing ice. Having settlements made public gets corporations and governments to change policies for the good. Given that sexual assault/abuse is both a crime and a tort, there is some public value in allowing the information to be made public.

On the other hand, she stated that sometimes confidentiality agreements could be beneficial for plaintiffs. They are an easy way for the plaintiff to avoid talking about the issue if they don't want to. The problem is that confidentiality agreements bind plaintiffs into the future and may find they want to talk about these issues later on. So the goal is to try to give plaintiffs as much leeway as possible.

Ms. Jellinek stated that she is beginning to see confidentiality agreements that are mutual, especially in cases of a present day assault; some plaintiffs do not want publicity either.

One of the issues that arises with defense/respondent counsel in these cases is that "just because money is paid does not mean that there was wrongdoing" and there is often a clause in settlements that says that. However, when the public finds out that money was paid, there is an inference of wrongdoing. Defendants have a fear of bad press and a ruined reputation, especially when institutions are involved. There is also a fear that publicity with respect to one claim will spur on more claims. For defendants, confidentiality clauses provide some finality. However, the fact of the matter is that plaintiffs have had a lot of time to discuss their claims, but have not. In negotiation, the point can be made: " Why would they start talking the day after a settlement if they have not talked a great deal so far?"

Ms. Jellinek's view is that confidentiality clauses have to be part of the negotiated settlement, put on the table as part of the negotiations. She helps clients understand the big picture, that life circumstances will change after the settlement, and that what you don't want to talk about today may be what you need to talk about tomorrow. She is wary of far reaching settlements and tries to make them as narrow as possible. In addition, key people should be excluded from the application of such provisions, such as family members.

In closing, she stated that confidentiality clauses can be good when it is what a vulnerable survivor wants. Sometimes, she stated, that she gets defense counsel to agree that they are silly and to leave them out.

QUESTIONS AND ANSWERS

Colleen invited counsel for the parties to ask questions and make comments first. No counsel had any questions or comments. Colleen then opened the floor to questions and comments from the audience.

Question 1

How does a confidentiality agreement affect the victim's ability to approach the police to make a complaint? Are victims allowed to talk to the police/Crown?

Ms. Jellinek answered that this situation comes up sometimes. She thought that the confidentiality clause would not be enforceable in this situation, either through public policy or through legislation or litigation. She stated that parties are not able to contract out of these types of responsibilities and duties – even if the clause says that they are not supposed to talk to anyone about the settlement, this would not apply to police/crown attorneys.

Professor Knutsen agreed with Ms. Jellinek. He stated that in the criminal justice system a private agreement would have to give way to the public interest in preventing and prosecuting crime.

Question 2

How often do clients ask you about the enforceability of confidentiality clauses and what do you tell them?

Mr. Gaon stated that most lawyers don't raise this issue with clients and that it comes as a shock and surprise to clients that they are asked to sign one or afterward when they realize the impact of what they have signed.

Ms. Jellinek agreed. However, in her practice, she discusses the issue with clients early on in the process. She stated that she often gets instructions from clients as to what they will and will not agree to and she is thus able to use it as a bargaining chip.

With respect to enforceability however, she stated that she does not know what the answer is. There has never been a case in Canada that deals with this specifically so we don't know what a judge would do in the case. As stated before, it is unlikely that a breach of a confidentiality clause would be brought to court as it would bring even more publicity to the case. She has not seen a confidentiality clause enforced through the courts, but has seen a cease and desist letter sent.

Question 3

What would your advice be to a client who stated they would sign a confidentiality clause but would not be bound by it?

Ms. Jellinek stated that this would put her in a difficult situation, and would advise her client that they are signing a contract and that they are bound by the terms of the contract. She would also advise them of what could happen if they chose to break the contract.

Mr. Gaon stated that most lawyers, out of self-interest, would give their clients the most restrictive interpretation of a contract. Most lawyers would advise their clients that they could be open to a lawsuit if they breached the agreement, but whether the agreement would be enforceable is another story.

Question 4

The government sets public policy, but is also a litigant, with an interest in having confidentiality clauses. How can these two roles be balanced?

Professor Knutsen agreed that this is a good question. In the US there is an argument that there should be no option for governments to enter into confidentiality agreements as they are dealing with public money. However, in Canada, most governments do use them. He offered that we might need to adjust how we think about the government and the role of the civil litigation system. Is it a public justice system or a private dispute resolution system?

Ms. Jellinek stated that she has sued a lot of government institutions. Generally, there are a selected group of lawyers that deal with these cases. In her view, the government often handles these cases differently than private litigants. In large cases or multiple victim cases, they will often waive provisions or procedures in order to expedite the matter.

Question 5

The audience member complimented Ms. Jellinek on her empathy towards her clients.

As there were no more questions, Colleen offered the panel the last word.

Professor Knutsen asked Ms. Jellinek whether settlements could be used as an instrument for change?

Ms. Jellinek stated that the problem is that with secret settlements, we have a two tiered justice system. There are cases that settle, and cases that go to trial. The cases that settle often involve more money than those that go to trial, as the payment is being made to keep the case from going to trial. However, it is difficult for a lot of inexperienced lawyers to know how much to settle these kinds of cases for.

She also stated that progress is made through case law generally, but is also incrementally made through settlements as well. For example, she has seen various Children's Aid Societies change policies over time due to settlements taking place. She has seen this happen in other contexts as well: "So while you may not need a civil judgment to change practices, you may need the lawsuit as a catalyst for change."

Mr. Gaon stated that once you have walked into a trial, you have lost, as it is a very unsatisfactory process. In his view, mediated settlements are more satisfactory to the parties: "With settlements, we have an opportunity to change the world in a small way, two parties at a time, as opposed to on a large scale with a judgment and legal precedent."

Colleen expressed the Inquiry's thanks to the panel for sharing their expertise. She stated that there are clear public policy issues here and at the end of the day it is about what we want as a society in the administration of civil justice. She expressed hope that this session would be educational for lawyers who may not have addressed these issues in the past.