



**Manitoba Law
Reform Commission**

THE USE OF NON-DISCLOSURE AGREEMENTS IN THE SETTLEMENT OF MISCONDUCT CLAIMS

FINAL REPORT

June 2023

The Use of Non-Disclosure Agreements in the Settlement of Misconduct Claims

Final Report #145

June 2023

Library and Archives Canada Cataloguing in Publication

Manitoba Law Reform Commission

The Use of Non-Disclosure Agreements in the Settlement of Misconduct Claims

(Report ; 145)

Cover title.

Includes bibliographical references.

ISBN: 978-07711-1647-6

The Commission's Reports are available electronically at www.manitobalawreform.ca.

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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The Manitoba Law Reform Commission is funded through grants from:



ACKNOWLEDGMENTS

Funding for the Manitoba Law Reform Commission is generously provided by the Manitoba Law Foundation and the Manitoba Department of Justice.

This Report was prepared by Stefanie Steigerwald, legal counsel. Contributions were also made by Kristal Bayes-McDonald, director and legal counsel.

This project was commenced under the direction of former Commissioners, Sacha Paul, Dr. Michelle Gallant, Jaqueline Collins, Myrna Phillips and former President Cameron Harvey, K.C. The Commission is grateful for the work of the former Commission Board in moving this project forward.

The Commission would also like to thank Megan Filyk, former student extern from the Faculty of Law, University of Manitoba, for her assistance on this project.

Finally, the Commission gratefully acknowledges the many people who took the time to carefully consider its consultation paper, provide thoughtful written submissions, and speak to Commission staff about their thoughts, experiences, and concerns surrounding this area of the law. This feedback has been invaluable, and has assisted the Commission in considering the many complex issues posed by this project, and in crafting the recommendations contained in this final report.

Please note that the information provided in this report does not represent the views of those who have so generously assisted the Commission in this project.

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EXECUTIVE SUMMARY

A. Background

A non-disclosure agreement (“NDA”) is a contract which restrains parties from disclosing certain information. Several high profile situations in recent years have shone light on concerns with respect to NDAs used to settle misconduct claims. This includes the harm which can be perpetuated when NDAs are used to silence victims of misconduct, particularly sexual misconduct, in exchange for money.

It is an established principle of law that persons have the right to negotiate and enter into contracts freely, including NDAs. This principle must be balanced with the policy objective at issue: the protection of individuals who have been victimized by predatory contracts and contract-making.

Concerns about NDAs used to settle sexual misconduct claims have led to a push for legislation in Canada and other jurisdictions that would restrict, and in many instances effectively prohibit, the use of NDAs in the settlement of claims of misconduct. Legislation has been proposed in Manitoba as Bill 215, *The Non-Disclosure Agreements Act*, Manitoba.

On June 2, 2022, the Minister of Justice and Attorney General of Manitoba asked the Commission to consider the advisability of, and options for, law reform regarding the use of NDAs in Manitoba. On December 15, 2022, the Commission released a consultation paper titled *Non-Disclosure Agreements*. The consultation paper explained the current state of the law on NDAs in Manitoba and other jurisdictions and canvassed the public and the legal profession for input on a number of issues.

B. Consultation

The commentary and feedback received during the consultation process was extensive, and presented multifaceted and divergent positions. The issues are complex.

On one hand, proponents of NDA legislation voiced concerns over the use of NDAs to silence complainants and potentially perpetuate wrongdoing.

On the other hand, the Commission was advised and cautioned about the potential negative impacts that proposed legislation could have on complainants, respondents, and the legal system in Manitoba at large. These negative impacts could include: an increase in lengthy, public and potentially contentious court hearings, potential contractual uncertainty, a decrease in the significant number of out-of-court settlements, and the exacerbation of access to justice issues.

Additionally, the Commission identified nuanced issues with respect to the statutory NDA frameworks that have been enacted and proposed to date that would need to be addressed by either the legislature or the courts. Adding to the complexity is the novelty of statutory regulation of

NDA in general. There is little evidence from other jurisdictions of the impacts of such regulation, either positive or negative, on complainants, the public, or legal systems.

C. Primary Recommendation – No Legislation at this Time

The Commission is particularly concerned that legislation which effectively prohibits NDAs will dramatically reduce pre-trial settlement of disputes involving allegations of misconduct. Respondents and defendants are much less likely to settle claims prior to trial or adjudication if they cannot be assured of a full resolution, including a limit on publicity. The probable consequence of essentially banning NDAs would be to force complainants to forego compensation altogether unless they are able to pursue their claim to trial or an adjudicated hearing.

Furthermore, there is a concern that legislation which is intended to regulate only NDAs that are used to settle misconduct claims may be misinterpreted such that it unintentionally impacts the utility of NDAs in a wide array of other disputes, including many relatively routine employment matters.

For these reasons, the Commission does not, at this time, recommend legislation in the form that has recently been proposed in Manitoba and other jurisdictions. Moreover, it is the view of the Commission that such legislation could cause serious unintended consequences and negatively impact complainants.

D. Alternative Recommendation – Limited Legislation

Given the prominence of this issue and the trend of legislative reform undertaken in other jurisdictions, the Commission recognizes that NDA legislation *could* be enacted in Manitoba in the near future, despite the Commission's current position and recommendation. It is the Commission's view that if government does choose to proceed, any such legislation should be drafted narrowly and cautiously, and address only the most pressing concerns.

Accordingly, while the Commission does not recommend the enactment of NDA legislation in Manitoba at this time, this final report contains twenty-five (25) recommendations intended to guide the legislature with respect to any NDA legislation that *might* be enacted in Manitoba. These recommendations touch upon the scope of such legislation, the requirements for enforceable NDAs, disclosures that should be permitted despite the existence of an otherwise valid NDA, as well as other miscellaneous matters. The Commission's key recommendations are highlighted below.

- NDA legislation should govern NDAs which prohibit or restrict the disclosure of information concerning claims of harassment, discrimination *and abuse*.

- NDA legislation should only require that a complainant have a reasonable opportunity to receive independent legal advice in order for an NDA to be valid and enforceable.
- NDA legislation should indicate that pre-dispute NDAs (NDAs that are signed by parties before a claim of misconduct is ever made, in order to prevent disclosure following a hypothetical future dispute) are unenforceable.
- NDA legislation should provide that, despite the terms of an NDA, information can always be disclosed by a complainant: (1) as required under provincial or federal law, (2) to their lawyer, (3) to persons qualified to provide medical, psychological, mental health, spiritual, or other related support, (4) as required to financially account for, dispose of, or invest the settlement funds, or (5) as required for income tax reporting.
- NDA legislation should generally only apply to NDAs made after the legislation takes effect. However, any provisions contained in such legislation which outline the permitted disclosures described in the preceding recommendation should apply to NDAs made both before and after the law takes effect.

In conclusion, the Commission strongly recommends that legislation governing the content and use of NDAs in claims of misconduct should *not* be enacted in Manitoba at this time. However, in the event that this recommendation is not followed, the Commission respectfully urges legislators to draft any such legislation to address only the most pressing concerns, and in accordance with the recommendations made by the Commission in this final report.

SOMMAIRE

A. Contexte

Un accord de confidentialité est un contrat qui empêche les parties de divulguer certains renseignements. Au cours des dernières années, plusieurs situations très médiatisées ont mis en lumière des préoccupations quant à l'utilisation de ces accords pour régler des allégations d'inconduite. On s'inquiète notamment que les préjudices puissent perdurer lorsque ces accords sont utilisés pour faire taire les victimes d'inconduite, particulièrement d'inconduite sexuelle, en échange d'argent.

Un principe fondamental du droit est que les personnes ont le droit de librement négocier et conclure des contrats, y compris des accords de confidentialité. Ce principe doit être équilibré avec l'objectif politique en cause : la protection des particuliers qui ont été victimes de contrats abusifs et de passation de contrats prédatrices.

Les préoccupations concernant les accords de confidentialité utilisés pour régler des plaintes d'inconduite sexuelle ont entraîné des pressions en faveur de l'adoption de dispositions législatives au Canada et ailleurs qui restreindraient, et, dans de nombreux cas, qui interdiraient, l'usage d'accords de confidentialité dans le règlement des allégations d'inconduite. Une loi a été proposée au Manitoba dans le projet de loi 215, la *Loi sur les accords de confidentialité*.

Le 2 juin 2022, le ministre de la Justice et procureur général du Manitoba a demandé à la Commission d'examiner la pertinence d'une réforme du droit concernant l'utilisation d'accords de confidentialité au Manitoba, et d'envisager différentes options à cet égard. Le 15 décembre 2022, la Commission a publié un document de consultation intitulé *Non-Disclosure Agreements*. Ce document expliquait l'état actuel du droit concernant les accords de confidentialité au Manitoba, et ailleurs, et présentait les résultats d'un sondage auprès du public et des membres de la profession juridique.

B. Consultation

La rétroaction et les commentaires issus du processus de consultation sont nombreux et présentent des points de vue multidimensionnels et divergents. Les enjeux sont complexes.

D'une part, les personnes en faveur d'une loi relative aux accords de confidentialité ont exprimé leurs préoccupations quant à l'utilisation de ces accords pour faire taire les plaignants et potentiellement contribuer à perpétuer les inconduites.

D'autre part, la Commission a été avisée et mise en garde que la loi proposée pourrait avoir des incidences négatives sur les plaignants, les intimés et le système juridique du Manitoba dans son ensemble. Parmi ces incidences négatives, notons : une hausse des audiences publiques, coûteuses,

interminables et potentiellement controversées, une incertitude contractuelle potentielle, une diminution des règlements à l'amiable et une exacerbation des problèmes d'accès à la justice.

En outre, la Commission a relevé des questions nuancées quant aux cadres législatifs relatifs aux accords qui ont été adoptés et proposés jusqu'à maintenant, et qui devraient être traités par les législateurs ou les tribunaux. S'ajoutant à cette complexité est la nouveauté de la réglementation par voie législative des accords de confidentialité en général. Il y a peu de données probantes provenant d'autres juridictions indiquant les incidences d'une telle réglementation, positives ou négatives, sur les plaignants, le public ou les systèmes juridiques.

C. Recommandation principale – Aucune loi pour le moment

La Commission craint particulièrement qu'une loi interdisant les accords de confidentialité réduise considérablement le nombre de règlements à l'amiable portant sur des allégations d'inconduite. Les intimés et les plaignants sont beaucoup moins susceptibles de parvenir à un règlement avant le procès ou le jugement s'ils ne peuvent être assurés d'une résolution complète, y compris une limite de publicité. La conséquence probable d'une interdiction effective des accords de confidentialité serait de forcer les plaignants à renoncer à une indemnisation sauf s'ils sont en mesure de présenter leur plainte devant un tribunal ou une audience de délibération.

De plus, on craint qu'une loi qui vise uniquement à réglementer les accords de confidentialité utilisés pour régler des allégations d'inconduite puisse être mal interprétée au point d'avoir un impact involontaire sur l'utilité des accords de confidentialité dans de nombreux autres domaines de conflit, notamment de nombreuses questions en matière d'emploi relativement courantes.

Pour ces raisons, la Commission ne recommande pas, pour le moment, une telle loi dans la forme récemment proposée au Manitoba et dans d'autres juridictions. De plus, la Commission est d'avis qu'une telle loi pourrait entraîner de graves conséquences involontaires et avoir un impact négatif sur les plaignants.

D. Recommandation optionnelle – Dispositions législatives limitées

Compte tenu de l'importance de cette question et de la tendance à procéder à des réformes législatives dans d'autres juridictions, la Commission reconnaît qu'une loi relative aux accords de confidentialité *pourrait* être adoptée au Manitoba dans un avenir rapproché, malgré la position et la recommandation actuelles de la Commission. La Commission croit que si le gouvernement décide d'aller de l'avant, une telle loi devrait être rédigée de façon étroite et prudente, et uniquement traiter des préoccupations les plus pressantes.

Par conséquent, bien que la Commission ne recommande pas l'adoption d'une loi relative aux accords de confidentialité au Manitoba pour le moment, le présent rapport final contient vingt-cinq (25) recommandations visant à orienter les législateurs quant à toute loi relative aux accords

de confidentialité qui *pourrait* être adoptée au Manitoba. Ces recommandations portent sur le champ d'application d'une telle loi, les critères pour que les accords de confidentialité soient exécutoires, les divulgations qui devraient être autorisées malgré l'existence d'un accord autrement valide, ainsi que d'autres questions diverses. Les principales recommandations de la Commission sont soulignées ci-après.

- Une loi relative aux accords de confidentialité devrait régir les accords qui interdisent ou restreignent la divulgation d'information concernant des allégations de harcèlement, de discrimination *et de mauvais traitements*.
- Une loi relative aux accords de confidentialité ne devrait exiger qu'un plaignant ait eu une occasion raisonnable de recevoir un avis juridique indépendant pour qu'un accord de confidentialité soit valide et exécutoire.
- Une loi relative aux accords de confidentialité devrait indiquer que les accords préalables à un litige (les accords signés par les parties avant qu'une plainte pour mauvaise conduite ne soit émise, afin de prévenir une divulgation d'information suivant un éventuel litige dans l'avenir) ne sont pas exécutoires.
- Une loi relative aux accords de confidentialité devrait indiquer que, malgré les conditions d'un tel accord, un plaignant peut toujours divulguer de l'information : (1) requise en vertu d'une loi fédérale ou provinciale, (2) à son avocat, (3) aux personnes qualifiées pour fournir de l'aide médicale, psychologique, spirituelle et de santé mentale ou tout autre soutien connexe, (4) requise à des fins de comptabilisation, d'utilisation ou d'investissement des fonds du règlement, ou (5) requise à des fins de déclaration fiscale.
- Une loi relative aux accords de confidentialité devrait généralement seulement s'appliquer aux accords conclus après son entrée en vigueur. Toutefois, toute disposition de la loi énonçant les divulgations autorisées décrites dans la recommandation précédente devrait s'appliquer aux accords de confidentialité conclus avant et après l'entrée en vigueur de la loi.

En conclusion, la Commission recommande fortement qu'une loi régissant le contenu et l'utilisation des accords de confidentialité dans une plainte pour inconduite *ne soit pas* adoptée au Manitoba pour le moment. Toutefois, dans l'éventualité où cette recommandation n'est pas suivie, la Commission demande respectueusement aux législateurs de préparer un projet de loi qui traiterait seulement des préoccupations les plus pressantes, et qui serait conforme aux recommandations formulées par la Commission dans le présent rapport final.

GLOSSARY

The following terms are given the meaning ascribed below throughout this final report:

Commenter: an individual or organization that provided feedback to the Commission in response to the *Non-Disclosure Agreements* consultation paper.

Complainant: an individual who has experienced or who has made allegations of misconduct. Throughout this report, the Commission will use this language to describe both actual victims of misconduct and alleged victims, meaning individuals who have made allegations of misconduct which have not been proven.

Institutional Respondent: an institution or representative of an institution that has a legal obligation to take reasonable steps to terminate misconduct in the place where misconduct occurred or is alleged to have occurred. An example of an institutional respondent is an employer of a respondent, such as an educational institution.

Misconduct: harassment, discrimination, and abuse. The Commission notes that many of the statutory frameworks examined in this final report only address non-disclosure agreements used to settle claims of harassment and discrimination, and not abuse. For the reasons contained in Chapter 3 of this final report, the Commission has chosen to expand its interpretation of the term “misconduct” to include abuse as well.

Non-Disclosure Agreement (“NDA”): a legally binding agreement that restrains contracting parties from disclosing certain information to individuals not named in the agreement. Throughout this report, the Commission will use this language to describe both non-disclosure provisions contained within larger settlement agreements, and standalone non-disclosure agreements.

Respondent: an individual who has committed or who is alleged to have committed misconduct. Throughout this report, the Commission will use this language to describe both actual perpetrators of misconduct and alleged perpetrators, meaning individuals against whom allegations of misconduct are made but not proven.

Settlement Agreement: a legally binding agreement that disposes of one or more issues in dispute between contracting parties in relation to a potential legal claim.

CHAPTER 1: INTRODUCTION

A non-disclosure agreement (“NDA”) is a legally binding contract which restrains contracting parties from disclosing certain confidential knowledge or information to anyone outside of the agreement.¹ Historically, NDAs were used to prevent the sharing of confidential business information, intellectual property, and trade secrets by high-level employees upon their termination or departure from a corporation.² However, over the years, the use of these agreements has proliferated in the employment context with NDAs now being regularly used to prevent the sharing of information pertaining to a wide variety of workplace experiences by employees. Moreover, NDAs have now also become commonplace in the settlement of civil lawsuits, with many plaintiffs agreeing to release defendants from liability and to stay silent about the allegations at issue in exchange for a sum of money or other benefit.³ Specifically, NDAs are being used in the settlement of claims of misconduct such as harassment, discrimination, and abuse (“misconduct”). These specific NDAs, which have come under public scrutiny in Canada in recent times in light of their role in notorious legal matters like the Peter Nygard⁴ case and Hockey Canada⁵ scandal, will be the primary focus of this paper.

Commentators have recognized a number of potential benefits of NDAs for complainants where they are crafted reasonably,⁶ and entered into in good faith, with adequate consideration and mutual consent.⁷ For instance, these agreements are said to protect the confidentiality and privacy of

¹ Shubham Mishra, "Non-Disclosure Agreements for the Protection of Business" (2019) 6:10 Ct Uncourt 2.

² Julie Macfarlane, “The misuse of non-disclosure agreements in cases of sexual violence and harassment” (PowerPoint presentation delivered at the MBA 2022 Mid-Winter Conference, 20 January 2022) [unpublished].

³ Kevin W. Saunders, "Non-Disclosure Agreements, Catch and Kill, and Political Speech" (2020) 58:2 U Louisville L Rev 283.

⁴ In April 2020, a civil class-action lawsuit filed in New York against Nygard, alleging that he had raped 10 women at his estate in the Bahamas between 2008 and 2015, was amended to account for sexual assault allegations made by an additional 36 women, raising the total number of complainants to nearly 50. According to a CBC News report, the complaint indicated that until that point in time, Nygard had largely been able to silence his victims through tactics including “intimidation, threats of retribution, bribery, payoffs and forced non-disclosure agreements.” See Timothy Sawa, “18 Canadians among new accusers in Peter Nygard rape lawsuit”, *CBC News* (21 April 2020), online: <[⁵ Hockey Canada has recently come under fire for its use of NDAs in the settlement of sexual assault allegations. A CBC news report explains that after a woman filed a \\$3.5 million lawsuit in April 2022 alleging that she was sexually assaulted in 2018 by eight Canadian Hockey League players, the woman signed a settlement agreement with Hockey Canada which prohibited her from talking about the allegations. See Ashley Burke, “Hockey Canada scandal shows the need to ban non-disclosure agreements, advocates say”, *CBC News* \(10 August 2022\), online: <\[>\]\(http://www.cbc.ca/news/politics/growing-calls-outlaw-non-disclosure-agreements-canada-1.6546531\)](http://www.cbc.ca/news/world/peter-nygard-canadian-accusers-1.5540392#:~:text=“Until%20recently%2C%20Nygard%20has%20largely%20been%20able%20to,payoffs%20and%20forced%20non-disclosure%20agreements%2C”%20the%20complaint%20says.>.”></p></div><div data-bbox=)

⁶ Vasundhara Prasad, “If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements” (2018) 59:7 Boston College Law Review 2507 at 2516.

⁷ Nico Bernardi, "Silence Can Be Golden: The Benefits That Confidentiality Clauses Can Bring Survivors Seeking Settlement" (2021) 33:1 Can J Women & L 1 at 3.

complainants and to provide them with closure;⁸ to shield complainants from further trauma and embarrassment that could result from a public hearing into a matter; to prevent unfair hiring practices of potential future employers who might otherwise perceive a complainant as litigious; to strengthen complainants' bargaining power in settlement negotiation; and to restore in them a sense of agency and control.⁹

On the other hand, NDAs used in the settlement of misconduct claims have been recognized as problematic for a number of reasons. These include the silencing effect that they have on complainants, which can prevent them from obtaining support, closure and justice; the harms that they can cause to third parties, who may become unsuspecting victims of serial perpetrators whose actions are hidden by NDAs; and more generally, their contribution to a culture of silence, impunity, and tolerance of wrongdoing.¹⁰

In an attempt to combat these concerns, various lawyers, advocates, and politicians have started pushing for legislation that would restrict the use of NDAs in the settlement of these types of cases. This legislative reform movement has resulted in changes to existing legislation and the enactment of new laws in jurisdictions outside of Canada. It has also led to the enactment in March 2022 of the *Non-Disclosure Agreements Act* of Prince Edward Island ("PEI NDAA"),¹¹ the first piece of legislation in Canada governing the use of NDAs in the settlement of harassment and discrimination claims, which invalidates NDAs made in this context that do not comply with a rigid set of statutory criteria. Similar legislation has since been proposed elsewhere in Canada, including in Manitoba, and around the world.

In Manitoba, a private members' bill entitled *The Non-Disclosure Agreements Act* ("MB Bill 225")¹² was introduced in the legislative assembly in April 2022. While the bill passed second reading on October 11, 2022, and was sent to the Standing Committee on Legislative Affairs on November 2, 2022, it died on the Order Paper. Subsequently, on November 29, 2022, Bill 215, *The Non-Disclosure Agreements Act* ("MB Bill 215")¹³ was introduced in the legislative assembly. While there were slight changes to this bill, it was virtually identical to the original. It also died on the Order Paper. Like the PEI NDAA, the purpose of MB Bill 225 and its successor, MB Bill 215, is to "restrict or prohibit the use of non-disclosure agreements as they relate to claims of harassment and discrimination."¹⁴

⁸ Austl, Commonwealth, Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) [*Respect@Work*] at 32.

⁹ Prasad, *supra* note 6 at 2516.

¹⁰ Bernardi, *supra* note 7 at 12.

¹¹ *Non-Disclosure Agreements Act*, RSPEI 2021, c 51 [PEI NDAA].

¹² 4th Sess, 42nd Leg, Manitoba, 2022 (second reading 11 October 2022) [MB Bill 225].

¹³ 5th Sess, 42nd Leg, Manitoba, 2023 (first reading 29 November 2022) [MB Bill 215]. See Appendix A.

¹⁴ *Ibid*, s 1.

Following the introduction of MB Bill 225, the Minister of Justice and Attorney General of Manitoba requested that the Commission “undertake a review of the use of [NDAs] in the context of allegations of harassment and abuse.”¹⁵ Specifically, he recommended that this review include “consideration as to whether there is a need to reform the law on the use of NDAs in cases of harassment and abuse, and the options for doing so.”¹⁶ This request was the impetus for this project.

A. The Consultation Process

On December 15, 2022, the Commission released a consultation paper titled *Non-Disclosure Agreements*,¹⁷ which canvassed the public on 13 issues for discussion. These issues explored the current state of the law on NDAs in Manitoba, Canada, and around the world, and the legislative reform which has occurred and is being contemplated in other Canadian and international jurisdictions surrounding NDAs used to settle claims of misconduct. The purpose of the consultation process was to gather input from the public with respect to whether Manitoba should enact such legislation in the province, and if so, what this legislation should look like.

The consultation paper was posted on the Commission’s website, circulated to the Commission’s mailing list, shared through other avenues such as the Commission’s Twitter page, and provided to various individuals and organizations including subject matter experts, interested stakeholders, and parties with unique perspectives on the topic. The Commission also had the opportunity to present the paper to an audience of approximately 70 lawyers belonging to various sections of the Manitoba Bar Association (“MBA”) and to approximately 50 lawyers as part of the Commission’s presentation at the MBA’s Midwinter Conference in early 2023.

Ultimately, the Commission received numerous written submissions in response to the consultation paper and received feedback from others during virtual meetings. Commenters include parties to NDAs, students, academics, NDA reform advocates, politicians, union-side labour lawyers, management-side labour lawyers, employment lawyers and civil lawyers from both within and outside of Manitoba, as well as Manitoban and Canadian human rights organizations. The feedback received through this consultation process assisted the Commission in crafting the recommendations contained in this final report.

There were many key takeaways from the consultation phase of this project. In considering the issues necessary to making recommendations, the Commission considers the following to be fact:

- Misconduct has been perpetrated against Manitobans by persons in positions of power or authority over them, either in an employment context, or otherwise;

¹⁵ Letter from the Minister of Justice and Attorney General of Manitoba to the Manitoba Law Reform Commission (2 June, 2022).

¹⁶ *Ibid.*

¹⁷ Manitoba Law Reform Commission, *Non-Disclosure Agreements* (December 2022).

- Disputes are often privately settled through the negotiation of NDAs, either as part of a formalized process (e.g. Human Rights Tribunal mediation process) or outside of a more structured process, with or without legal representation; and
- Some percentage of parties that enter into an NDA are not fully aware of the legal consequences of the NDA, do not enter into the NDA willingly, and/or regret entering into the NDA later on.

Nothing contained in this report should be construed to signify that the Commission does not accept the above-stated facts. No one should be entering into a contract unwillingly or unknowingly and care must be given to ensure that victims of misconduct are only entering into binding contracts with informed consent. The question to be considered is what role, if any, legislation can or should play.

Chapter 2 of this report provides background on the legal landscape and recent legislative reform efforts surrounding NDAs in Canada and around the world, which have helped to guide the Commission's exploration of potential NDA legislation in Manitoba. Chapter 3 outlines the Commission's recommendations for reform in Manitoba, considering the commentary, academic literature and feedback obtained in the Commission's consultation process. Chapter 4 provides a summary of the recommendations identified throughout the final report.

CHAPTER 2: BACKGROUND

A. State of the Law on NDAs in Manitoba

1. Common Law

There is currently no legislation in Manitoba governing the use of NDAs. Accordingly, the legality and enforceability of NDAs, like many other contracts, is governed by the common law and equity. NDAs made in the course of settling misconduct claims may be invalidated by the courts where, for example, they are deemed unconscionable, or are the result of undue influence.¹⁸ The Commission has not located any reported Canadian decisions in which a court or tribunal considers the illegality of an NDA used in the settlement of a misconduct claim.¹⁹ This does not indicate, however, that such arguments have not been pleaded before the court or considered in unreported decisions. In the absence of statutory regulation, common law and equitable principles are the only current means to set aside an NDA or otherwise find an NDA unenforceable in Manitoba. Therefore, the Commission will examine certain of these doctrines and advise how they might apply to NDAs.

In particular, the Commission examines unconscionability and undue influence, doctrines that may apply to situations where a stronger party has taken advantage of a weaker party in the course of inducing the weaker party's consent to an agreement,²⁰ because these doctrines have the most obvious nexus with NDAs and with the policy goals underlying statutory NDA reform. Like the existing and proposed statutory NDA frameworks, these doctrines are intended to “protect one of the parties to the contract who, because of that party's circumstances, is perceived to be at a [...] legally significant disadvantage as against the other contracting party, at least as far as that contract is concerned.”²¹

¹⁸ Aside from unconscionability and undue influence, there are other legal doctrines that may be relied upon by contracting parties to contest a contract's enforceability, or its very existence. These include doctrines such as duress, misrepresentation, mistake, illegality, and frustration, for example. For a detailed yet concise discussion of these doctrines, see Bruce MacDougall, *Introduction to Contracts*, 5th ed (Toronto: LexisNexis Canada Inc., 2022) at Part V: Contesting the Contract.

¹⁹ Canadian lawyers have commented on the underdevelopment of the Canadian case law in this regard. See e.g. Emma Phillips & Geetha Philipupillai, “What is the role for non-disclosure agreements after #MeToo?” (Winter 2020) *The Advocates' Journal* 37 at 38, online (pdf): <[nationalmagazine.ca/en-ca/articles/law/opinion/2019/metoo-and-restricting-the-use-of-non-disclosure-ag](https://cfetorontomu.ca/sites/default/files/The%20Advocates'%20Journal%20-%20Winter%202020%20-%20Emma%20Phillips%20and%20Geetha%20Philipup...pdf#:~:text=One%20of%20the%20most%20controversial%20of%20these%20has,serious%20stigma%2C%20reputational%20damage%2C%20legal%20costs%2C%20and%20tremendous>.” See also Alexander Gay, “#MeToo and restricting the use of non disclosure agreements in Canada”, <i>National Magazine</i> (28 March 2019), online: <i>The Canadian Bar Association</i> <.

²⁰ John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 403.

²¹ MacDougall, *supra* note 18 at 265.

i. Unconscionability

Unconscionability is an equitable legal doctrine that is used to set aside certain types of unfair agreements.²² Specifically, it addresses contracts made between parties of unequal bargaining power, stemming from some weakness or vulnerability of the claimant or their circumstances, resulting in a transaction that is “improvident” for the weaker of the two parties.²³ Thus, the two main elements of a claim of unconscionability are: (1) inequality of bargaining power; and (2) an improvident bargain. These elements have recently been explored in depth by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*,²⁴ in which the claimant, a food delivery provider working for Uber, made out a successful claim of unconscionability.

With respect to the first element of unconscionability, the Supreme Court in *Uber* explains that “inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process”²⁵ either because a particular weakness or vulnerability makes them unable to freely enter or negotiate a contract, or compromises their ability to understand or appreciate the meaning and significance of the contractual terms, or both.²⁶ The Court indicates that there are no “rigid limitations” in terms of the particular types of weaknesses or vulnerabilities that create the inequality between the parties, and rather, that “[e]quity is prepared to act on a wide variety of transactional weaknesses”, including both personal and circumstantial weaknesses.²⁷

The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", so as to preclude "a worthwhile judgment as to what is in his best interest". Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person", and therefore was specially disadvantaged because of "the contingencies of the moment".²⁸

The Court offers two common examples of when inequality of bargaining power may arise: (1) in what it refers to as “necessity cases”; and (2) in cases involving “cognitive asymmetry.” “Necessity cases” refer to cases in which a weaker party is unable to contract freely and autonomously because they are “so dependent on the stronger that serious consequences would flow from not agreeing to a contract.”²⁹ The Court explains that where this is the case, and “the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's

²² *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16 at para 54.

²³ *Ibid.*

²⁴ The claim was made in respect of a term in the claimant’s employment contract which required that any disputes with Uber be resolved through mediation and arbitration in the Netherlands, which would require “up-front administrative and filing fees of US\$14,500, plus legal fees and other costs of participation.” *Ibid* at para 2.

²⁵ *Ibid* at para 66.

²⁶ *Ibid* at para 68.

²⁷ *Ibid* at para 67.

²⁸ *Ibid* at para 67, citing Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont.: LexisNexis, 2014 at 525.

²⁹ *Ibid* at para 69.

unfortunate situation.”³⁰ “Cognitive asymmetry” cases, on the other hand, refer to situations in which “only one party could understand and appreciate the full import of the contractual terms.”³¹ The Court goes on to explain:

[...] This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. In these cases, the law's assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation have otherwise been met (see Sébastien Grammond, "The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective" (2010), 49 Can. Bus. L.J. 345, at pp. 353-54).³²

With respect to the second element of unconscionability, the Court explains that a bargain will be considered improvident if, at the time of contracting, it either unduly advantages the stronger party or unduly disadvantages the weaker party.³³ This advantage or disadvantage must be assessed contextually, considering the particular facts of a case, and the “surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties.”³⁴

The concept of unconscionability is also examined in an Ontario labour arbitration decision regarding a grievance between the Globe and Mail (the “employer”) and one of its former employees (the “grievor”) and her union.³⁵ The grievance related to a breach of an agreement made between the employer, the grievor and the union (the “MOA”), which settled a claim made by the grievor against the employer for sick leave.

In this decision, unlike in *Uber*, the arbitrator found that there were no elements of unconscionability in the execution of the contract at issue. Specifically, it found that there was neither inequality in bargaining power between the parties, nor evidence that the employer had taken unfair advantage of the grievor or her circumstances. In coming to this conclusion, the arbitrator notes that the grievor was a sophisticated party, that she was represented both by her union, which had retained experienced legal counsel to pursue her claims at arbitration, and by separate legal counsel, which represented her own personal interests, and that negotiations took place over a lengthy period of time such that this was not a “take it or leave it” settlement.³⁶

³⁰ *Ibid.*

³¹ *Ibid* at para 71.

³² *Ibid.*

³³ To be clear, the Court notes that improvidence must be measured at the time that a contract is formed, and that unconscionability will not assist a party who is attempting to “escape from a contract when their circumstances are such that the agreement now works a hardship upon them.” See *ibid* at para 74.

³⁴ *Ibid* at para 75.

³⁵ *Globe and Mail, a Division of CTV Globemedia Publishing Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 87-M, Southern Ontario Newsmedia Guild (Breach of Memorandum Grievance)*, [2013] O.L.A.A. No. 273.

³⁶ *Ibid* at paras 64-65.

When individuals sign NDAs respecting allegations of misconduct, there may be an inequality in bargaining power between the parties to these agreements that results in an improvident bargain. For example, if a complainant signs an NDA without the benefit of legal advice, thus not understanding that they are in fact signing away their right to speak about the allegations with *any* person for the rest of their life, including their friends, families, or even a medical or mental health professional, there may be an element of “cognitive asymmetry” between the parties. This may result in an unfair surprise and disadvantage to the complainant, constituting an improvident bargain. In such an instance, an NDA may be deemed unconscionable.

Further, consistent with the Supreme Court’s explanation of “necessity cases”, if a party claiming to have experienced misconduct signs an NDA because they feel they have no other choice but to sign it, this might represent an inequality in bargaining power sufficient to ground a claim of unconscionability. Take for instance the case of technology policy expert Ifeoma Ozoma, who played a major role in the creation of California’s *Silenced No More* legislation, which will be discussed below in section C of this chapter. Ozoma, who was terminated from her position at Pinterest after attempting to address discriminatory pay practices that she had discovered by her employer, was informed that if she did not sign an NDA, she would not receive any severance pay and would be immediately cut off from any health insurance.³⁷ This was particularly troubling for Ozoma given that she was terminated at the beginning of the COVID-19 pandemic.³⁸ Ozoma has explained that she felt she had no choice but to sign the NDA.

ii. Undue Influence

Another relevant legal concept with respect to the enforceability of NDAs in cases of misconduct is undue influence, which can be broken down into *actual* undue influence and *presumed* undue influence. Actual undue influence is concerned with “conduct that [is] straightforwardly coercive, exploitative, manipulative or deceptive toward a peculiarly vulnerable party,” such that the vulnerable party’s consent has been “infected,” so to speak.³⁹ In other words, it is concerned with one party dominating the will of another person, or exercising a persuasive influence over them.⁴⁰

Unlike *actual* undue influence, *presumed* undue influence is based on a particular relationship between the parties, such as a “fiduciary” or “advisory” relationship or some sort of relationship of trust. Where such a relationship exists, there will be a presumption that the trusting party was

³⁷ “Silenced No More: Can a New Law Change How NDAs Silence the Abused?” (2 April 2021) at 00h:20m:25s, online (video): *YouTube* <[³⁸ *Ibid.*](http://www.bing.com/videos/search?q=Ifeoma+Ozoma&&view=detail&mid=C384EEEC8DEBB280B6D2C384EEEC8DEBB280B6D2&&FORM=VRDGAR&ru=%2Fvideos%2Fsearch%3Fq%3DIfeoma%2BOzoma%26FORM%3DHDRSC4>>.</p></div><div data-bbox=)

³⁹ Marshall Haughey, “The Fiduciary Explanation for Presumed Undue Influence” (2012) 50:1 *Alta L Rev* 129-156 at 134.

⁴⁰ *Geffen v. Goodman Estate*, [1991] 2 SCR 353 [*Geffen*] at para 40.

unduly influenced, which the trusted party must then rebut. The framework for analyzing undue influence has been explained as follows:

[...] undue influence can either be Class 1 (actual) or Class 2 (presumed). Presumed undue influence can be established in one of two ways: either the relationship is a recognized category at law, such as solicitor/client or doctor/patient (Class 2A), or "the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer" (Class 2B). It is clear that Class 2A relationships are the status categories. Class 2B, then, is a fact-based inquiry to determine whether reposed trust and confidence (deferential trust) is present [...]⁴¹

In one of the leading Canadian cases on this subject, *Geffen v. Goodman Estate*,⁴² the Supreme Court of Canada touches on the different relationships that may underpin a claim of presumed undue influence. With respect to Class 2A, relationships that are recognized at law, the Court mentions the relationships of a trustee and beneficiary, solicitor and client, doctor and patient, parent and child, and "future husband and fiancée."⁴³ With respect to Class 2B, other special relationships of trust and confidence, the Court explains that there have been differing opinions as to how such a relationship should be established, but that ultimately, "relationships in which one party develops a *dominating influence* over another are 'infinitely various' and there [is] no substitute for a 'meticulous examination of the facts'."⁴⁴

In the case of NDAs used to settle claims of misconduct, either actual or presumed undue influence may arise in the course of negotiations. Actual undue influence may arise if through coercion, exploitation, manipulation or some other form of deception, the will of the complainant is dominated by another party and they are thus influenced to sign the NDA. For example, if an employee in Manitoba signs an NDA upon termination because they are told by their employer that they will not be entitled to receive severance pay if they do not, this may constitute manipulation which vitiates their will to choose whether or not to sign the agreement. This is because under *The Employment Standards Code*,⁴⁵ they are actually legally entitled to wages in lieu of notice, regardless of any outside agreement.

In terms of presumed undue influence, a complainant may also, depending on the circumstances, be able to demonstrate the type of special relationship contemplated in the case law. For instance, they may be able to demonstrate that they relied on the guidance or advice of the respondent in signing the NDA (particularly if they did not have an opportunity to receive independent legal advice); that the respondent was aware that they relied on them for their advice or guidance; and that the respondent then obtained a benefit from the transaction; in this case, the complainant's silence.

⁴¹ Haughey, *supra* note 39 at para 44 [footnotes omitted].

⁴² *Geffen*, *supra* note 40.

⁴³ *Ibid* at para 28.

⁴⁴ *Ibid* at paras 28-29 [emphasis added].

⁴⁵ *The Employment Standards Code*, CCSM c E110, s 61 [ESC].

Despite the availability of legal arguments that may be used to contest a contract, experts in this area have expressed concern about placing the burden on the complainants of misconduct to challenge the enforceability of an NDA in court.⁴⁶ For instance, Toronto-based labour lawyer Emma Phillips notes that in Canada, you not only bear your own legal costs if your claim is unsuccessful, but also those costs of the opposing party. This, she argues, poses too big of a financial risk for most people to be willing to undertake.⁴⁷ She states that she does not think that “leaving it to judicial scrutiny and the courts and individual legal action is the answer.”⁴⁸

Additionally, others have commented on the complexity of legal doctrines such as unconscionability, undue influence and duress, and the difficulty that this may pose for individuals who try to rely on these principles to contest a contract. Bruce MacDougall, for example, in his text, *Introduction to Contracts*, states the following:

It is an unfortunate irony of the law that these doctrines are perhaps among the most complicated areas of the law of contracts, when these doctrines are largely designed to protect weaker parties who are also those who tend to have the most difficulty accessing or understanding the law. This means that those who are intended to benefit from the doctrines might not know of their existence or understand quite how they operate.⁴⁹

Therefore, while legal doctrines like unconscionability or undue influence used to contest a contract in court are available to a complainant, they may face certain challenges in pursuing such claims. This brings the Commission back to the underlying question of this project: *Should Manitoba implement legislation governing the use of NDAs in the settlement of claims of misconduct, and if so, what should such legislation look like?*

2. Proposed NDA Legislation in Manitoba

On April 26, 2022, Manitoba Liberal Leader Dougald Lamont introduced a private members’ bill entitled *The Non-Disclosure Agreements Act* (“MB Bill 225”)⁵⁰ in the Legislative Assembly of Manitoba. The purpose of MB Bill 225 was to “restrict or prohibit the use of non-disclosure agreements as they relate to claims of harassment and discrimination.”⁵¹ While the bill was sent to the Standing Committee on Legislative Affairs on November 2, 2022, it died on the Order Paper. On November 29, 2022, Mr. Lamont introduced Bill 215, *The Non-Disclosure Agreements Act* (“MB Bill 215”), virtually identical to MB Bill 225. MB Bill 215 did not proceed beyond second reading.

⁴⁶ “Does Confidentiality Work Against Justice?” (28 April 2021) at 01h:07m:55s, online (video): *Centre for Free Expression* <<https://cfe.ryerson.ca/key-resources/podcasts/does-confidentiality-work-against-justice>>.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ MacDougall, *supra* note 18 at 266.

⁵⁰ MB Bill 225, *supra* note 12.

⁵¹ *Ibid.*, s 1.

MB Bill 215, as well as many of the statutory instruments discussed in this chapter,⁵² is derived from the work of the Can't Buy My Silence campaign, which advocates for “legislation to limit the utility of NDAs as an all-purpose muzzle, especially in cases involving allegations of wrongdoing.”⁵³ This campaign was instrumental in the implementation of certain policy changes surrounding the use of NDAs in institutions in the United Kingdom like the University College, London, and has played a significant role in the creation and introduction of new bills and laws governing NDAs in Canada, certain American states, and Ireland.

An NDA is defined in MB Bill 215 as “an agreement between a complainant and a respondent that prohibits or restricts a complainant from disclosing information concerning harassment or discrimination, or alleged harassment or discrimination that the complainant experienced.”⁵⁴ A “complainant” is defined as a “person who has, or alleges to have, experienced harassment or discrimination.”⁵⁵ A “respondent” includes both “a person who committed or is alleged to have committed harassment or discrimination against the complainant,” and a “responsible party,” a “person who has a legal obligation to take reasonable steps to terminate harassment and discrimination in the place where harassment or discrimination occurred or is alleged to have occurred.”⁵⁶ Take for example, an NDA used to settle a claim of misconduct allegedly committed by one employee against another employee. In that situation, the NDA may be executed between the two employees (the complainant and the respondent), as well as their employer (the responsible party). For purposes of this report, when not directly quoting from or referencing a particular statutory instrument, the Commission will use the term “institutional respondent” to describe this third party.

“Discrimination” is given the same definition in MB Bill 215 as in *The Human Rights Code of Manitoba*.⁵⁷ Under *The Human Rights Code*, discrimination includes:

- (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
- (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2)⁵⁸; or

⁵² See, for example, the sections below outlining the state of the law on NDAs in Prince Edward Island, British Columbia, Ontario, and Ireland.

⁵³ “The Campaign to End NDAs” (13 September 2021), online: *CANADALAND* <www.canadaland.com/julie-macfarlane-campaign-to-end-nondisclosure-agreements/>.

⁵⁴ MB Bill 215, *supra* note 13, s 2.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *The Human Rights Code*, SM 1987-88, c 45 [MB HRC].

⁵⁸ Characteristics referred to in s 9(2) of the MB HRC include ancestry, nationality, ethnic background, religion, age, sex, gender identity, sexual orientation, marital or family status, source of income, physical or mental disability, and social disadvantage, etc.

(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).⁵⁹

“Harassment” is defined in the bill as follows:

(a) a course of abusive or unwelcome conduct or comment that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person;

(b) a series of objectionable and unwelcome sexual solicitations or advances;

(c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.⁶⁰

Pursuant to s. 3(1) of MB Bill 215, any provision of an NDA which prohibits or restricts a complainant from disclosing information concerning harassment or discrimination, or alleged harassment or discrimination, would be presumptively invalid and unenforceable. These provisions would only be considered valid and enforceable if:

(a) it was the expressed wish and preference of the complainant to enter into a non-disclosure agreement;

(b) the complainant had a reasonable opportunity to receive independent legal advice, including advice about

(i) entering into the agreement, and

(ii) the terms and conditions of the agreement;

(c) there were no undue attempts to influence the complainant in respect of the decision to enter into the agreement;

(d) the complainant's compliance with the agreement will not adversely affect

(i) the health or safety of a third party, or

(ii) the public interest;

⁵⁹ MB HRC, *supra* note 57, s 9(1).

⁶⁰ MB Bill 215, *supra* note 13, s 2.

(e) the agreement includes an opportunity for the complainant to waive, by following a process set out in the agreement, the provisions of the agreement that prohibit or restrict the disclosure of information about harassment or discrimination or alleged harassment or discrimination; and

(f) the agreement is of a set and limited duration.⁶¹

Additionally, in accordance with s. 4 of MB Bill 215, NDA provisions will be deemed invalid and unenforceable to the extent that they do any of the following:

(a) [prohibit or restrict] a party to the agreement from disclosing information protected or required under *The Employment Standards Code*, *The Human Rights Code*, *The Workplace Safety and Health Act*, or any disclosure protected or required under another enactment or an Act of Parliament;

(b) [prohibit or restrict] the complainant from engaging in artistic expression that does not identify

(i) another party to the agreement, or

(ii) the terms of the agreement; or

(c) [prohibit or restrict] the complainant from communicating information concerning the harassment or discrimination, or the alleged harassment or discrimination, to

(i) a person whose duties include the enforcement of an enactment or an Act of Parliament, with respect to a matter within the person's power to investigate,

(ii) a person authorized to practise law in Canada,

(iii) a physician, psychologist or psychological associate, registered nurse or nurse practitioner, or registered social worker, authorized to practise in Canada,

(iv) a person who provides victim services under *The Victims' Bill of Rights*,

(v) a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the complainant,

(vi) the Ombudsman,

(vii) the Advocate for Children and Youth,

(viii) a friend, a family member or personal supporter as specified or approved in the non-disclosure agreement, or

(ix) a person or class of persons specified in the regulations.⁶²

⁶¹ *Ibid*, s 3(1).

⁶² *Ibid*, s 4.

Further, pursuant to s. 5 of the bill, a provision of an NDA will also be deemed “invalid and unenforceable to the extent that it prohibits or restricts the complainant from disclosing that they entered a non-disclosure agreement in respect of their previous employment” if the complainant:

- (a) does not disclose the particulars of the harassment or discrimination that occurred or is alleged to have occurred during their previous employment; and
- (b) makes the disclosure as part of providing information about their employment history for the purposes of obtaining new employment.⁶³

Section 6 prohibits anyone from entering an NDA which does not comply with ss. 3-5 of the bill.

Generally speaking, MB Bill 215 would not apply to a provision in an NDA that prohibits or restricts the complainant from disclosing the amount that they were paid.⁶⁴ In other words, such provisions would generally be considered valid, despite MB Bill 215, and a complainant could therefore be prohibited from disclosing that type of information. However, by virtue of s. 7(2) of the bill, a complainant cannot be prohibited from disclosing the amount that they were paid, if they are disclosing that information to a person identified in s. 4 of the Act (e.g. a person authorized to practise law in Canada, a physician, psychologist, registered nurse, or registered social worker, the Ombudsman, etc.)⁶⁵

Whereas the preceding sections address NDAs made between complainants and respondents, s. 8 of MB Bill 215 addresses agreements made between a person who has committed or is alleged to have committed harassment or discrimination (a respondent), and a responsible party (an institutional respondent). Section 8(1) states that a responsible party is not to enter into an agreement with a person who committed or is alleged to have committed harassment or discrimination “for the purpose of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination.”⁶⁶ If this were to happen, any provision of that agreement that has the effect of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination will be considered invalid and unenforceable.⁶⁷

Pursuant to s. 10 of the bill, a respondent who contravenes the legislation is guilty of an offence and liable on conviction to a fine of not more than \$10,000.⁶⁸

⁶³ *Ibid*, s 5.

⁶⁴ *Ibid*, s 7(1).

⁶⁵ *Ibid*, s 7(2).

⁶⁶ *Ibid*, s 8(1).

⁶⁷ *Ibid*, s 8(2).

⁶⁸ *Ibid*, s 10.

B. State of the Law on NDAs around Canada

1. Prince Edward Island

The *Non-Disclosure Agreements Act* (“PEI NDAA”),⁶⁹ the first piece of NDA legislation to be enacted in Canada, received royal assent on November 17, 2021 and came into force on May 17, 2022. Its stated purpose is to “regulate the content and use of non-disclosure agreements,” which it defines as:

[...] a provision in writing in a settlement agreement, however described, between a relevant person and

- (i) the party responsible, or
- (ii) the person who committed or is alleged to have committed the harassment or discrimination,

whereby the relevant person agrees not to disclose any material information about the circumstances of a dispute between them concerning allegations of harassment or discrimination that are unlawful under an enactment or Act of the Parliament of Canada⁷⁰

A “relevant person” refers to the person who has experienced or made allegations about harassment or discrimination, and a “party responsible” refers to a person who has an obligation in law to take reasonable steps to prevent harassment and discrimination in the place where the harassment or discrimination occurred or is alleged to have occurred (the institutional respondent).⁷¹

Like MB Bill 215, Prince Edward Island’s statute defines discrimination in accordance with Prince Edward Island’s human rights legislation, while harassment is independently defined. Discrimination is defined in Prince Edward Island’s *Human Rights Act*⁷² as “discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals.”⁷³ Harassment is defined in the PEI NDAA as follows:

(b) “**harassment**” means any action, conduct or comment that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person and, without limiting the generality of the foregoing, includes actions, conduct or comments of a sexual nature, including but not limited to

- (i) sexual solicitations or advances,
- (ii) sexually suggestive remarks, jokes or gestures,

⁶⁹ PEI NDAA, *supra* note 11.

⁷⁰ *Ibid*, s 1(d).

⁷¹ *Ibid*, ss 1(e), (f).

⁷² RSPEI 1988, c H-12 [PEI HRA].

⁷³ *Ibid*, s 1(d).

- (iii) circulating or sharing inappropriate images,
- (iv) unwanted physical contact,
- (v) any action, conduct or comment that might reasonably be perceived as placing a condition of a sexual nature on employment, an opportunity for training or a promotion, or
- (vi) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance⁷⁴

Sections 4(1) and (2) of the PEI *NDA* create a general prohibition in Prince Edward Island against NDAs which have “the purpose or effect of concealing the details relating to a complaint of harassment or discrimination,”⁷⁵ except where the NDA “is the expressed wish and preference of the relevant person concerned.”⁷⁶ Further, in accordance with s. 4(3) of the Act, even where an NDA is the expressed wish and preference of the relevant person, it will not be enforceable unless:

- (a) the relevant person has had a reasonable opportunity to receive independent legal advice;
- (b) there have been no undue attempts to influence the relevant person in respect of the decision to include a requirement not to disclose any material information;
- (c) the agreement does not adversely affect
 - (i) the health or safety of a third party, or
 - (ii) the public interest;
- (d) the agreement includes an opportunity for the relevant person to decide to waive their own confidentiality in the future and the process for doing so; and
- (e) the agreement is of a set and limited duration.

Additionally, like s. 8 of MB Bill 215, s. 4(4) of the PEI *NDA* prohibits a party responsible (an institutional respondent) from entering into a separate NDA with a person who has committed or who is alleged to have committed harassment or discrimination (a respondent) if the purpose of that NDA is to “[prevent] a lawful investigation into a complaint of harassment or discrimination.”⁷⁷ Where such an NDA is made, or where an NDA is made which fails to comply with s. 4(3) of the Act (i.e. there was undue influence, the agreement was not of a limited duration, etc.) it will be deemed to be null and void.⁷⁸

⁷⁴ PEI *NDA*, *supra* note 11, s 1(b).

⁷⁵ *Ibid*, s 4(1). According to s. 4(9), all references in s. 4 of the Act to NDAs shall also be taken to refer to “non-disparagement agreements” where the non-disparagement agreement has the effect or purpose of concealing details relating to an allegation or incident of harassment or discrimination.

⁷⁶ *Ibid*, s 4(2).

⁷⁷ *Ibid*, s 4(4).

⁷⁸ *Ibid*, s 4(5).

Moreover, s. 4(6) of the PEI *NDAA* outlines certain examples of provisions which will never be valid or enforceable in an NDA, despite the aforementioned requirements being met. Like s. 4 of MB Bill 215, these include provisions which prohibit or restrict disclosures of information that are protected or required under certain provincial enactments or other Acts of Parliament, artistic expressions that do not identify respondents and institutional respondents, or the terms of the NDA, and communications relating to the harassment or discrimination between the relevant person and certain individuals and professionals. These individuals and professionals include lawyers, medical practitioners, psychologists, registered nurses, nurse practitioners, social workers, victim services workers, community elders, spiritual counselors, certain designated friends and family members, etc.⁷⁹

Similarly, pursuant to s. 4(7) of the PEI *NDAA*, even where it is the expressed wish and preference of a relevant person to enter into an NDA, such an NDA cannot prevent that person from communicating with a prospective employer for the purpose of obtaining employment and providing information about their employment history.⁸⁰ In particular, the PEI *NDAA* specifies that an NDA cannot prevent a complainant from making:

(a) [a] disclosure of the fact that a settlement agreement was reached with the party responsible or the person who committed or is alleged to have committed the harassment or discrimination; and

(b) that the settlement agreement includes a non-disclosure agreement

if the communication does not state the particulars of the harassment or discrimination that occurred or is alleged to have occurred.⁸¹

However, provisions in settlement agreements that preclude the disclosure of the amount paid in the settlement of a claim will generally still be considered valid. In other words, the PEI *NDAA* does not prohibit such provisions.⁸²

While NDAs which were made prior to the PEI *NDAA* coming into force will be generally exempt from its application, s. 5 of the Act indicates that the PEI *NDAA* will apply to provisions of such NDAs that prohibit or restrict disclosures that are permitted under subsections 4(6) and 4(7) of the Act. Those sections relate to the disclosure of information protected or required under various Acts, certain artistic expressions, disclosure relating to the harassment or discrimination between the relevant person and certain professionals, and disclosures made in the course of seeking new employment, etc.

⁷⁹ *Ibid*, s 4(6).

⁸⁰ *Ibid*, s 4(7).

⁸¹ *Ibid*.

⁸² *Ibid*, s 4(10).

A party responsible (an institutional respondent) or a person who committed or is alleged to have committed harassment or discrimination (a respondent) who now enters into an NDA that fails to comply with s. 4 of the Act will be “liable on summary conviction to a fine of not less than \$2,000 or more than \$10,000.”⁸³

2. British Columbia

On March 9, 2023, British Columbia Green Party Leader Sonia Furstenau tabled Bill M-215, the *Non Disclosure Agreements Act* (the “BC Bill”),⁸⁴ which would regulate the use of non-disclosure agreements in cases of harassment and discrimination in British Columbia. The framework of the bill is very similar to that of MB Bill 215, the PEI *NDAA*, and the *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021* (the “Irish Bill”),⁸⁵ a bill which is currently before the Irish legislature, and which will be discussed later on in this chapter.

An “NDA” is defined in the bill as an agreement between a relevant person and respondent that “prohibits or restricts the relevant person from disclosing information about discrimination or harassment experienced, or alleged to have been experienced, by the relevant person” or which “prohibits or restricts disparagement by the relevant person, if the purpose or effect of the prohibition or restriction is to conceal details relating to discrimination or harassment experienced, or alleged to have been experienced, by the relevant person.”⁸⁶ A “relevant person” refers to the person who has experienced or made allegations about harassment or discrimination.⁸⁷ A “respondent” includes both a person who committed, or is alleged to have committed, the discrimination or harassment and a “responsible person”, which is a person who has an obligation to take reasonable steps to prevent or eliminate harassment and discrimination in the place where the harassment or discrimination occurred or is alleged to have occurred (an institutional respondent).⁸⁸

As in MB Bill 215 and the PEI *NDAA*, discrimination is defined in the BC Bill in accordance with the province’s human rights legislation, while harassment is independently defined in the bill. Under British Columbia’s *Human Rights Code*,⁸⁹ discrimination includes discriminatory publications;⁹⁰ discrimination in accommodation, service and facility;⁹¹ discrimination in the

⁸³ *Ibid*, s 6.

⁸⁴ Bill M-215, *Non-Disclosure Agreements Act*, 4th Sess, 42nd Parl, British Columbia, 2023 (first reading 9 March 2023) [BC Bill].

⁸⁵ *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021* [Irish Bill].

⁸⁶ BC Bill, *supra* note 84, s 1.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

⁸⁹ RSBC 1996, c 210 [BC HRC].

⁹⁰ *Ibid*, s 7.

⁹¹ *Ibid*, s 8.

purchase of property;⁹² discrimination in tenancy premises;⁹³ discrimination in wages;⁹⁴ discrimination in employment;⁹⁵ and discrimination by unions and associations.⁹⁶ Harassment is defined in the bill as “any action, conduct or comment that could reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person, including, without limitation, sexual harassment.”⁹⁷ “Sexual harassment” is defined as follows:

- (a) an unwelcome action or comment or unwelcome conduct of a sexual nature, including, without limitation,
 - (i) a sexual solicitation or advance,
 - (ii) a sexually suggestive remark, joke or gesture,
 - (iii) the circulation or sharing of an inappropriate image, and
 - (iv) physical contact,
- (b) an action or comment or conduct that could reasonably be perceived as placing a condition of a sexual nature on employment, an opportunity for training or a promotion, and
- (c) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.⁹⁸

Like MB Bill 215 and the PEI *NDAA*, the BC Bill establishes a blanket prohibition against NDAs pertaining to claims of harassment and discrimination which is subject to certain exceptions. Specifically, s. 2(1) of the bill states:

- 2(1) A respondent must not enter into a non-disclosure agreement in respect of discrimination or harassment or allegations of discrimination or harassment with a person who is a relevant person in relation to the discrimination, harassment or allegations unless
- (a) the agreement is the expressed wish and preference of the relevant person,
 - (b) before entering into the agreement, the relevant person has a reasonable opportunity to receive independent legal advice,
 - (c) there are no undue attempts to influence the relevant person in relation to the decision to enter into the agreement,
 - (d) the agreement does not adversely affect the health or safety of a third party or the public interest,

⁹² *Ibid*, s 9.

⁹³ *Ibid*, s 10.

⁹⁴ *Ibid*, s 12.

⁹⁵ *Ibid*, s 13.

⁹⁶ *Ibid*, s 14.

⁹⁷ BC Bill, *supra* note 84, s 1.

⁹⁸ *Ibid*.

- (e) the agreement includes
 - (i) an opportunity for the relevant person to waive the relevant person's own confidentiality, and
 - (ii) a process for waiving confidentiality, and
- (f) the agreement is of a set and limited duration.⁹⁹

Additionally, like s. 8 of MB Bill 215 and s. 4(4) of the PEI *NDAA*, s. 5(1) of the BC Bill prohibits a responsible person (an institutional respondent) from entering into a separate NDA with a person who has committed or who is alleged to have committed harassment or discrimination (a respondent) if the purpose of that NDA is to “[prevent] or [interfere] with a lawful investigation into discrimination, harassment or allegations of discrimination or harassment [...]” Where such an NDA is made, it will be deemed void.¹⁰⁰

Moreover, s. 4(1) of the BC Bill indicates that NDAs will be void to the extent that they prohibit or restrict certain types of disclosures and communications. Like Manitoba’s bill and Prince Edward Island’s legislation, these include disclosures of information that are protected or required under certain provincial enactments or other Acts of Parliament, artistic expressions that do not identify the respondents or the terms of the NDA, and communications relating to the harassment or discrimination between the relevant person and certain individuals and professionals. These individuals and professionals include lawyers, medical practitioners, psychologists, registered nurses, nurse practitioners, social workers, victim services workers, community elders, spiritual counselors, certain designated friends and family members, clinical counsellors, etc.¹⁰¹

An NDA will also be considered void to the extent that it prohibits or restricts a relevant person from disclosing the fact that they entered into an NDA or settlement agreement to a prospective employer in the course of providing information about their employment history for the purposes of obtaining employment.¹⁰² However, in order to be permitted, this disclosure must not communicate the particulars of the discrimination or harassment or alleged discrimination or harassment.¹⁰³

As in the Manitoba and Prince Edward Island instruments, the BC Bill does not generally apply to provisions in settlement agreements that preclude the disclosure of the monetary amount paid in the settlement of a claim.¹⁰⁴ However, by virtue of s. 7(2) of the bill, these types of provisions cannot prohibit a relevant person from disclosing the amount that they were paid, if they are disclosing that information to a person identified in s. 4 of the Act (e.g. a person authorized to

⁹⁹ *Ibid*, s 2.

¹⁰⁰ *Ibid*, s 5(2).

¹⁰¹ *Ibid*, s 4(1).

¹⁰² *Ibid*, s 4(2)(a).

¹⁰³ *Ibid*, s 4(2)(b).

¹⁰⁴ *Ibid*, s 7(1)(a).

practise law in Canada, a physician, psychologist, registered nurse, or registered social worker, etc.)¹⁰⁵

As with the PEI *NDA*, NDAs which are made prior to the BC Bill coming into force will be exempt from its application. However, s. 7(3) of the bill indicates that the bill *will* apply to provisions of such NDAs that prohibit or restrict certain types of disclosures that are outlined in s. 4. These include disclosures of information protected or required under various Acts, certain artistic expressions, disclosures relating to the harassment or discrimination between the relevant person and certain professionals, and disclosures made in the course of seeking new employment, etc.

Pursuant to s. 8 of the bill, an individual who contravenes the legislation is guilty of an offence and liable on conviction to a fine of not less than \$2,000 and not more than \$10,000.¹⁰⁶ Uniquely, the BC Bill sets out a distinct offence provision for corporations. Section 8(2) indicates that persons who are not individuals who contravene the legislation are liable on conviction to a fine of not less than \$10,000 and not more than \$50,000. For clarity, s. 8(3) indicates that “[if] a corporation commits an offence under this Act, an officer, director, shareholder, employee or agent of the corporation who directs, authorizes, permits or participates or acquiesces in the commission of the offence commits the same offence, whether or not the corporation has been prosecuted of the offence.”

Also unique to the BC Bill is a provision which indicates that the rights established in the bill cannot be waived. Section 6 states: “This Act applies despite an agreement to the contrary, and any waiver or release of the rights, benefits or protection provided by this Act is void.”

3. Ontario

On December 8, 2022, Bill 26, the *Strengthening Post-secondary Institutions and Students Act, 2022*¹⁰⁷ received royal assent. Bill 26 amends *The Ministry of Training, Colleges and Universities Act*¹⁰⁸ and *The Private Career Colleges Act, 2005*¹⁰⁹ (the “ON Acts”), among other pieces of legislation. The ON Acts now place restrictions on the types of agreements that can be made by publicly-assisted universities and colleges of applied arts and technology (“institutions”) and private career colleges, respectively. Specifically, the ON Acts now explicitly void any agreement made by an institution or private career college and any person, which,

¹⁰⁵ *Ibid*, s 7(2).

¹⁰⁶ *Ibid*, s 8.

¹⁰⁷ Bill 26, *An Act to amend various Acts in respect of post-secondary education*, 1st Sess, 43rd Leg, Ontario, 2022 [Bill 26].

¹⁰⁸ RSO 1990, c M.19.

¹⁰⁹ SO 2005, c 28.

directly or indirectly, prohibits the institution [,private career college] or any person related to the institution [or private career college] from disclosing that an allegation or complaint has been made that an employee of the institution [or private career college] committed an act of sexual misconduct toward a student of the institution [or private career college].¹¹⁰

However, institutions and private career colleges may enter into agreements that contain such terms if a student requests that they do so, and if the following conditions are met:

- (a) the student has had a reasonable opportunity to receive independent legal advice;
- (b) there have been no undue attempts to influence the student with respect to the request;
- (c) the agreement includes an opportunity for the student to decide to waive their own confidentiality in the future and the process for doing so; and
- (d) the agreement is of a set and limited duration.¹¹¹

These conditions are consistent with the validity and enforceability requirements in MB Bill 215, the PEI *NDAA*, the BC Bill, and the Irish Bill. However, interestingly, the ON Acts do *not* include the requirement that the NDA not adversely affect the health or safety of a third party or the public interest. Each of these other legislative frameworks do require consideration of the health and safety of third parties and/or the public interest as a whole.

On June 6, 2023, a private members' bill was introduced and received first reading in the Ontario legislature titled, Bill 124, *An Act to regulate the use of non-disclosure agreements relating to discrimination, harassment, sexual harassment and sexual assault*.¹¹² The contents of this bill are nearly identical to the PEI *NDAA* and the bills introduced by the other Canadian provinces to date. The scope of the misconduct is broader given that it applies to settlement of claims of sexual assault.

4. Nova Scotia

In Nova Scotia, a private member's bill, Bill 144, the *Non-Disclosure Agreements Act*¹¹³ was read for a first time on April 7, 2022. The bill was virtually identical to Prince Edward Island's legislation. It had the same stated purpose as the PEI *NDAA*: "to regulate the content and use of non-disclosure agreements,"¹¹⁴ and almost all of the same provisions. Further, it created the same blanket prohibition against NDAs as in s. 4(1) of the PEI *NDAA*, the same exceptions to this prohibition, the same criteria for enforceability of NDAs, and the same provisions outlining non-application of NDAs.

¹¹⁰ Bill 26, *supra* note 107, Schedule 1, s 3; Schedule 2, s 1.

¹¹¹ *Ibid.*

¹¹² 1st sess, 43 Leg, Ontario, 2023. Bill 124 was introduced in Ontario while the Commission was in the process of finalizing this report. Therefore, it is not referenced elsewhere in this report.

¹¹³ Bill 144, *Non-Disclosure Agreements Act*, 1st Sess, 64th Leg, Nova Scotia, 2022 (first reading 7 April 2022).

¹¹⁴ *Ibid.*, s 4.

Ultimately, the bill did not receive the necessary support of the government to move it through the legislative process beyond this point.¹¹⁵ In October 2022, CBC News reported on the status of the bill, quoting from Nova Scotia’s Justice Minister Brad Johns, who indicated that while he understood the call for legislation to be passed as soon as possible, “he ha[d] concerns that no other province has passed similar legislation yet“, and “first wants to see how things play out on P.E.I.”¹¹⁶ Johns stated: “I think it’s better to just slow things down and see how things continue to go in P.E.I. and make a decision in the future on whether or not the province will do that.”¹¹⁷

On March 28, 2023, MLA for Cumberland North, Elizabeth Smith-McCrossin, introduced a new private member’s bill in Nova Scotia pertaining to NDAs. Bill 278, the *Non-disclosure Agreement Prohibition Act*,¹¹⁸ would prohibit NDAs which are used to settle claims of sexual assault or harassment committed or alleged to have been committed by a member of a political party, including a member of the House of Assembly, an employee of a caucus office and a staff member employed by a Provincial political party. Unlike Bill 144, Bill 278 would create a complete prohibition against these NDAs, with no exceptions. The bill was called for second reading on March 29, 2023. When asked in early April, 2023, whether the government was considering legislation to restrict the use of NDAs, Nova Scotia Premier Tim Houston indicated: “We’re doing the research, we’re listening to both sides, we’re taking the issue very seriously.”¹¹⁹

5. Federal Reform

Reform efforts are now also underway at the federal level. On May 9, 2023, Bill S-261, the *Can’t Buy Silence Act* (the “Federal Bill”),¹²⁰ was introduced in the Canadian Senate by Senator Marilou McPhedran. This bill amends the *Financial Administration Act* (the “FAA”)¹²¹ and the *Parliament of Canada Act* (the “PCA”)¹²² to restrict the use of public money to enter into NDAs and to litigate NDAs against complainants.¹²³ An NDA is defined in the Federal Bill as:

a provision of a written agreement, however called, that is entered into after this section comes into force and is between a complainant and an entity whose financial information is included in the Public Accounts prepared under [the *Financial Administration Act*],

¹¹⁵ Michael Gorman, “Banning use of NDAs in sexual assault matters not a priority for N.S. government”, *CBC News* (17 October 2022), online: <www.cbc.ca/news/canada/nova-scotia/nda-non-disclosure-agreement-sex-assault-hockey-canada-1.6618926>.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Bill 278, *An Act Prohibiting Non-disclosure Agreements with Political Parties*, 1st Sess, 64th Leg, Nova Scotia, 2023 (first reading 28 March 2023).

¹¹⁹ Alex Cooke, “N.S. MLA planning legal action after calls to remove her over NDA debate”, *Global News* (4 April 2023), online: <<https://globalnews.ca/news/9600450/elizabeth-smith-mccrossin-nda-legal-action/>>.

¹²⁰ Bill S-261, *An Act respecting non-disclosure agreements*, 1st Sess, 44th Parl, 2022-2023 (first reading 9 May 2023) [Federal Bill].

¹²¹ RSC 1985, c F-11 [FAA].

¹²² RSC 1985, c P-1 [PCA].

¹²³ *Ibid.*, Summary.

under which a complainant agrees not to disclose any material information regarding any of the following:

- (a) a circumstance of harassment and violence or discrimination based on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act* experienced or alleged by the complainant;
- (b) the resolution of a complaint, including the details of any formal or informal process to address the allegation; or
- (c) the monetary value of a written settlement insofar as it relates to the allegation.¹²⁴

Based on the definition of “NDA” in the Federal Bill, the statutory restrictions apply to settlement provisions precluding a complainant from disclosing the amount paid to settle a claim. This is in contrast to most of the other NDA legislation and bills which do not apply to such provisions enabling contracting parties to restrict disclosures of such information unfettered.

“Complainant” is defined in the bill as “any person who alleges having been the subject of harassment and violence or discrimination”, and “harassment and violence” is defined as “any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.”¹²⁵

The bill amends the *FAA* and the *PCA* by creating restrictions and requirements under those Acts for NDAs used by various governmental entities.¹²⁶ These restrictions and requirements are similar in many ways to those created by the legislation that has been enacted and proposed in the various other jurisdictions.

Like the Canadian and Irish instruments, the Federal Bill creates presumptive prohibitions against NDAs used to settle claims of misconduct and accompanying exceptions to these prohibitions. Under the amended *FAA* and *PCA*, the specified government agencies will be prohibited from entering into NDAs with complainants and permitting public money to be used to enter into NDAs with complainants unless two conditions are satisfied:

1. The complainant has had the opportunity to obtain independent legal advice that includes advice on alternative means to protect the confidentiality of their personal information; and
2. After receiving said advice, the complainant makes a specific and voluntary written request for an NDA before the agreement is entered into.¹²⁷

¹²⁴ *Ibid*, s 5.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*, ss 6-10.

¹²⁷ *Ibid*, ss 6-10.

The requirements for enforceable NDAs are much more succinct and less rigorous than the requirements in the other instruments reviewed in this chapter. Unlike the other instruments, the Federal Bill does *not* require, for an NDA to be enforceable, that there has been no undue attempts to influence a complainant to enter into the NDA; that the NDA will not adversely affect the health or safety of a third party or the public interest; that the NDA include an opportunity for the complainant to waive their confidentiality requirements in the future; or that the NDA be of a set and limited duration. It is likely that these exclusions were a deliberate choice made by the drafters of the bill.

The Federal Bill also establishes statutorily permitted exceptions that will be read into NDAs. Under the amended *FAA* and *PCA*, parties to NDAs under the scope of the legislation will be statutorily permitted to make the following types of disclosures despite the existence of an otherwise valid NDA:

1. Disclosures protected or required under an Act of Parliament or the laws of a province or territory;
2. Artistic expressions by complainants that do not identify parties to the NDA or the terms of the NDA; and
3. Communications relating to misconduct between the complainant and individuals whose duties include the enforcement of an Act of Parliament or the laws of a province or territory if the communication is in respect of a matter within the person's official duties; lawyers; medical and nurse practitioners; registered nurses; psychologists and psychological associates; social workers; victim services providers; culturally specific service providers like community elders and spiritual counsellors; and friends, family members and personal supporters.¹²⁸

Unlike MB Bill 215, the PEI *NDAA*, the BC Bill, and the Irish Bill, the Federal Bill does not create a statutory carve out for disclosures to prospective employers.

Also unique to the Federal Bill is the creation of prohibitions against litigation of NDAs against complainants. Under the amended *FAA* and *PCA*, specified government entities will be prohibited from using public money to litigate an NDA against a complainant.¹²⁹

Other notable differences between the Federal Bill and the other enacted and proposed NDA statutes include:

- The exclusion in the Federal Bill of any provisions addressing NDAs made between respondents and institutional respondents;
- The exclusion in the Federal Bill of any offence provisions; and

¹²⁸ *Ibid*, ss 6-10.

¹²⁹ *Ibid*, ss 6-10.

- The purely prospective application of the Federal Bill (evidenced by the definition of NDA, which includes only NDA provisions that are entered into after the bill comes into force).

Finally, the Federal Bill requires a high degree of transparency and oversight on the part of government to disclose its negotiation of NDAs to settle disputes and prevent public monies from being used for such a purpose by outside actors. First, the bill requires the President of the Treasury Board of Canada to table Annual Reports in both Houses of Parliament detailing the number of NDAs entered into by public sector entities¹³⁰ and non-governmental entities that receive federal funding,¹³¹ and the total dollar amount of agreements containing NDAs that are entered into by these entities.¹³² Secondly, the bill requires that any statutory authority making a grant or a contribution of public money to an entity whose financial information is not included in the Public Accounts prepared under the *FAA* be exercised in a way that prevents that public money from being used to pay for NDAs used to settle claims of harassment and violence or discrimination or to litigate NDAs against complainants.¹³³

6. Non-Statutory Reform

Reform efforts have also been made by the Canadian legal profession to address some of the problems said to be associated with NDAs. On February 9, 2023, lawyers across Canada voted in favour of a Canadian Bar Association resolution to “discourage [the] use [of NDAs] to silence victims and whistleblowers who report experiences of abuse, discrimination and harassment in Canada” and to “advocate and lobby the federal, provincial and territorial governments to enact changes to legislation and policies to ensure NDAs are not misused for the purpose of silencing victims and whistleblowers.”¹³⁴ The resolution passed by a margin of 94%.¹³⁵ While the resolution is not law, its supporters explain that it removes the opposition of the legal profession as an obstacle for governments attempting to enact NDA legislation.¹³⁶

¹³⁰ This includes any entity whose financial information is included in the Public Accounts prepared under the *Financial Administration Act*. See *FAA*, *supra* note 121, Part VI.

¹³¹ This includes entities who receive a grant or a contribution of public money, but whose financial information is not included in the Public Accounts prepared under the *Financial Administration Act*. As per s 5 of the Federal Bill, any agreement that provides for federal funding to such entities must now require that entity to report annually to the President of the Treasury Board information on the number of NDAs entered into by that entity, and the total dollar amount of agreements entered into by that entity that contain NDAs.

¹³² Federal Bill, *supra* note 120, ss 3(1),(2).

¹³³ *Ibid*, s 5.

¹³⁴ CBA Resolution 23-05-A, *Principles to Prevent Misuse of Non-Disclosure Agreements in Cases of Abuse and Harassment*, online (pdf): <www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2023/Principles-to-Prevent-Misuse-of-Non-Disclosure-Agr/23-05-A.pdf> [CBA Resolution].

¹³⁵ Priya Bhat & Rhianna Schmunk, “Lawyers across Canada approve groundbreaking resolution to help prevent abuse of non-disclosure agreement”, *CBC News* (9 February 2023), online: <www.cbc.ca/news/canada/british-columbia/lawyers-across-canada-approve-groundbreaking-resolution-to-help-prevent-abuse-of-non-disclosure-agreements-1.6741976>.

¹³⁶ *Ibid*.

C. State of the Law on NDAs Outside of Canada

1. United States

On December 7, 2022, President Joe Biden signed the bipartisan *Speak Out Act*,¹³⁷ the first federal statute in the United States which regulates the use of NDAs. This law “limit[s] the judicial enforceability of *pre-dispute* nondisclosure and nondisparagement contract clauses relating to disputes involving *sexual assault* and *sexual harassment*.”¹³⁸ It differs from the Canadian NDA legislation and bills in that it does not apply to NDAs that are signed *after* a dispute has occurred, in the course of settling that dispute, and it does not apply to NDAs regarding other types of allegations such as discrimination. Aside from this newly enacted federal law, there are a number of individual states that have moved to pass laws which explicitly bar the enforcement of confidentiality provisions in workplace sexual harassment settlements, and which regulate NDAs generally, including the following:

Table 1: US laws regulating the use of NDAs

Source: (Spooner, 2020)¹³⁹

State	Regulation of Non-Disclosure Agreements as of January 2020
Arizona	Prohibits the use of a NDA to prevent a victim from testifying in a criminal proceeding.
California	Prohibits a provision in a settlement that bars disclosure of factual information relating to sexual assault or harassment, but it requires that a formal legal complaint is made (a complaint to an employer would not be sufficient) in order to be invoked.
Illinois	Bans all non-disclosure and non-disparagement clauses in agreements between employers and employees.
Maryland	Does not include NDAs specifically but they are likely to be included in the voiding of any provision in an employment contract that waives any substantive right to a future claim of sexual harassment.
Nevada	Banned NDAs from settlement agreements if the NDA restricts a complainant from disclosing information concerning a sexual offence.

¹³⁷ *Speak Out Act*, Pub L No 117-224, §4524.

¹³⁸ *Ibid* [emphasis added]. An example of a “pre-dispute” NDA would be one which an employee or contractor is required to sign as a condition of employment. See Michelle L. Price, “Biden signs #MeToo law curbing confidentiality agreements”, *Associated Press News* (7 December 2022), online: <<https://apnews.com/article/biden-business-kirsten-gillibrand-united-states-government-karine-jean-pierre-9be38e03abc6ba2382d386ef4e286776>>.

¹³⁹ Ireland, Department of Children, Equality, Disability, Integration and Youth, *The prevalence and use of Non-Disclosure Agreements (NDAs) in discrimination and sexual harassment disputes* (February 2022) at 21, citing Rachel S. Spooner, “The Goldilocks Approach: Finding the “Just Right” Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases” (2020) 37:2 Hofstra Lab & Emp LJ 331 at 355-362, online: <www.gov.ie/pdf/?file=https://assets.gov.ie/217724/f2b97bb1-dac8-4e06-9fdf-315362366dcf.pdf#page=null> [Irish Report].

New Jersey	Prohibits enforcement of all NDAs relating to discrimination or harassment after 18 th of March 2019.
New York	Requires that an NDA only be used if it is a complainant’s preference.
Oregon	Prohibits any NDA that prevents disclosure of sexual assault unless the complainant requests it.
Tennessee	States that an employer may not require an employee enter into an NDA concerning sexual harassment as a condition of employment after 15 th May 2018.
Vermont	Bans employers from asking employees to waive their rights concerning sexual harassment, with the legislation covering not just employees but everyone hired to perform work or services.
Virginia	Prohibits employment agreements that conceal the details relating to a claim of sexual assault, though the legislation does not address sexual harassment.
Washington	Prohibits employers from requiring employees to sign an NDA to conceal sexual assault or harassment.

Other states which have also passed NDA-related legislation include Louisiana,¹⁴⁰ New Mexico,¹⁴¹ Maine,¹⁴² Hawaii,¹⁴³ and Pennsylvania.¹⁴⁴ These laws largely ban the use of NDAs in the context of employment agreements, as opposed to creating a ban on NDAs generally.

California, in particular, has made significant changes to its NDA-related laws in recent years. In 2018, California implemented legislation known as the *STAND (Stand Together Against Nondisclosure) Act*, which added §1001 to the *Code of Civil Procedure* of California. As the table above indicates, this new section prohibits and invalidates provisions in settlement agreements that prevent the disclosure of “factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action.”¹⁴⁵ In January of 2022, this section of the Code was broadened by the “*Silenced No More Act*”, which “expands these prohibitions to confidentiality provisions in settlement agreements relating to the disclosure of underlying factual information relating to **any type** of workplace

¹⁴⁰ US, HB 197, *Prohibits certain nondisclosure agreements in settlements involving the payment of public funds*, 2019, Reg Sess, LA, 2019 (enacted).

¹⁴¹ US, HB 21, *An act relating to employment law; providing that nondisclosure agreements in sexual harassment or sexual assault cases are unenforceable*, 54th Leg, Reg Sess, NM, 2020 (enacted).

¹⁴² US, HP 711, *An Act Concerning Nondisclosure Agreements in Employment*, 130th Leg, 1st Reg Sess, ME, 2021 (enacted).

¹⁴³ US, HB 2495, *A bill for an act relating to employment practices*, 31st Leg, Reg Sess, HI, 2022 (enacted).

¹⁴⁴ US, HB 938, *An Act providing for nondisclosure agreements relating to sexual harassment*, 2021-2022, Reg Sess, PA, 2021 (enacted).

¹⁴⁵ US, SB 820, *An act to add Section 1001 to the Code of Civil Procedure, relating to civil procedure*, 2017-2018, Legislative Counsel’s Digest.

harassment, discrimination or retaliation, whether the protected characteristic is sex, age, national origin, race or others covered by California law.”¹⁴⁶

By virtue of the *Silenced No More Act*, §1001 of California’s *Code of Civil Procedure* now states:

(a) Notwithstanding any other law, a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:

- (1) An act of sexual assault that is not governed by subdivision (a) of Section 1002.¹⁴⁷
- (2) An act of sexual harassment, as defined in Section 51.9 of the Civil Code.
- (3) An act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code.
- (4) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code.¹⁴⁸

Additionally, the *Silenced No More Act* amended §12964.5 of the Government Code of California so that it now does the following:

- Prohibits an employer from requiring an employee to sign a non-disparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace, such as harassment or discrimination;
- Makes it an unlawful employment practice for an employer or former employer to include in any agreement related to an employee’s separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace; and
- Requires a non-disparagement or other contractual provision that restricts an employee’s ability to disclose information related to conditions in the workplace to include specified language relating to the employee’s right to disclose information about unlawful acts in the workplace.¹⁴⁹

¹⁴⁶ Mitch Boyarsky, P. John Veysey & Nick Ladin-Sienne, “California Continues to Whittle Away Non-Disclosure and Non-Disparagement Clauses in Employee Settlement and Separation Agreements” (26 October, 2021), online: *The National Law Review* <www.natlawreview.com/article/california-continues-to-whittle-away-non-disclosure-and-non-disparagement-clauses> [emphasis added].

¹⁴⁷ Subdivision (a) of section 1002 of the Code addresses felony sex offenses, childhood sexual assault, sexual exploitation of a minor, and sexual assault against older or dependent adults.

¹⁴⁸ *Cal Civ Code*, §1001(a).

¹⁴⁹ US, SB 331, *An act to amend Section 1001 of the Code of Civil Procedure, and to amend Section 12964.5 of the Government Code, relating to civil actions*, 2021, Legislative Counsel’s Digest.

2. Ireland

On June 1, 2021, *An Act to restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination*, otherwise known as the *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021* (the “Irish Bill”)¹⁵⁰ was presented to the Seanad Eireann, the upper house of the Irish legislature. The Irish Bill amends existing legislation, the *Employment Equality Act 1998* of Ireland, to restrict the use of NDAs in connection with allegations of sexual harassment or discrimination. Unlike the law and bills in Canada, the Irish Bill defines an NDA as “a provision in writing in an agreement, however described, **between an employer and an employee** whereby the latter agrees not to disclose any material information about the circumstances of a dispute between them concerning allegations of **sexual** harassment or discrimination which are unlawful under this Act.”¹⁵¹ This definition refers specifically to agreements made between employers and employees, thus limiting the scope of the legislation to agreements made in an employment context. Further, it refers specifically to harassment of a sexual nature.

Given that this bill amends the *Employment Equality Act 1998*, the terms “discrimination” and “sexual harassment” are defined in accordance with that Act. Under that Act, discrimination is said to occur where, “one person is treated less favourably than another is, has been or would be treated” because of their gender, marital status, family status, sexual orientation, religion, age, disability, race, or membership in the “traveller community.”¹⁵² Sexual harassment is considered a form of discrimination on the basis of gender, and includes unwelcome acts or conduct by an employer, a fellow colleague, or a client, customer or other business contact of one’s employer, that could reasonably be regarded as sexually offensive, humiliating or intimidating.¹⁵³

The substantive law contemplated in the Irish Bill is very similar to that in the PEI NDAA, MB Bill 215 and the BC Bill. In accordance with the proposed amendments, the *Employment Equality Act 1998* would be amended to state:

14B. (1) Other than in accordance with subsection (2), an employer shall not enter into a non-disclosure agreement with a relevant employee where—

(a) the employee has experienced or made allegations of sexual harassment (within the meaning of section 14A), or

(b) the employee has experienced or made allegations of discrimination which are unlawful under this Act, and the non-disclosure agreement has the purpose or effect of concealing the details relating to a complaint of discrimination or harassment under paragraphs (a) or (b).

¹⁵⁰ Irish Bill, *supra* note 85.

¹⁵¹ *Ibid*, s 1 [emphasis added].

¹⁵² *Employment Equality Act 1998*, ss 6(1), (2).

¹⁵³ *Ibid*, s 23.

(2) An employer may only enter into a non-disclosure agreement with a relevant employee in accordance with this section if such an agreement is the expressed wish and preference of the relevant employee concerned.

(3) Where an agreement is made under subsection (2), the agreement shall only be enforceable where—

(a) the relevant employee has been offered independent legal advice, in writing, provided at the expense of the employer,

(b) there have been no undue attempts to influence the relevant employee in respect of the decision to include a confidentiality clause,

(c) the agreement does not adversely affect—

(i) the future health or safety of a third party, or

(ii) the public interest,

(d) the agreement includes an opportunity for the relevant employee to decide to waive their own confidentiality in the future, and

(e) the agreement is of a set and limited duration.

(4) An employer may not enter into a separate non-disclosure agreement solely with the relevant individual where the agreement has the purpose or effect of concealing the details of a complaint relating to the sexual harassment or discrimination concerned.

(5) Where a non-disclosure agreement following an incident of workplace sexual harassment or discrimination is made that does not comply with subsections (3) or (4), that agreement shall be null and void.

(6) An employer who enters into a non-disclosure agreement after the coming into operation of this section that is not made in accordance with this section is guilty of an offence.

(7) Where a non-disclosure agreement was made before the coming into operation of this Act, it shall only be enforceable if it was made in accordance with subsection (3), save for any provisions protecting the identity of the relevant employee, which shall remain in effect.

(8) An agreement made in accordance with subsection (2) shall not apply to—

(a) any disclosure of information under the Protected Disclosures Act 2014, or

(b) any communication relating to the harassment or discrimination between the relevant employee and:

(i) An Gardai Síochána;

(ii) a legal professional;

(iii) a medical professional;

(iv) a mental health professional;

- (v) a relevant State regulator;
- (vi) the Office of an Ombudsman;
- (vii) the Office of the Revenue Commissioners;
- (viii) a prospective employer; or
- (ix) a friend, a family member or personal supporter.

(9) An agreement made under subsection (2) shall, insofar as is possible, be written in plain English.

(10) The Minister shall make regulations to provide for the standard form for an agreement to be made under subsection (2) and for any other purpose to enable this Act to have full effect.

(11) The Minister shall publish guidelines for employers, employees and legal professionals to aid compliance with this section.

(12) In this section, all references to a non-disclosure agreement shall be taken to also reference non-disparagement agreements where a nondisparagement agreement has the effect or purpose of concealing details relating to an incident of sexual harassment or discrimination.”¹⁵⁴

On July 6, 2022, the bill entered into the Seanad Eireann in the Fourth Stage (Report Stage).¹⁵⁵

3. United Kingdom

In March of 2018, Britain’s national equality body, The Equality and Human Rights Commission (the “EHRC”), released a report reviewing how sexual harassment is dealt with by employers in the United Kingdom, and reviewing “what had happened when individuals reported cases of sexual harassment and what they felt should be done to improve practice.”¹⁵⁶ After gathering evidence from approximately 1,000 individuals and employers between December 2017 and February 2018, the EHRC made a number of recommendations to the Government of the United Kingdom which the EHRC believed would help to eliminate sexual harassment in every British workplace. These include the following recommendations pertaining to the use of NDAs and confidentiality clauses by employers:

¹⁵⁴ Irish Bill, *supra* note 85, s 2.

¹⁵⁵ There are five stages of a bill in the Irish legislative process. Following the fourth stage, in which Members have their last opportunity to make amendments to the text of a bill, the bill is received for final consideration by the Seanad in the Fifth Stage. If it is determined in the Fifth Stage that the bill would constitute good law, the bill will then be sent to the other House, the Dáil, where it must go through the same Stages of debate, beginning on Second Stage. Once a bill has been passed by the Dáil and Seanad, the President signs it into law. See “How laws are made” (last modified 19 October 2020), online: *Houses of the Oireachtas* <www.oireachtas.ie/en/visit-and-learn/how-parliament-works/how-laws-are-made/#Stages>.

¹⁵⁶ Equality and Human Rights Commission, “Turning the tables: Ending sexual harassment at work” (2018) at 2, online (pdf): <www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf>.

- The UK Government should introduce legislation making any contractual clause which prevents disclosure of future acts of discrimination, harassment or victimisation void.
- The statutory code of practice on sexual harassment and harassment at work should, subject to consultation on the code, set out:
 - The circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void.
 - Best practice in relation to the use of confidentiality clauses in settlement agreements including that the employer should, for example:
 - Pay for the employee to receive independent legal advice on the terms of the agreement, including the reasonable costs of agreeing to changes to the terms.
 - Give the employee a reasonable amount of time to consider the terms of a settlement agreement before it will become effective.
 - Allow the employee to be accompanied by a trade union representative or colleague when discussing the terms of a settlement agreement.
 - Only use confidentiality clauses at the employee’s request, save in exceptional circumstances.
 - Annexe a statement to the settlement agreement explaining why confidentiality clauses have been included and what their effect is.
- In Scotland, the Law Society of Scotland and the Faculty of Advocates and, in England and Wales, the Solicitors Regulation Authority and Bar Standards Board should issue guidance regarding solicitors’ advocates and barristers’ professional obligations when drafting and advising on confidentiality clauses.
- The UK Government should ensure that all guidance on the use of settlement agreements in the public sector is updated to state that clauses should not be used to prevent disclosures of acts of sexual harassment.¹⁵⁷

Further, the EHRC recommended that NDAs which are used at the start of an employment relationship or in advance of a particular event should not be used at all, while any confidentiality clauses used in settlement agreements after an allegation of harassment has been made should be closely regulated.¹⁵⁸ Additionally, it suggested the creation of updated guidelines for the public sector on the use of NDAs and confidentiality clauses, in order to ensure that “confidentiality clauses and public money are not used to prevent employees from discussing harassment.”¹⁵⁹

Following up on these recommendations, the EHRC, in October 2019, released a practical guide entitled “The use of confidentiality agreements in discrimination cases,” which “aims to clarify the law on confidentiality agreements in employment and to set out good practice in relation to their use.”¹⁶⁰ While the EHRC explains that the “guidance” is not a statutory code, and therefore,

¹⁵⁷ *Ibid* at 16-17.

¹⁵⁸ *Ibid* at 17.

¹⁵⁹ *Ibid* at 18.

¹⁶⁰ Equality and Human Rights Commission, “The use of confidentiality agreements in discrimination cases” (October 2019), online (pdf): <www.equalityhumanrights.com/sites/default/files/guidance-confidentiality-agreements-in-discrimination-cases.pdf>. These guidelines are concerned with “confidentiality agreements that could stop a worker speaking about any act of discrimination, harassment or victimisation which contravenes the

not binding on employment tribunals or courts, it advises that the document “may still be used as evidence in legal proceedings where it is relevant.”¹⁶¹

In addition to the feedback and recommendations of the EHRC, the UK Government also received recommendations with respect to the use and treatment of NDAs from the Women and Equalities Committee (“WEC”) in June 2019, in its report entitled “The use of non-disclosure agreements in discrimination cases.” At the completion of its consultation with various stakeholders, including employers, employees, unions, human resources professionals, charities, employment lawyers, academics, regulators and professional bodies, the WEC made a number of recommendations to the UK Government regarding NDAs, including the following:

*The Government should legislate to ensure that NDAs cannot be used to prevent legitimate discussion of allegations of unlawful discrimination or harassment, and in the public interest consider how to stop their use to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives. Legitimate purposes include discussing potential claims with other alleged victims, or supporting such victims through the trauma of raising a complaint of discrimination and harassment.*¹⁶²

In July 2019, the UK Department for Business, Energy & Industrial Strategy (the “Department”) released a report summarizing the results of its own consultation process which sought the public’s feedback on “proposals to tackle the misuse of confidentiality clauses in cases of sexual harassment and discrimination.”¹⁶³ The Department, which had launched its consultation in March 2019, waited to publish its final proposals in this report until after having considered the recommendations of the WEC. Ultimately, considering the WEC’s recommendations, feedback gathered from 6 roundtable discussions with stakeholders in England, Scotland and Wales, and feedback from “trade unions, campaign organisations, legal institutes, individuals and businesses”,¹⁶⁴ the Department made the following proposals to prevent the misuse of confidentiality clauses or NDAs:

- legislate so that no provision in a non-disclosure agreement can prevent disclosures to the police, regulated health and care professionals and legal professionals;
- legislate so that limitations in non-disclosure agreements are clearly set out in employment contracts and settlement agreements;
- produce guidance for solicitors and legal professionals responsible for drafting settlement agreements;

Equality Act 2010.” Individuals protected by the *Equality Act 2010* include employees, workers, apprentices, crown employees, House of Commons and House of Lords staff, job applicants, contract workers, etc.

¹⁶¹ *Ibid* at 4.

¹⁶² Women and Equalities Committee, “The use of non-disclosure agreements in discrimination cases” at 49-55, online (pdf): <<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1720/1720.pdf>>.

¹⁶³ United Kingdom, Department for Business, Energy & Industrial Strategy, *Confidentiality Clauses: Response to the Government consultation on proposals to prevent misuse in situations of workplace harassment or discrimination* (July 2019), online (pdf):

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818324/confidentiality-clause-consultation-govt-response.pdf> [Business, Energy & Industrial Strategy Report].

¹⁶⁴ *Ibid* at 7.

- legislate to enhance the independent legal advice received by individuals signing non-disclosure agreements; and,
- introduce enforcement measures for non-disclosure agreements that do not comply with legal requirements in written statements of employment particulars and settlement agreements.¹⁶⁵

To date, the British Government has not directly acted on the Department’s statutory recommendations.¹⁶⁶ However, certain bills relating to NDAs have been introduced to Parliament. For instance, in June of 2022, Layla Moran, the Liberal Democrat MP for Oxford West and Abingdon, presented a private member’s bill to Parliament, entitled the *Non-Disclosure Agreements Bill*, which would “make provision about the content and use of non-disclosure agreements.”¹⁶⁷ While the second reading of this bill is scheduled to take place on November 24, 2023, the House of Commons is currently not expected to sit on this day and the bill is therefore not expected to be taken.¹⁶⁸

Further, on May 11, 2023, the *Higher Education (Freedom of Speech) Bill*¹⁶⁹ of the United Kingdom received Royal Assent. The *Higher Education (Freedom of Speech) Act 2023* (the “UK Act”) requires governing bodies of registered higher education providers to ensure that the provider does not enter into a “non-disclosure agreement” with a staff member, other member, student, or visiting speaker in relation to a “relevant complaint” made to the provider by that person.¹⁷⁰ The law declares that if such an NDA is entered into, it is void.¹⁷¹

A “non-disclosure agreement” is defined as “an agreement which purports to any extent to preclude the person from (a) publishing information about the relevant complaint, or (b) disclosing information about the relevant complaint to any one or more other persons.”¹⁷² “Relevant complaint” is defined as “a complaint relating to misconduct or alleged misconduct by any person”, and “misconduct” is defined as “(a) sexual abuse, sexual harassment or sexual misconduct, and (b) bullying or harassment not falling within paragraph (a).”¹⁷³

Interestingly, unlike the PEI NDAA, MB Bill 215, the BC Bill, the ON Acts, the Federal Bill and the Irish Bill, there are no circumstances under which such NDAs in the higher education context will be valid. Rather, this new law creates a complete prohibition for these NDAs.

¹⁶⁵ “Second Special Report” (29 October 2019), online: *UK Parliament* <<https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/215/21502.htm#footnote-001-backlink>>.

¹⁶⁶ Business, Energy & Industrial Strategy Report, *supra* note 163 at 19.

¹⁶⁷ “Non-Disclosure Agreements Bill”, online: *UK Parliament* <<https://bills.parliament.uk/bills/3303/news>>.

¹⁶⁸ “Latest News: Non-Disclosure Agreements Bill” (20 March 2023), online: *UK Parliament* <<https://bills.parliament.uk/bills/3303/news>>.

¹⁶⁹ *Higher Education (Freedom of Speech) Bill* [HL] (UK), 2022-2023 sess, HL Bill 79.

¹⁷⁰ *Higher Education (Freedom of Speech) Act 2023* (UK), s A1(11) [UK Act].

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, s A1(12).

¹⁷³ *Ibid.*

4. Australia

In January 2020, the Australian Human Rights Commission (“AHRC”) released a report outlining the findings of Australia’s National Inquiry into Sexual Harassment in Australian Workplaces 2020, which “examined the nature and prevalence of sexual harassment in Australian workplaces, the drivers of this harassment and measures to address and prevent sexual harassment” (the “AHRC Report”).¹⁷⁴ Ultimately, in the AHRC Report, Australia’s Sex Discrimination Commissioner, Kate Jenkins, recommended a new legal and regulatory system that “improves the coordination, consistency and clarity between the antidiscrimination, employment and work health and safety legislative schemes.”¹⁷⁵ In establishing this new system, the AHRC addresses the issue of the use of NDAs in workplace sexual harassment matters.¹⁷⁶

The AHRC heard in its inquiry that “NDAs could be used to protect the reputation of the business or the harasser and contribute to a culture of silence.”¹⁷⁷ As such, the AHRC recommended that in conjunction with the Workplace Sexual Harassment Council, it ought to create a practice note or guideline “that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs.”¹⁷⁸

In April 2021, the federal government of Australia responded to the AHRC, announcing that it would adopt “‘in full, in-principle or in-part’ all of the 55 recommendations set out in the [AHRC] Report.”¹⁷⁹ In accordance with the AHRC’s Recommendation 38, the Government indicated that it would “ask the [Workplace Sexual Harassment] Council to develop guidance that identifies best practice principles for the use of non-disclosure agreements (NDA) in workplace sexual harassment matters.”¹⁸⁰ Consequently, in 2022, the “Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints”¹⁸¹ were established. The guidelines recommend the following approach to guide the use of confidentiality clauses in settlement agreements, which is intended to “help contribute to improving the way confidentiality clauses are used in relation to workplace sexual harassment complaints.”¹⁸²

¹⁷⁴ *Respect@Work*, *supra* note 8.

¹⁷⁵ *Ibid* at 10.

¹⁷⁶ *Ibid* at 32.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* at 47.

¹⁷⁹ Jaan Murphy & Howard Maclean, “Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021” (12 August 2021), online: *Parliament of Australia* <www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2122a/22bd011#_ftnref10>.

¹⁸⁰ Austl, Commonwealth, Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (2021) at 8.

¹⁸¹ Australian Human Rights Commission, *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (2022), online (pdf):

<www.respectatwork.gov.au/sites/default/files/2022-12/Guidelines%20on%20the%20Use%20of%20Confidentiality%20Clauses%20in%20the%20Resolution%20of%20Workplace%20Sexual%20Harassment%20Complaints.pdf>.

¹⁸² *Ibid* at 6.

1. Consider the need for a confidentiality clause on a case-by-case basis.
2. The scope and duration of the confidentiality clause should be as limited as possible.
3. Confidentiality clauses should not prevent organisations from responding to systemic issues and providing a safer workplace.
4. All clauses in a settlement agreement should be clear, fair, in plain English and, where necessary, translated and/or interpreted.
5. The person who made the allegation should have access to independent support or advice to ensure they fully understand the meaning and impact of the settlement agreement, including any confidentiality clause.
6. Negotiations about the terms of a settlement agreement should ensure so far as possible the wellbeing and safety of the person who made the allegation, and be trauma-informed, culturally sensitive and intersectional.¹⁸³

¹⁸³ *Ibid* at 9.

CHAPTER 3: POTENTIAL REFORM IN MANITOBA

The Commission has been tasked to consider whether Manitoba should enact legislation governing NDAs used to settle claims of misconduct and, if so, how this legislation should regulate such agreements. In doing so, the Commission has considered the various statutes that have been recently proposed or enacted in other jurisdictions including the other Canadian provinces and at the federal level, the United States, the United Kingdom, and Ireland. While these statutory instruments have helped to guide the Commission's review, the Commission's analysis has not been confined to these frameworks.

Considering the current legal landscape, recent reform efforts, and the public's opinion on the statutory regulation of NDAs in the context of misconduct, this chapter will consider whether Manitoba should enact NDA legislation, and what such legislation should look like if the government were to decide to enact such a statutory framework.

A. Is there a Need for Statutory Regulation of NDAs in Manitoba?

There are strong proponents both for and against the use of NDAs in the settlement of claims of misconduct. Those who do not consider legislating in this area to be advisable have emphasized benefits of NDAs for complainants of misconduct, such as preservation of privacy, protection against further or re-traumatization, and enhanced bargaining power and agency. Those opposed to regulation have also highlighted potential negative implications of NDA legislation, such as the infringement on parties' freedom of contract, the potential to exacerbate issues surrounding access to justice,¹⁸⁴ and the potential to decrease the success of settlement negotiations both in the context of particular claims of misconduct and more broadly.

On the other hand, those who are critical of the use of NDAs in this context, and who are thus advocates for legislative reform in this area, highlight the negative implications of NDAs such as the silencing effect that NDAs have on complainants, third-party harms resulting from NDAs, and their contribution to a culture of silence and impunity.¹⁸⁵ Additionally, they stress the need for legislation in this area given the power imbalances which can exist between contracting parties when an NDA is being executed to settle misconduct claims.

1. The Case Against Regulation

Overwhelmingly, the primary concern with respect to NDA legislation that was raised by many legal professionals during the consultation process was that such legislation will hinder settlements in the context of misconduct claims, and possibly in other legal contexts as well. Though the

¹⁸⁴ Bernardi, *supra* note 7 at 14-17.

¹⁸⁵ *Ibid* at 12.

proposed legislation is intended to protect victims, reducing the potential for out of court resolutions would have a negative impact on many complainants.

One group of labour lawyers argues that such legislation would “make it effectively impossible to include an enforceable NDA in a settlement agreement” and that as a result,

there will be more employers that decide it is preferable to put claimants to the onus of proving their allegations of harassment and discrimination in a hearing, and to let the chips fall where they may with the fact finder, than reach a settlement that does not preclude unproven allegations from continuing to be discussed.

The Commission heard similar arguments from many labour and employment lawyers practicing in Manitoba, who represent employers, employees and unions that are involved in harassment, discrimination, and other human rights complaints. One lawyer notes that NDAs are valuable settlement tools for both respondents and complainants, and that this value could be seriously diminished in the face of NDA legislation. They argue that the “promise of confidentiality is something that promotes settlement of harassment and discrimination cases, and lawsuits generally.” They explain that for complainants, NDAs are a “valuable ‘give’ that [they] can use to obtain a more favorable settlement.” They allow complainants to avoid reliving the trauma of their experience and suffering any embarrassment as a result of a public hearing, and it allows them to achieve settlement without the need for an expensive, emotionally draining, and lengthy hearing, and to gain closure. This commenter notes that NDAs allow respondents to avoid the exposure of a public hearing, and affords them an opportunity to proactively address claims of misconduct and to promote a safe and respectful workplace.

Similarly, a group of Manitoba labour and employment lawyers argued that it is in all parties’ interests to resolve matters without the need to expend the time, energy and expense of an arbitration hearing or trial. They state:

In fact, it is our experience that almost all victims would prefer not to have to [go through a hearing process where they may feel revictimized in a very public fashion]. The nature of these types of cases is such that the emotional and psychological toll of participating in an adversarial process is high. As you know, both the labour arbitration and court processes are open to the public. Resolving matters in a confidential manner is often the desire of the affected employee. Frequently, affected employees simply want the matter to be resolved, in a confidential matter, so they can move on. Hearing processes can routinely take years to complete.

Aside from the practical reality of participating in a public hearing, there are also financial costs in proceeding. In non-unionized settings, employees are put to significant personal legal expense if a matter cannot be resolved. Hearings of this nature routinely costs tens of thousands of dollars in legal fees. In unionized environments, although not the direct cost of the employee, the legal costs of proceeding ultimately come from the union members in the form of union dues.

Several lawyers expressed concern to the Commission that exceptional cases, like those of recent high profile serial offenders who have used NDAs to settle egregious harassment and sexual assault claims¹⁸⁶ may be perceived as the rule rather than the exception, and that such exceptions may drive legislation that is neither appropriate nor necessary in the majority of settlements. These commenters acknowledge that it may be the case that individuals with wealth and privilege have used NDAs to settle well-founded claims and consider the compensation paid to their victims as the price to pay for continuing their abuse. However, it was submitted to the Commission that, while these cases have caused justifiable outrage, they do not necessarily reflect the norm in Manitoba.

Another group of lawyers points to the cases involving Harvey Weinstein and Hockey Canada, noting that “such examples are thankfully extreme outliers and represent a tiny percentage of the cases labour and employment lawyers deal with in Manitoba.” They go on to state “[t]hat is not to say that discrimination and harassment does not occur in Manitoba, but the occasions in which the scope and seriousness of the two examples noted above arise are extremely rare. Our sense is that well intentioned outrage over these high profile events is driving [Bill 215].” Similarly, another group of lawyers argues that “caution should be exercised in using the most extreme cases of workplace harassment and sexual assault, where NDAs were part of sweeping abhorrent behaviour under the rug and enabling its repetition, to drive legislative reform that will apply to all cases of harassment and discrimination.”

In a similar vein, one lawyer challenges the widely-held concern that complainants who sign NDAs are often forced to do so without the benefit of legal advice. This is one reason offered by many proponents of NDA legislation for why NDA legislation is needed. This commenter notes that in their experience, a complainant entering into an NDA without some form of professional advice is the exception, not the rule. They explain that most settlements of this nature take place with the complainant being represented by counsel or their union, while others may have the benefit of a mediator or representative from the Human Rights Commission. This commenter argues that complainants are generally informed of the consequence of their settlement and the importance of confidentiality.

Interestingly, while many proponents of NDA legislation argue that NDAs chill the climate for people wishing to speak up about misconduct, one group of Manitoba lawyers argues that legislation *restricting* NDAs would result in this chilling effect:

It is difficult already for employees to raise complaints of harassment and discrimination, particularly in the workplace. Will such a complaint affect my personal relationships within the workplace or worse, my livelihood altogether? Will I be believed? Such thoughts cross the mind of every complainant before filing a complaint. For a complaint to be upheld, it

¹⁸⁶ Examples provided include the well-publicized cases of Harvey Weinstein, the American movie producer, Peter Nygard, the Canadian fashion designer, and NDAs signed by Hockey Canada with victims of the organization’s players.

very frequently requires corroboration from fellow employees. No matter how well intentioned fellow employees may be, our experience is that virtually all such employees are not inclined to get involved in workplace disputes. They are concerned with how they may be perceived and what the impact of their “taking sides” may have on them. These are reasonable concerns. It is rare that a witness to a complaint does not insist on their involvement remaining confidential in order to participate in the investigation. If such witnesses knew that the outcome of the investigation they are being asked to participate in may not remain confidential, it is our view that witnesses will be significantly less willing to be forthcoming or involved at all. If victims understand (and they will) that their concerns will have to [be] aired publicly, this will have a dramatic and negative impact on the very people this Bill is designed to protect.

Another lawyer who the Commission heard from during consultation challenges the notion that NDAs chill the climate for complainants, arguing that contrary to popular opinion, it is not NDAs that have the chilling effect, but rather, the stigma of being a party to a complaint. They argue that this stigma is mitigated by the fact that employers in Manitoba are required to have policies providing for confidential complaint processes through which to deal with complaints of harassment and discrimination. Further, they argue that existing legislation like *The Human Rights Code*¹⁸⁷ and *The Workplace Safety and Health Act*¹⁸⁸ are effective enough tools to protect complainants and to ensure due process of the parties. This commenter notes that it is already the law in Manitoba that employers provide a harassment free workplace with a means whereby complaints can be received and dealt with properly and confidentially.

One of the groups of lawyers who provided a consultation submission argues that NDA legislation that reflects the frameworks proposed in instruments like the PEI NDAA, MB Bill 215, the BC Bill and the Irish Bill “will result in virtually no settlements in harassment and discrimination cases.” Further, one lawyer expressed concern that NDA legislation which regulates NDAs used to settle misconduct claims may not only impact the settlement of misconduct, but that it may negatively impact the utility of NDAs in *all* contexts. This commenter explains:

I had the opportunity to briefly discuss the impact of the PEI legislation with a lawyer in PEI who said it is too early to fully know the impact the legislation will have in that Province, but early signs are that the public is of the impression NDAs are illegal without appreciating the limitations in the scope of the PEI legislation. The effect has been that it has become more difficult to get parties to agree to NDAs in other contexts not covered by the legislation. I acknowledge this is anecdotal but it highlights the risk of unintended consequences of legislation which is intended to have narrow effect.

While this commenter does note that there may be areas for improvement when it comes to the execution and implementation of NDAs in this context, they argue that these improvements can be attained without legislation. Instead, they argue that these improvements could be achieved through education of the legal profession, employment and labour law professionals, and the

¹⁸⁷ MB HRC, supra note 57.

¹⁸⁸ CCSM c W210 [WSHA].

Manitoba Human Rights Commission. Other suggestions raised by lawyers during the consultation process as alternatives to NDA legislation include increased funding to the Manitoba Human Rights Commission to ensure adequate staffing and resources that are necessary to investigate and respond to harassment and discrimination complaints in a timely manner; amendments to other legislation such as *The Workplace Safety and Health Act*, to improve complaints processes under that framework, and amendments to the Law Society's Code of Conduct to ensure appropriate consideration of the rights of complainants during the negotiation of settlement agreements.

2. The Case for Regulation

The Commission also heard from lawyers, human rights organizations, NDA reform advocates, politicians, parties to NDAs, and other members of the public who disapprove of the use of NDAs to settle claims of misconduct, and who are in support of legislation regulating the use of such NDAs.

For example, one commenter, a lawyer, professor, and NDA reform advocate, denounces the use of NDAs to settle claims of misconduct, arguing that:

the use of NDAs in cases involving the public interest in safety (for example, the protection of school and university students from known sexual harassers) and freedom from discrimination and harassment of all forms (for example racism, gender harassment, transphobia, religious discrimination) is both immoral and unlawful.¹⁸⁹

Specifically, this commenter argues that NDAs used in this context perpetuate harassment and discrimination; protect employers and respondents and not the complainant; gag complainants permanently; make complainants and others lie; and chill the climate for anyone wishing to speak up about abuse in the workplace.¹⁹⁰ Citing data collected by Speak Out Revolution,¹⁹¹ this commenter advised the Commission of the impacts that NDAs have on a complainants' willingness to come forward with a complaint of misconduct. They note that "almost one third of those experiencing harassment or discrimination in the workplace do not file a formal complaint at all, because they anticipate being required to sign an NDA, which they do not wish to do."

In explaining to the Commission why Manitoba ought to enact legislation governing the use of NDAs to settle claims of misconduct, this commenter argues that current non-legislative efforts to control the misuse of NDAs,¹⁹² while a step in the right direction, are insufficient to address the issue. They argue that legislation is required in order to prevent misconduct from being covered

¹⁸⁹ Julie Macfarlane, "How a Good Idea Became a Bad Idea: Universities and the Use of Non-Disclosure Agreements in Terminations for Sexual Misconduct" (2020) 21:2 *Cardozo J Conflict Resol* 361 at 363.

¹⁹⁰ "What's the Problem with NDAs?" (last visited 20 October, 2022), online: *Can't Buy My Silence* <<https://www.cantbuymysilence.com/>>.

¹⁹¹ Speak Out Revolution is a not-for-profit organization founded in 2020 in the United Kingdom, with a mission to cancel the culture of silence on harassment and bullying in workplaces. It is the data partner of the Can't Buy My Silence campaign.

¹⁹² An example would be the resolution recently passed by the Canadian Bar Association establishing a voluntary pledge for lawyers to not use NDAs in the settlement of claims of misconduct. See CBA Resolution, *supra* note 134.

up and repeated, to protect complainants and potential future victims, and to enable systemic change.

An important consideration highlighted by NDA reform advocates is the power differentials that often exist between parties to these agreements. They note that NDAs arising out of allegations of misconduct are often made by individuals who are lower in rank in an organization than the individuals against whom they are making a claim (e.g. a university student against a professor; a junior staff member against a senior manager, etc.).¹⁹³ Respondents often have the power to influence the complainant's future within that organization and their future goals more broadly, thus placing the complainant in an inferior negotiating position. In many cases, NDAs are actually made between a complainant and an institution or organization (the "institutional respondent"), acting on behalf of a respondent, making the power imbalance even more pronounced. This may be the case because a respondent's reputation is often "entangled with that of the institution," and thus, it is in the interest of both the respondent *and* the institutional respondent, to keep certain allegations hidden by virtue of an NDA.¹⁹⁴

Moreover, the Commission learned that NDAs may be entered into by a respondent and an institutional respondent exclusively, in an effort to ensure that allegations do not come to light.¹⁹⁵ Generally, these NDAs involve an agreement by the respondent to step down from their position and leave the institution in exchange for the institutional respondent's silence in respect of the allegations against them. In some cases, institutional respondents may even agree, by way of NDA, to provide the respondent with a letter of reference.¹⁹⁶ These types of NDAs benefit both the institutional respondent and the respondent by facilitating the quick and quiet removal of the problematic actor from the organization, and by enabling the respondent to avoid disciplinary action and a negative personnel record which might impact their ability to find other employment. Complainants may not be involved in these arrangements whatsoever, and so may be left with little to no control over the outcome of the matter. Further, while they themselves are not party to the NDA and are thus technically free to speak about the allegations as they choose, they may be left without the support of the organization within which the alleged misconduct occurred, which could potentially be detrimental to any legal claim they may try to put forward.

In addition to these inherent power imbalances, proponents of NDA legislation note that respondents and institutional respondents also often have greater access to the resources needed to be successful in contractual negotiations.¹⁹⁷ Namely, they may have more money, and thus greater access to legal advice than a complainant, who may not even be able to afford a lawyer.¹⁹⁸ Therefore, respondents and institutional respondents may enter negotiations better prepared and

¹⁹³ Irish Report, *supra* note 139 at 34.

¹⁹⁴ *Ibid* at 5.

¹⁹⁵ Macfarlane, *supra* note 189 at 363.

¹⁹⁶ *Ibid* at 365.

¹⁹⁷ Irish Report, *supra* note 139 at 34.

¹⁹⁸ *Ibid*.

more informed than complainants, who are likely unfamiliar with the applicable laws of contract which should govern an NDA. This makes complainants more susceptible to enter into an unfair or even unconscionable agreement.

Those in favor of regulation also argue that NDAs that are used in the settlement of misconduct claims can perpetuate toxic work environments and facilitate continued misconduct. The Irish Department of Children, Equality, Disability, Integration and Youth in a 2022 Report on the use of NDAs in cases of misconduct, notes that “NDAs can serve to preserve toxic workplace environments, when used by an organisation or industry to avoid a wider intervention or conversation about the nature of the working culture and promoting a ‘culture of secrecy’.”¹⁹⁹ Further, the Department explains, “NDAs may prevent the identification of people against whom multiple accusations of harassment, abuse or discrimination have been made, thereby enabling them to continue to operate largely undetected.”²⁰⁰ By allowing respondents to avoid taking responsibility for their actions, and sometimes, to continue working for other institutions in the same capacity, these NDAs may not only create a “culture of impunity,” but may actually place other people in danger of falling victim to a perpetrator.

Additionally, the Commission heard arguments that the secrecy created by these NDAs can have negative emotional consequences for complainants.²⁰¹ These may include feelings of anxiety and fear of being subject to legal action if an NDA were to be broken, and additionally, feelings of depression or isolation, which arise from the inability to confide in family, friends, acquaintances, and even in some cases, mental health professionals, about the traumatic experiences which underlie an agreement.²⁰² It has been said that the silencing effect that some NDAs may have can “halt or slow down a victim's healing process.”²⁰³

3. The Commission’s Position on Regulation

After considering the extensive submissions and reviewing the literature on the topic, the Commission concludes that NDA legislation of the breadth and scope that has been proposed in Manitoba and elsewhere in Canada would not improve the state of the law in Manitoba. The unintended negative consequences to complainants are likely to be significant, and is likely to outweigh any potential benefits. If legislative reform of NDAs is adopted at all, it should be applied narrowly and cautiously.

One commenter eloquently expressed the challenges in balancing legislation of this nature. This person, an author, lawyer, and party to an NDA used to settle a claim of childhood sexual abuse, provided the Commission with a unique, thoughtful, and multifaceted perspective on the statutory

¹⁹⁹ *Ibid* at 42.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* at 36.

²⁰² *Ibid* at 37.

²⁰³ Glennisha Morgan, “Reconsidering Non-Disclosure Agreements”, *Business NH Magazine* 35:1 (January 2018) 50 at 51.

regulation of NDAs to settle claims of misconduct, touching on both the benefits and disadvantages of NDAs and legislation restricting their use. They state:

Given my past, I tend to focus first on the victim, on what's best for the victim. That focus is so absolute that the only possible submission I could make here is that NDAs in these circumstances must be eliminated, right?

Wrong.

Because even though I live daily with my experience as a victim of the worst serial sexual abuse imaginable, I can't shut down the other part of me that knows that I benefitted from an arrangement that involved an NDA that may not have been possible had there been a law preventing an NDA in my circumstances.

In short, there is no right answer, for as strong as all of the reasons why NDAs can be harmful and dangerous for victims are, things just might end up even worse for victims if NDAs are not allowed in these circumstances.

My submission would undoubtedly be different if we lived in a world where as much money and other resources is dedicated to rehabilitating victims as is made available for incarcerating and attempting to rehabilitate those who commit the crimes against these victims. But we don't live in that world. Things are getting better, but we still don't focus enough on making sure victims are rehabilitated. That can leave a victim desperate for whatever help and support he or she can get, financial or otherwise.

Unfortunately, NDAs are one side of a commercial transaction. It's ugly to think of them that way, but that's what is most often taking place. Silence is being traded for money. It's awful, it's disgusting. But it's the reality. And, it's an undeniable fact that without an NDA and the corresponding secrecy parties would have less incentive to enter into agreements with victims.

As bad as being constrained by an NDA might be, it isn't for me to ever say that a victim would be better off being free from that burden if it meant having to give up a financial settlement that could possibly provide life-sustaining support. The unfortunate reality is that there would be fewer settlements available for victims if NDAs were not permitted in these instances.

I know what I want to write. I know what people want to hear from a victim like me. I want to be able to write that NDAs in these circumstances are reprehensible and should be precluded. And they are reprehensible. But just because they are reprehensible doesn't mean that the alternative wouldn't be worse. Eliminating NDAs would skew incentives in a way that would likely have an even worse impact on victims. And, I don't think there is any meaningful way to legislate a way out of this basic conundrum.

We want to do good things, we want to better our world. We are angry that bad things happen to good people, that bad people get away with bad things. We want to change that. We are motivated for all of the right reasons. So we try to do something, anything, to try to make things better. NDAs seem bad, they feel bad, so they must be bad, we must enact a new law precluding them or limiting them.

But NDAs can facilitate what a victim needs. NDAs, as abhorrent as they may be, actually develop out of a process that tries to make things better for the victim. So I urge caution before any steps are taken that would potentially interfere with this unpalatable yet important part of our legal system involving victims.

This commenter's powerful words demonstrate the complexity of the question at hand. Like the ideas presented in this submission, the commentary, academic literature and feedback obtained during the Commission's consultation process presents multifaceted and divergent positions. It reveals well-founded and practical concerns both with respect to the continued, unregulated use of NDAs in this context, and with respect to legislation which would attempt to restrict these agreements in Manitoba.

On one hand, the Commission was advised of potential negative impacts that such legislation could have on complainants, respondents, and the legal system in Manitoba at large. Of particular concern to commenters was the potential for such legislation to cause contractual uncertainty, a decrease in out-of-court settlements and increase in expensive, drawn-out, public and potentially contentious court hearings, the exacerbation of access to justice issues, and additional strain on an already backlogged legal system. Top of mind for many commenters was the practical unworkability of the enacted and contemplated statutory frameworks under review in this report, which, they argue, may ultimately render NDAs obsolete in this area, and jeopardize the prospects of settlement. This, the Commission heard, would not only impact respondents, who may wish to settle matters informally in order to avoid publicity, and to save time and costs, but complainants, who will have fewer opportunities to settle their disputes. These complainants may either have no other option but to settle a matter informally due to their financial circumstances and needs, or may desire an out-of-court settlement for a variety of reasons, including the preservation of their privacy, or the expedient resolution of an embarrassing or traumatic ordeal.

On the other hand the Commission heard about the potential negative impacts of the continued absence of such legislation in Manitoba on complainants of misconduct and the public. Major concerns presented by commenters in this regard included the continued, widespread use of unconscionable NDAs to settle claims of misconduct, and the resulting silencing of complainants, chilling effect on complaints, and perpetuation of wrongdoing. Commenters were not only concerned that the continued, unregulated use of NDAs in this context will help to maintain the current culture of silence and impunity, but that it will have detrimental impacts on the mental health of complainants who become parties to these NDAs, and members of the public who may become unsuspecting victims of serial perpetrators whose actions may be hidden by NDAs.

Additionally, commenters identified numerous nuanced issues with respect to the statutory NDA frameworks that have been enacted and proposed to date that would need to be addressed by either the legislature or the courts. The issue is complex. Adding to this complexity is the novelty of statutory regulation of NDAs in general, and thus an absence of evidence demonstrating the impacts of such regulation, intended or otherwise, on complainants of misconduct, the public, and legal systems. With Prince Edward Island and Ontario having only enacted NDA related

legislation within the last two years, it is simply too early to consider and analyze the practical effects of such legislation.

Pursuant to its enabling statute, it is the role of the Manitoba Law Reform Commission to make recommendations for the improvement, modernization and reform of Manitoba law.²⁰⁴ Ultimately, the Commission does not believe that statutory regulation of NDAs in Manitoba in accordance with the model frameworks would improve the province's laws or its administration of justice at this time. After extensive review of the feedback and literature, it was the conclusion of this Commission that any legislative venture into this territory should be narrow and cautious, if undertaken at all. It is the view of this Commission that legislation which would amount to a virtual prohibition of the use of NDAs - in essence what many of the recently proposed bills amount to - could cause serious, unintended consequences and negatively impact complainants.

In particular, is it the concern of the Commission that effectively removing the ability of parties to enter into a valid and enforceable NDA would reduce the likelihood of pre-trial settlement of disputes involving allegations of the categories of misconduct contemplated by the legislation. Respondents and defendants are much less likely to settle claims prior to trial or adjudication if they cannot be assured of a full resolution, including a limit on publicity. The probable consequence of essentially banning NDAs would be to force complainants to choose between being subjected to trials and adjudicated hearings, or else forego compensation altogether.

Furthermore, there is a concern that legislation which is intended to regulate NDAs used to settle misconduct claims may be misinterpreted such that it impacts more than just the settlement of claims of misconduct. The concern is that misinterpretation or misunderstanding of such legislation could negatively or unintentionally impact the utility of NDAs in a wide array of other disputes, including many relatively routine employment matters.

For these reasons, the Commission makes the following recommendation:

Recommendation 1: Legislation that governs the content and use of NDAs in claims of misconduct (“NDA legislation”) should not be enacted in Manitoba at this time.

Given the prominence of this issue and the legislative reform being undertaken in other jurisdictions, however, the Commission recognizes that this type of legislation *could* be enacted in Manitoba in the near future, despite the Commission's position and recommendation, and emphasizes that care must be taken in doing so to avoid unanticipated and unintended consequences. Accordingly, while the Commission does not recommend the enactment of NDA legislation in Manitoba at this time, the remainder of this final report will outline the feedback received and the Commission's recommendations with respect to any potential statutory

²⁰⁴ *The Law Reform Commission Act*, CCSM c L95, s 6.

framework for NDA legislation that *might* be enacted in Manitoba, should the government proceed to enact such legislation.

At the outset, the Commission suggests that any enacted legislation in Manitoba should be statutorily required to undergo a formal evaluation process within its first few years of existence to assess its effects on Manitobans.

Recommendation 2: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should include a review clause which requires a comprehensive review of the statute within 5 years of its coming into force.

B. Elements of a Statutory NDA Regime in Manitoba, should one be Enacted

Should Manitoba choose to enact legislation which regulates the use of NDAs in the settlement of claims of misconduct, the Commission makes recommendations in the following areas:

1. Scope of the legislative framework;
2. Regulation of NDAs made between respondents and institutional respondents;
3. Requirements for valid and enforceable NDAs;
4. Permitted disclosures; and
5. Miscellaneous matters.

1. Scope of the Legislation

Consideration should be given to three aspects relating to the scope of a potential legislative framework in Manitoba:

- i. Individuals to whom NDA legislation would apply in Manitoba;
- ii. Types of misconduct which should be covered by NDA legislation in Manitoba; and
- iii. Types of agreements which should be governed by NDA legislation in Manitoba.

i. Individuals to whom Potential NDA Legislation would apply

(a) *Individuals in the Employment Context*

The first question is whether NDA legislation should apply only to those individuals who enter into NDAs in the employment context, or whether it should also apply to individuals who enter into NDAs in other contexts. Every commenter who spoke directly to this issue agreed that NDA legislation in Manitoba should not be limited to regulating NDAs signed in the employment context. Many commented on the pervasiveness of misconduct in other contexts, such as, for instance, in circumstances involving children or volunteers, sport, or post-secondary institutions, and even in consumer disputes, including disputes over the construction and pricing of new homes, malpractice, disputes over professional services including financial advice and realtor services,

and care in nursing homes. Limiting the legislation to the employment context only, these commenters argue, would prevent the protection of other groups of people that are also likely to be disadvantaged by problematic NDAs. The Commission agrees.

Recommendation 3: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not be restricted to governing NDAs that are signed by individuals in an employment context.

(b) *Minors*

To date, none of the existing or contemplated statutory NDA frameworks examined by the Commission treat agreements with minor complainants differently than adult complainants. Each of these instruments can be interpreted as applying to all persons in the same way, regardless of age.

Minors are considered a protected class of individuals under contract law as they are generally regarded as lacking “adequate judgment, maturity and experience to make significant decisions concerning their welfare.”²⁰⁵ As a result, minors are generally not bound by a contract they enter into, even for their benefit, meaning that such a contract is “voidable at the minor’s option.”²⁰⁶ This rule is subject to a few exceptions. For example, contracts made by a minor for the supply of “necessaries”, such as certain services, apprenticeships or education, are binding upon them.²⁰⁷

Contracts previously entered into may be affirmed or ratified by a minor upon reaching the age of majority:

A voidable contract is binding on an infant who ratifies it within a reasonable time of attaining the age of majority. Such ratification will be assumed in the absence of a distinct positive act of avoidance. But a voidable contract may also be repudiated if rejected *in toto*. Such rejection must be done at any time before, or within a reasonable time after, the infant attains the age of majority, and the infant must promptly restore any benefit received under the contract or the value thereof, including any goods still in his or her possession. Alternatively, the court may equitably require the infant to give credit in the action for the value received.²⁰⁸

²⁰⁵ Halsbury’s Laws of Canada (Online), *Contracts*, “Capacity to Contract: Exceptions: Minors” (VII.2(1)) at HCO-100 (Cum Supp Release 55).

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at note 6.

²⁰⁸ CED 4th (online), *Contracts*, “Parties to a Contract: Capacity to Contract: Natural Persons: Infants (Minors) — Provinces Other than British Columbia” (IV.2(a)(iii)) at §168 [footnotes omitted].

In determining whether a reasonable time has passed since the minor has reached the age of majority so as to prevent the minor from repudiating the contract, “it is necessary to consider each individual case on its own merits.”²⁰⁹

Canadian courts have recognized that certain contracts which are “necessarily to the prejudice of the infant” or not for the minor’s benefit will be considered *void* as opposed to *voidable*, and thus cannot be ratified by the minor, even if no repudiation is made within a reasonable period of time of the minor reaching the age of majority.²¹⁰ This concept prevents minors from becoming bound by harsh or prejudicial contracts where they “sleep on [their] rights [to repudiate a contract] after reaching majority”, circumstances which could otherwise ratify an agreement.²¹¹ Contracts falling within this category are said to include “any contract imposing a penalty” on the minor.²¹²

Given that an NDA may subject a contracting party to a penalty depending on its particular terms, such agreements, if entered into with a minor, would likely be considered void in accordance with the common law. Further, there is jurisprudence supporting the position that an NDA which removes one’s right to take legal action against a person for perpetrated misconduct is prejudicial to a minor, or at least constitutes a contract which is not to the minor’s benefit, and is thus void.

For instance, consider *Butterfield v. Sibbitt and Nipissing Electric Supply Company Limited*,²¹³ a case involving a minor who, having been injured in a car accident, accepted a sum of money from the motorist’s insurer in full settlement and signed a release of all claims in respect of the accident. In that case, the Court held that the minor could not contract himself out of his right to bring a claim against the defendant who had injured him in the accident. The Court stated:

All contract[s] entered into by an infant must be for his benefit, otherwise they are void. If they are for his benefit they are still voidable unless the contract is one for the supply of necessities. There are certain contracts which are binding upon an infant until he repudiates them; these are contracts where there are recurrent obligations. But generally speaking a contract which is for the benefit of an infant is voidable. The classes of contracts made by an infant which are void, not merely voidable, are referred to in the case of *Beam v. Beatty* (1902), 4 O.L.R. 554. That was a case of an action on a bond with a penalty, made by an infant, where it was held that the infant was incapable of contracting himself out of his secured rights or subjecting himself to a penalty. ***It was also held in that case that one cannot make a contract with an infant containing stipulations that cannot be for his benefit but must be to the disadvantage of the infant. In such cases the contract is void. I think a release given by an infant of his rights is in that category,*** as is a conditional sale agreement containing a forfeiture clause.

²⁰⁹ Halsbury’s Laws of Canada (Online), *Restitution*, “The Context of Restitutionary Relief: Contract and Restitution: Minors and Persons of Limited Capacity: Contracts with a Minor” (V.5(2)(a)) at HRE 88 (2021 Reissue) at “voidable contract”.

²¹⁰ John D. McCamus, “Restitution of Benefits Conferred under Minors’ Contracts” (1979) 28 UNBLJ 89 at 93.

²¹¹ *Ibid* at 94.

²¹² See e.g. *Beam v. Beatty* (No. 2), [1902] O.J. No. 192 at para 8.

²¹³ [1950] O.R. 504.

It was argued by counsel for the defendants that the arrangement made by the defendants was for the benefit of the infant as it appeared at the time, but, as I said before, I think we consider the circumstances at the time only if we are examining an alleged contract for necessities. Here *the infant has contracted himself out of his rights, and that he is incapable of doing*.²¹⁴

Similar sentiments are expressed by John Barnes in *Sports and the Law in Canada* (3rd ed. Butterworths). Barnes explains: “Most contracts made by minors (or "infants") are only valid if they are for the minor's benefit. Since a release or exclusion of rights is to the minor's disadvantage such contracts are not enforceable; even when co-signed by the parent or guardian.”²¹⁵

Considering the foregoing, an NDA entered into with a minor, which prohibits or restricts the minor’s ability to disclose information pertaining to misconduct, would be, at the very least, voidable at common law.

One lawyer proposed that legislation should invalidate NDAs settling claims of misconduct involving a minor altogether, as there is an even greater need for transparency in these instances. Alternatively, they suggest that prospective legislation should prohibit NDAs where an employer who is a party to the agreement routinely employs minors or where the misconduct is sexual in nature.

On the other hand, rather than suggesting a full prohibition, another commenter, a Canadian child welfare organization, argues that prospective NDA legislation in Manitoba should at least deal with minors in a way that would acknowledge their unique vulnerabilities as contracting parties. They explain:

Children are a unique and vulnerable subset of society and require a comprehensive set of specially designed protections that take into account their status as independent rights holders and their vulnerability to abuse. The protection of children is a fundamental value of Canadian society and it is the government’s obligation to protect them from harm and structure laws and policies in their best interests. Children cannot be an afterthought, and it cannot be assumed that a realization of their rights and interests will be accomplished in the same way as it would be for adults.

[...]

There are unique particularities to consider when a complainant is under the age of 18. One must consider whether any proposed bill will naturally flow with the current applicable statutes and common law principles or if it will create any inconsistencies or tensions in this respect. One must account for parents or guardians who would typically negotiate any settlement on behalf of the child, and sign such agreements themselves for a matter that concerns their child. Before we pass legislation that may upend these settlements in the future, more research is needed to understand them in context. It might also be beneficial

²¹⁴ *Ibid* [emphasis added].

²¹⁵ *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.*, [2009] B.C.J. No. 1992 at para 26, citing John Barnes, *Sports and the Law in Canada*, 3rd ed (Toronto: Butterworths, 1996).

to study and specify within a proposed bill what types of settlement are appropriate and allowed for complainants under age 18.

With this in mind, this commenter raises concerns regarding the application of legislative frameworks such as the PEI *NDAA*, MB Bill 215, the BC Bill and the Irish Bill to NDAs involving both children and adults who were victimized when they were children. For instance, they note that the definition of harassment contained in MB Bill 215 does not appropriately apply to children as the definition requires the impugned conduct to be “unwelcome” or “objectionable.” They explain that conduct such as sexual advances towards a child will always be unwelcome and objectionable, and therefore this language is inappropriate if the legislation is, in fact, intended to protect not just adults, but children as well.

Interestingly, despite their concerns, this commenter does recognize certain benefits of NDAs for children who have been sexually victimized. Specifically, it is acknowledged that timely and fair settlements achieved through NDAs “can provide a child with funds that can be used to access essential services such as therapy and counselling”, and can “help avoid what could be stressful, traumatizing and time-consuming legal proceedings.” Accordingly, as opposed to recommending that NDA legislation completely prohibit NDAs involving minors, they make recommendations for how NDA legislation could more properly account for the unique concerns of minor contracting parties, including, for example:

- incorporating the principles surrounding “the best interests of the child”²¹⁶ into the legislation;
- amending the language in the definition of “harassment” (for the reasons stated above); and
- ensuring that harassment that is facilitated by technology be brought within the scope of the legislation, to account for the prevalence of cyber-victimization of children.

While not specific to NDAs, it was also suggested that Manitoba ought to consider enacting legislation akin to the *Infant Act*²¹⁷ of British Columbia which codifies the treatment of minors who enter into contracts and dictates when such a contract will and will not be enforceable.²¹⁸

²¹⁶ This respondent notes that Canada is one of the many countries that ratified the *United Nations Convention on the Rights of the Child* more than 30 years ago, and this convention requires that the best interests of the child shall be the primary consideration in all actions concerning children.

²¹⁷ RSBC 1996, c 223.

²¹⁸ Section 19(1) of *The Infant Act* of British Columbia provides: “Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is (a) a contract specified under another enactment to be enforceable against an infant, (b) affirmed by the infant on his or her reaching the age of majority, (c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or (d) not repudiated by the infant within one year after his or her reaching the age of majority.” Section 19(2) provides: “A contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.”

Two examples were put forward by this commenter where minors may be parties to NDAs settling claims of misconduct, including claims of abuse. First, an NDA may be signed by a parent or guardian on behalf of a child, restricting or prohibiting the parent/guardian and child from disclosing information about some form of misconduct experienced by the child in a school, sport organization, religious institution or other similar organization. The second example is an NDA signed by a minor employee and their employer to settle an instance of misconduct experienced by the minor in the course of their employment. If the minor were to enter into an NDA in either of these circumstances to settle the claim of misconduct, the same principles discussed above would apply: the contract would likely be considered prejudicial to the minor and thus void.

Even if such contracts were *not* found to be clearly prejudicial to the minor and thus *void*, they would still be considered *voidable*, thus enabling the minor to repudiate the contract before or within a reasonable time of reaching the age of majority.

The Commission is of the opinion that the well-accepted common law principles on a minor's capacity to contract largely protect minor contracting parties from the harms against which NDA legislation seeks to protect. Further, the Commission notes that these common law protections are reflected in Manitoba's *Court of King's Bench Rules*, which state:

No settlement of claim without judge's approval

7.08(1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge, unless a statute provides otherwise.

A person under disability is defined in the rules as a person or party who is mentally incompetent or incapable of managing their affairs, and a minor.²¹⁹

In order to properly acknowledge the heightened vulnerabilities of minors and their unique designation as a protected class of individuals to which a separate set of contractual principles apply, this Manitoba Court of King's Bench rule ought to be reflected in any NDA legislation that might be enacted in Manitoba.

Recommendation 4: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should include a provision reflecting Rule 7.08(1), *No settlement of claim without judge's approval*, of the *Court of King's Bench Rules*, to be applied in addition to the other requirements set out in the legislation for a valid and enforceable NDA.

ii. Types of Misconduct to be Covered by Potential NDA Legislation

Should Manitoba enact legislation regulating the use of NDAs to settle claims of misconduct, consideration must be given to the scope of the misconduct covered by the legislation. The NDA

²¹⁹ *Court of King's Bench Rules*, Man Reg 553/88, r 1.03.

legislation in Prince Edward Island, the proposed federal and provincial Canadian legislation, the Irish Bill, and some American statutes apply only to the settlement of claims of harassment and discrimination. The Commission has considered whether the scope of potential NDA legislation in Manitoba could or should be broader than this. This was one of the major concerns raised by commenters during the consultation process.

Specifically, commenters questioned whether prospective NDA legislation in Manitoba should also govern NDAs which prohibit or restrict the disclosure of information concerning other types of claims, such as abuse, assault, the non-consensual distribution of intimate images, workplace reprisals, etc. These commenters argue that NDA legislation in Manitoba should not only aim to protect those who have experienced harassment or discrimination, but also those who have suffered from other similarly harmful forms of misconduct. Based on their professional (and for some, personal) knowledge and experiences, they note that NDAs are not only being used to settle claims of harassment and discrimination, but also these other types of misconduct. They argue that complainants in these other contexts are also vulnerable to becoming parties to harmful NDAs and should thus be equally protected by any potential NDA legislation in the province. In fact, one commenter, an Ontario-based lawyer, argues that there should be an even greater concern with misconduct such as physical and sexual assaults, given that “[the] perpetrators of these crimes are more likely to cause greater harm if allowed to continue their misconduct due to a NDA.”

Based on the existing and contemplated legislative NDA frameworks in Canada and around the world, and the feedback received from legal practitioners, scholars, NDA reform advocates, and parties to NDAs, it appears to the Commission that the primary concerns underpinning NDA legislation include not only NDAs arising out of claims of harassment and discrimination, but also those made to settle claims of sexual and physical abuse arising both in the civil and criminal contexts.

The PEI *NDAA* and ON Acts are the only pieces of legislation currently in force in Canada that govern NDAs used to settle claims of misconduct. The PEI *NDAA* governs NDAs made between complainants, respondents and/or institutional respondents that prohibit or restrict a complainant from disclosing information about allegations of ***harassment or discrimination***. The ON Acts govern NDAs made between publicly-assisted universities or colleges of applied arts and technology (“institutions”), private career colleges, and any other person, which pertain to acts of ***sexual misconduct***.

MB Bill 215 would govern NDAs made between a complainant and a respondent that “prohibits or restricts a complainant from disclosing information concerning ***harassment or discrimination***, or alleged harassment or discrimination that the complainant experienced.” Similarly, if enacted, the BC Bill would regulate NDAs used to settle claims of ***discrimination or harassment***. The Federal Bill would amend existing federal legislation in order to regulate NDAs that are used to settle claims of ***harassment and violence or discrimination***. The Irish Bill amends the *Employment Equality Act 1998* of Ireland to restrict the use of NDAs used to settle allegations of ***sexual harassment or discrimination***.

The UK Act “prohibit[s] higher education providers and their constituent colleges from entering into non-disclosure agreements with staff members, students and visiting speakers in relation to complaints of *sexual misconduct, abuse or harassment or other forms of bullying or discrimination*.”²²⁰

Finally, there are a number of individual American states that have moved to pass laws which explicitly bar the enforcement of confidentiality provisions in workplace sexual harassment settlements, and which regulate NDAs generally.²²¹ There is significant variation in the scope of the states’ legislation. For example, California’s laws prohibit provisions in a settlement that bar disclosure of factual information relating to *sexual assault or harassment*; Nevada’s laws ban NDAs if they restrict a complainant from disclosing information concerning *a sexual offence*; and Oregon’s laws prohibit any NDA that prevents disclosure of *sexual assault* unless the complainant requests it.²²² New Jersey’s laws touch not only on *sexual harassment* but also *discrimination*, prohibiting the enforcement of all NDAs relating to discrimination or harassment made after March 18, 2019.²²³

Based on these statutory frameworks, the commentary on these instruments, and the feedback to the consultation paper, it seems that the terms “sexual misconduct”, “sexual harassment”, “sexual assault”, “sexual violence” and “sexual abuse” are commonly used interchangeably, and viewed as different forms of abuse. Accordingly, it seems that NDA legislation is often interpreted as addressing harassment, discrimination *and* abuse, even where the statute does not actually account for abuse, *per se*. The conflation of these terms and their prevalence in the commentary and feedback on NDA legislation reinforces the Commission’s view that NDAs which are used to settle claims of abuse also form one of the major concerns underpinning the push for statutory regulation of NDAs.

In light of the foregoing, it is the Commission’s opinion that if Manitoba were to decide to implement NDA legislation, it should not only regulate NDAs which are used to restrict disclosures of information pertaining to claims of harassment and discrimination, but also claims of abuse.

Recommendation 5: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should govern NDAs which prohibit or restrict the disclosure of information concerning claims of abuse, in addition to claims of harassment and discrimination.

²²⁰ Can’t Buy My Silence, Press Release, “Universities Set to Face Ban on Use of Abusive Non-Disclosure Agreements” (8 February 2023), online (pdf): <www.cantbuymysilence.com/media/files/1675971724uk-press-release.pdf>. See also, UK Act, *supra* note 170, ss A1(11), (12).

²²¹ These include Arizona, California, Illinois, Maryland, Nevada, New Jersey, New York, Oregon, Tennessee, Vermont, Virginia, Washington, Louisiana, New Mexico, Maine, Hawaii, and Pennsylvania.

²²² Irish Report, *supra* note 139, citing Rachel S. Spooner, “The Goldilocks Approach: Finding the “Just Right” Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases” (2020) 37:2 Hofstra Lab & Emp LJ 331 at 355-362.

²²³ *Ibid.*

The Commission recognizes that if Manitoba were to enact NDA legislation, over time, we may learn that the scope of this legislation needs to be adjusted in order to fulfill its policy goals and meet the specific needs of Manitobans. For instance, we may find that there is a need to expand the scope of the legislation to explicitly account for NDAs made in the context of claims of non-consensual distribution of intimate images, or workplace reprisals, as suggested by some individuals who commented on the consultation paper. Legislating a review clause, as per the Commission’s second recommendation in this report, would enable government to assess whether NDA legislation is adequately protecting Manitobans from the types of harms warranting the statute; whether amendments are needed to achieve this goal; or whether there is a need to reassess the overarching goals of the legislation altogether.

Having concluded that prospective NDA legislation in Manitoba should govern NDAs pertaining to claims of harassment, discrimination, *and* abuse, the Commission will now comment on the treatment of these types of misconduct in such a statutory framework.

(a) *Harassment*

With respect to harassment, the Commission heard from the vast majority of commenters that any NDA legislation in Manitoba should apply to *all* forms of harassment, as opposed to only sexual harassment, as is the case in the Irish Bill and under many American NDA statutes. This way, NDA legislation would capture claims of other forms of harassment such as workplace bullying, which, the Commission heard, may also commonly form the basis of an NDA.

Recommendation 6: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should define “harassment” broadly enough to capture all forms of harassment, and not just sexual harassment.

(b) *Discrimination*

With respect to discrimination, the Commission is of the opinion that any NDA legislation that may be enacted in Manitoba should define “discrimination” in accordance with the definition contained in *The Human Rights Code* of Manitoba.²²⁴ Wherever possible, defined terms should be

²²⁴ *The Human Rights Code* of Manitoba defines “Discrimination” as: 9(1) [...] (a) differential treatment of an individual on the basis of the individual’s actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or (c) differential treatment of an individual or group on the basis of the individual’s or group’s actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

consistent across statutes. Those who commented on this issue during the consultation period universally agreed.

Recommendation 7: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should define “discrimination” in accordance with the definition of “discrimination” contained in *The Human Rights Code* of Manitoba.

(c) *Abuse*

While the legal meaning of harassment and discrimination in Manitoba is derived primarily from *The Human Rights Code*, abuse is a broad term with various interpretations in Manitoba law depending on the particular demographic against whom the abuse is committed. Accordingly, if Manitoba were to enact NDA legislation addressing NDAs pertaining to claims of abuse, legislative drafters would need to contemplate the proper interpretation of this term in the context of this new framework, considering those interpretations which already exist at law.

Outside of the criminal context, the three major demographics that are expressly protected against abuse under Manitoba law are children under *The Child and Family Services Act* (“CFSA”),²²⁵ adults living with an intellectual disability under *The Adults Living With an Intellectual Disability Act*, formerly, *The Vulnerable Persons Living with a Mental Disability Act* (“AIDA”),²²⁶ and adult

9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of (a) the form of the act or omission; and (b) whether the person responsible for the act or omission intended to discriminate.

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are (a) ancestry, including colour and perceived race; (b) nationality or national origin; (c) ethnic background or origin; (d) religion or creed, or religious belief, religious association or religious activity; (e) age; (f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy; (g) gender identity; (h) sexual orientation; (i) marital or family status; (j) source of income; (k) political belief, political association or political activity; (l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device; (m) social disadvantage.

9(2.1) It is not discrimination on the basis of social disadvantage unless the discrimination is based on a negative bias or stereotype related to that social disadvantage.

9(3) Interrelated actions, policies or procedures of a person that do not have a discriminatory effect when considered individually can constitute discrimination under this Code if the combined operation of those actions, policies or procedures results in discrimination within the meaning of subsection (1).

9(4) For the purpose of dealing with any case of alleged discrimination under this Code, no characteristic referred to in subsection (2) shall be interpreted to extend to any conduct prohibited by the *Criminal Code* of Canada.

9(5) Nothing in this Code shall be interpreted as condoning or condemning any beliefs, values, or lifestyles based upon any characteristic referred to in subsection (2).

²²⁵ *The Child and Family Services Act*, CCSM c C80 [CFSA].

²²⁶ See CCSM c V90 [AIDA] and Bill 23, *The Vulnerable Persons Living with a Mental Disability Amendment Act*, SM 2023, c 19 [VPAA]. On May 30, 2023, the VPAA received royal assent. Upon receiving royal assent, *The*

patients residing or receiving services in health facilities under *The Protection for Persons in Care Act* (“PPCA”).²²⁷ While the definitions of abuse in these three statutes share common elements, they differ from one another in important respects.

Abuse of a child²²⁸ is defined in s. 1(1) of the *CFSA* as:

- [...] an act or omission by any person where the act or omission results in:
- (a) physical injury to the child,
 - (b) emotional disability of a permanent nature in the child or is likely to result in such a disability, or
 - (c) sexual exploitation²²⁹ of the child with or without the child's consent.²³⁰

Under the *AIDA*, abuse is defined as:

mistreatment, whether physical, sexual, mental, emotional, financial or a combination thereof, that is reasonably likely to cause death, or that causes or is reasonably likely to cause serious physical or psychological harm to an adult living with an intellectual disability,²³¹ or significant loss to his or her property.²³²

Vulnerable Persons Living with a Mental Disability Act was renamed as *The Adults Living with an Intellectual Disability Act*, and the Act was amended so that it refers to “adults living with an intellectual disability” as opposed to “vulnerable persons” living with a “mental disability.” See VPAA, ss 2, 4(1).

²²⁷ *The Protection for Persons in Care Act*, CCSM c P144 [PPCA].

²²⁸ A “child” is defined in s. 1(1) of the *CFSA* as “a person under the age of majority.” *CFSA*, *supra* note 225. According to s. 1 of *The Age of Majority Act*, CCSM c A7, “Every person attains the age of majority, and ceases to be a minor, on attaining the age of 18 years.”

²²⁹ Sexual exploitation is not defined in the *CFSA*, but is defined in s. 1(2) of *The Child Sexual Exploitation and Human Trafficking Act*, CCSM c 94 as any instance where a person “(a) [...] uses force, the threat of force, intimidation or the abuse of power or a position of trust in order to cause or compel a child to engage in sexual conduct; or (b) [...] provides a child with a controlled substance in exchange for sexual conduct by or with the child.”

²³⁰ Where a child is abused or is in danger of being abused, they are considered a “child in need of protection” and are afforded certain protections under the *CFSA*. For instance, the *CFSA* establishes reporting requirements in s. 18 for individuals who have information that leads them reasonably to believe that a child is or might be in need of protection, including where the child is abused or is in danger of being abused. Specifically, s. 18 imposes a duty on every person in Manitoba with such information to report the information to a child and family services agency or to a parent or guardian of the child. Where a person fails to report information as required under section 18, they are guilty of an offence and liable on summary conviction to a fine of not more than \$50,000 or imprisonment for a term of not more than 24 months, or both.

²³¹ An “adult living with an intellectual disability” is defined as “an adult living with an intellectual disability who needs assistance to meet their basic needs with regard to personal care or management of their property.” See *AIDA*, *supra* note 226, s 1(1), and VPAA, *supra* note 226, s 4(1)(j). “Intellectual disability” is defined as “significantly impaired intellectual functioning existing concurrently with impaired adaptive behaviour both of which manifested before the age of 18 years, but excludes an intellectual disability due exclusively to a mental disorder as defined in section 1 of *The Mental Health Act*.” See *ibid*.

²³² See *AIDA*, *supra* note 226, s 1(1), and VPAA, *supra* note 226, s 4(1)(a). This definition of abuse will be replaced by a new definition of abuse that is contained in s 4(2) of the VPAA, on a date to be fixed by proclamation. The Commission notes that Part 3 of the *AIDA* focuses on protection and emergency intervention for adults living with an intellectual disability who have been or who are likely to be abused or neglected. Not only does it establish a blanket prohibition against abuse or neglect of these adults; it also creates a duty in service providers, substitute

Finally, abuse is defined in the *PPCA* as an act or omission that:

- (a) is mistreatment, whether physical, sexual, mental, emotional, financial or a combination of any of them, and
- (b) causes or is reasonably likely to cause
 - (i) death of a patient,²³³
 - (ii) serious physical or psychological harm to a patient, or
 - (iii) significant loss to a patient's property,but does not include neglect.²³⁴

“Abuse” is addressed or mentioned, but not defined, in several other pieces of legislation in Manitoba, including *The Public School Act*,²³⁵ *The Safer Communities and Neighbourhoods Act*,²³⁶ and *The Domestic Violence and Stalking Act*.²³⁷

The definitions of abuse in the *CFSA*, *AIDA*, and *PPCA* are structured in a similar way; they each reference a form of action or inaction that is directed towards a particular person (a child, an adult living with an intellectual disability, or a patient), and that must cause or be reasonably likely to cause a particular form of harm or harms to the person. The main differences between the definitions are the particular forms of harm that must occur and the requisite degree of likelihood that the harm will occur.

decision makers, and committees “to take all reasonable steps to protect the [adult] in respect of whom he or she is a service provider, substitute decision maker or committee from abuse or neglect.” Additionally, s. 21 creates a general duty for every person in Manitoba to report any reasonable belief that an adult living with an intellectual disability is, or is likely to be abused or neglected to the executive director under the Act or their delegate despite any restrictions respecting the disclosure of information found in other legislation or elsewhere. Where a person fails, refuses or neglects to report that an adult living with an intellectual disability is or is likely to be abused or neglected as required under section 21, they are guilty of an offence and liable on summary conviction to a fine of not more than \$50,000 or imprisonment for a term of not more than 24 months, or both.

²³³ A patient is defined in s 1(1) of the *PPCA* as an adult who: (a) is a resident or an in-patient in a health facility or is receiving respite care in such a facility, (b) is receiving services in a geriatric day hospital that is managed by a hospital designated by regulation under *The Health Services Insurance Act*, (c) is receiving services in an emergency department or urgent care centre of a health facility, or (d) is receiving any other services provided by a health facility that are specified in the regulations. *PPCA*, *supra* note 227.

²³⁴ *Ibid.* Section 2 of the *PPCA* creates a general duty for operators of health facilities to protect adult patients from abuse and neglect, and s 3(1) establishes a duty in service providers and others who have a reasonable basis to believe that a patient is, or is likely to be abused or neglected, to report that belief to the minister appointed to administer the Act. Section 3(2) indicates that this duty applies “even if the information on which the person's belief is based is confidential and its disclosure is restricted by legislation or otherwise.” Where a person contravenes the *PPCA*, which would include a failure to comply with their duty to report, under s 12(1), they are guilty of an offence and liable on summary conviction to a fine of not more than \$2,000, if they are an individual, and a fine of not more than \$30,000, if they are a corporation.

²³⁵ CCSM c P250.

²³⁶ CCSM c S5.

²³⁷ CCSM c D93.

Under the *CFSA*, an act or omission by any person directed towards a child must **result** in a **physical injury**, an **emotional disability of a permanent nature**, or **sexual exploitation** of the child with or without their consent. The act or omission may also constitute abuse if it is **likely to result** in an emotional disability of a permanent nature in the child. The act or omission will not constitute abuse, however, if it merely **likely to result** in physical injury or sexual exploitation. In contrast, both the *AIDA* and *PPCA* require “mistreatment, whether physical, sexual, mental, emotional, financial or a combination thereof”, which is directed towards an adult living with an intellectual disability or a patient, respectively. In order to constitute abuse, the mistreatment must either cause or be **reasonably likely to cause** the adult living with a mental disability or patient to die, or to sustain serious physical or psychological harm, or significant loss to their property.

The language used in the *AIDA* and *PPCA* enables an abuse claim to be made out where the mistreatment either causes **or is reasonably likely to cause** specified harm. Accordingly, the definitions of “abuse” in these instruments are not restricted to situations where harm has resulted, but instead apply where the action resulted or is reasonably likely to have resulted in harm. This may ensure that offenders do not escape responsibility for abuse based on a technicality, where, in reality, their conduct is problematic enough to warrant protections as the claim is being settled.

Additionally, while the *CFSA* provides concrete examples of physical, emotional, and sexual harms that must be suffered for abuse to be constituted, the other two statutes frame the harm requirement more broadly. Rather than requiring victims to have suffered from a specific type of physical, emotional or sexual harm, like an injury or disability, the provisions in the *AIDA* and *PPCA* itemize the particular forms of mistreatment that must occur (physical, sexual, mental, emotional, or financial mistreatment), leaving the actual harm suffered more open-ended (physical harm, psychological harm, or loss to property). These broad expressions of harm could be interpreted to include the narrower examples articulated in the *CFSA*, which are clearly of particular concern for abuse victims who are minors, among other forms of physical, psychological, or sexual harm.

With respect to defining abuse in potential NDA legislation in Manitoba, one commenter, a lawyer practicing in Manitoba, suggested that guidance could be found outside of Manitoba law. They suggested that the definition of “maltreatment” found in the Universal Code of Conduct to Prevent and Address Maltreatment in Sport²³⁸ may be incorporated. Another lawyer suggested that the various types of abuse (physical, sexual or psychological) could be outlined in an overarching

²³⁸ Canadian Centre for Ethics in Sport, “Universal Code of Conduct to Prevent and Address Maltreatment in Sport”, May 31, 2002, s. 5. This Code defines “psychological maltreatment”, “physical maltreatment”, and “sexual maltreatment” as different forms of prohibited conduct. “Psychological maltreatment” includes “verbal conduct, non-assaultive physical conduct, conduct that denies attention or support, and/or a person in authority’s pattern of deliberate non-contact behaviours that have the potential to cause harm.” “Physical maltreatment” includes “contact or non-contact infliction of physical harm”, and “sexual maltreatment” includes, among other things, sexual harassment, non-consensual touching of a sexual nature, indecent exposure, voyeurism, non-consensual distribution of intimate images, and luring.

definition of “abuse,” and that at least “sexual abuse” might be defined in accordance with sexual offence provisions found within the *Criminal Code*.

Uniformity of defined terms amongst statutes is desirable. Accordingly, if Manitoba were to enact legislation which governs NDAs pertaining to claims of abuse, it would be wise to incorporate a definition of abuse which already exists in Manitoba’s statutes. Given the variety of definitions of abuse that exist in Manitoba, it will be necessary for drafters to consider the definition most appropriate.

Recommendation 8: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, the term “abuse” should be defined in such legislation, and in drafting this definition, legislative drafters should consider existing definitions of abuse in Manitoba statutes with the objective of making the definition as consistent as possible with other legislation.

iii. Types of Agreements to be Governed by Potential NDA Legislation

(a) *Pre-Dispute NDAs*

The majority of the existing and contemplated statutory NDA frameworks examined in this final report govern agreements entered into post-dispute, meaning NDAs that are made between parties in order to settle a misconduct claim that has already arisen. During consultations, the Commission was asked to consider the argument that Manitoba NDA legislation should govern additional types of agreements, such as “pre-dispute NDAs”, being NDAs that are signed by parties before a claim of misconduct is ever made, in order to prevent disclosure following a hypothetical future dispute. For the reasons that follow, the Commission has ultimately concluded that should NDA legislation be enacted in Manitoba, pre-dispute NDAs pertaining to claims of misconduct should be deemed unenforceable.

An example of a *post*-dispute NDA, the type of NDA governed by the majority of the NDA frameworks examined by the Commission in this project, is an NDA signed by an employee and their employer after the employee makes a complaint to their employer that they have experienced misconduct in the workplace. The post-dispute NDA would be signed by the parties in order to settle the claim of misconduct brought by the employee outside of a formal hearing.

An example of a *pre*-dispute NDA, on the other hand, is a clause in an employment contract signed by an individual at the commencement of their employment, which prevents them from disclosing acts of misconduct which *may* occur in the future. The pre-dispute NDA would be signed by the parties before there was ever a claim of misconduct.

The PEI NDAA, MB Bill 215, BC Bill and Federal Bill apply to *post*-dispute NDAs exclusively.²³⁹ In contrast, the Irish Bill defines “non-disclosure agreement” more broadly, such that it may include *pre*-dispute NDAs.²⁴⁰

The *Speak Out Act*,²⁴¹ the first federal statute in the United States regulating the use of NDAs, is restricted in its scope to pre-dispute NDAs. The Act “limit[s] the judicial enforceability of *pre-dispute* nondisclosure and non-disparagement contract clauses relating to disputes involving sexual assault and sexual harassment.”²⁴² It states:

(a) IN GENERAL.—With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause *agreed to before the dispute arises* shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law.²⁴³

Accordingly, under this Act, pre-dispute NDAs pertaining to claims of sexual harassment and assault are rendered unenforceable.

In March 2018, Britain’s national equality body, the Equality and Human Rights Commission (the “EHRC”), made a number of recommendations to the Government of the United Kingdom which it believed would help to eliminate sexual harassment in every British workplace, including recommendations pertaining to NDAs. The EHRC recommends that NDAs used at the start of an employment relationship or *in advance* of a particular event should not be used at all. Legislation has not yet been enacted in the United Kingdom implementing these recommendations.

While the Commission received limited feedback on the issue of whether Manitoba NDA legislation should govern *pre*-dispute NDAs, it is of the opinion that the statutory unenforceability of pre-dispute NDAs would be consistent with and would further the policy goals underlying NDA legislation.

Recommendation 9: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, pre-dispute NDAs should be deemed unenforceable under such legislation.

²³⁹ This is evidenced by the definitions of “non-disclosure agreement”, “complainant” and “relevant person” contained in these instruments.

²⁴⁰ Under the Irish Bill, “NDA” is defined as “a provision in writing in an agreement, however described, between an employer and an employee whereby the latter agrees not to disclose any material information about the circumstances of a dispute between them concerning allegations of sexual harassment or discrimination which are unlawful under this Act.” This definition does not contain any language which would require the employee to have actually experienced alleged or actual harassment or discrimination, and further, it does not refer to the “relevant employee,” which is defined as “the employee who has experienced or made allegations about the sexual harassment or discrimination.” Accordingly, this definition could be interpreted as applying to pre-dispute NDAs.

²⁴¹ *Speak Out Act*, *supra* note 137.

²⁴² *Ibid* [emphasis added].

²⁴³ *Ibid*, s 4(a) [emphasis added].

2. Regulation of NDAs made between Respondents and Institutional Respondents

As discussed earlier in this chapter, the Commission learned during the consultation process that, in addition to NDAs entered into between complainants and respondents, which restrict complainants from disclosing information about claims of misconduct, there are circumstances in which respondents and institutional respondents enter into NDAs without the complainant, which restrict both parties or the institutional respondent only from speaking about the misconduct.

Commentary on the latter type of NDA highlights the negative implications for public safety. NDAs executed between respondents and institutional respondents may “prevent the identification of people against whom multiple accusations of harassment, abuse or discrimination have been made, thereby enabling them to continue to operate largely undetected.”²⁴⁴ By allowing respondents to avoid taking responsibility for their actions, and sometimes, to continue working for other institutions in the same capacity, these NDAs may place other people in danger of falling victim to perpetrators of misconduct.

These concerns are addressed in the PEI *NDAA*, MB Bill 225, the BC Bill and the Irish Bill in different ways. Under Prince Edward Island’s legislation, agreements between respondents and institutional respondents are prohibited where the agreement is entered into “for the purpose of preventing a lawful investigation into a complaint of harassment or discrimination.”²⁴⁵ Almost identically, Manitoba’s and British Columbia’s proposed legislation prohibits such agreements where they are entered into for the purpose of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination.²⁴⁶

Ireland’s proposed legislation would provide broader reach than the Canadian schemes given that it bans agreements between employers and relevant individuals (respondents) that “ha[ve] the purpose or effect of concealing the details of a complaint relating to the sexual harassment or discrimination concerned.”²⁴⁷ There is no requirement, as in the Canadian instruments, that the parties enter this separate agreement with the intention of preventing or interfering with an investigation of a misconduct claim. The result is that the Irish Bill creates a complete prohibition on NDAs entered into between employers (institutional respondents) and relevant individuals (respondents).

The Commission received mixed feedback on how agreements between respondents and institutional respondents should be handled in prospective NDA legislation in Manitoba. Ultimately, if legislation is enacted, legislative drafters must carefully consider whether and how to restrict NDAs between respondents and institutional respondents.

²⁴⁴Irish Report, *supra* note 139 at 42.

²⁴⁵ PEI *NDAA*, *supra* note 11, s 4(4).

²⁴⁶ MB Bill 215, *supra* note 13, s 8(1); BC Bill, *supra* note 84, s 5(1).

²⁴⁷ Irish Bill, *supra* note 85, s 2 (amended s 14B(4)).

Recommendation 10: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, legislative drafters ought to consider the distinct nature of NDAs made between respondents and institutional respondents in determining how such NDAs should be treated under this legislation.

3. Requirements for Valid and Enforceable NDAs

In assessing a potential statutory NDA framework in Manitoba which regulates the use of NDAs in the settlement of claims of misconduct, the Commission must consider the mechanism by which these NDAs will be restricted or prohibited. The statutory changes implemented in Prince Edward Island and Ontario and proposed in Manitoba, British Columbia, Canada, at the federal level, and Ireland, each involve a presumptive invalidation of NDAs unless the agreement meets a set of preconditions. While the conditions set out in each instrument may differ slightly, the following conditions have been considered in most jurisdictions:

- i. It was the expressed wish and preference of the complainant to enter the NDA;²⁴⁸
- ii. The complainant has had a reasonable opportunity to receive independent legal advice;²⁴⁹
- iii. There have been no undue attempts to influence the complainant in respect of the decision to enter into an NDA;²⁵⁰
- iv. The NDA does not adversely affect the health or safety of a third party, or the public interest;²⁵¹
- v. The NDA includes an opportunity for the complainant to decide to waive their own confidentiality in the future and the process for doing so;²⁵² and
- vi. The NDA is of a set and limited duration.²⁵³

The Commission recognizes that other models of statutory regulation of NDAs are being considered around the world; such as, for example, in the United Kingdom where the UK Act bans NDAs used to settle claims of misconduct made in post secondary education institutions altogether with no exceptions. However, there was a consensus amongst commenters that any NDA legislation in Manitoba should not ban NDAs altogether. Therefore, the Commission has

²⁴⁸ PEI NDAA, *supra* note 11, s 4(2); MB Bill 215, *supra* note 13, s 3(1)(a); BC Bill, *supra* note 84, s 2(1)(a); Federal Bill, *supra* note 120, ss 6-10; Irish Bill, *supra* note 85, s 2.

²⁴⁹ PEI NDAA, *supra* note 11, s 4(3)(a); MB Bill 215, *supra* note 13, s. 3(1)(b); BC Bill, *supra* note 84, s 2(1)(b); Federal Bill, *supra* note 120, ss 6-10; Irish Bill, *supra* note 85, s 2.

²⁵⁰ PEI NDAA, *supra* note 11, s 4(3)(b); MB Bill 215, *supra* note 13, s 3(1)(c); BC Bill, *supra* note 84, s 2(1)(c); Irish Bill, *supra* note 85, s 2.

²⁵¹ PEI NDAA, *supra* note 11, s 4(3)(c); MB Bill 215, *supra* note 13, s 3(1)(d); BC Bill, *supra* note 84, s 2(1)(d); Irish Bill, *supra* note 85, s 2.

²⁵² PEI NDAA, *supra* note 11, s 4(3)(d); MB Bill 215, *supra* note 13, s 3(1)(e); BC Bill, *supra* note 84, s 2(1)(e); Irish Bill, *supra* note 85, s 2.

²⁵³ PEI NDAA, *supra* note 11, s 4(3)(e); MB Bill 215, *supra* note 13, s 3(1)(f); BC Bill, *supra* note 84, s 2(1)(f); Irish Bill, *supra* note 85, s 2.

considered the utility and appropriateness of the abovementioned conditions for validity and enforceability contained in the various statutes and bills.

i. Expressed Wish and Preference

The Commission received mixed responses to the question of whether there should be a statutory precondition for an enforceable NDA that it be the “expressed wish and preference” of a complainant to enter the NDA. The majority of those who commented on this issue expressed concerns with the utility of such a condition.

One commenter, a lawyer and proponent of NDA reform who supports this statutory precondition, offered a suggestion on how drafters of an NDA could fulfill this requirement. It would require the complainant to be advised of alternatives to a mutual NDA, including a one-way confidentiality clause that would require only the respondent to contractually agree to not disclose information about the matter, and not the complainant. Then, an NDA could be required to include a statement indicating that the form of the agreement is chosen over the alternative of a one-sided confidentiality clause. If, having read this required statement, a complainant still chooses to sign a mutual NDA which restricts their ability to disclose information about misconduct, this commenter argues that this would adequately evidence their wish and preference to enter into an NDA and be bound by the obligation to not disclose information.

Uniquely, rather than requiring that it be the “expressed wish and preference” of a complainant to enter an NDA in order for an NDA to be valid and enforceable, as is the case in the majority of the proposed and enacted instruments, the Federal Bill requires that a complainant, after having received independent legal advice, make “a specific and voluntary written request for a non-disclosure agreement before the agreement is entered into.”²⁵⁴ In this way, the Federal Bill explicitly instructs how a complainant is to express their choice to enter an NDA.

The Commission notes that there is a difference between a party to a contract being fully informed of its meaning and expressly stating that it is their preference to enter into it. Parties often enter into contracts that they do not wish to be a part of in order to settle disputes. Parties may not want to settle on specific terms but, after weighing the option of settling a dispute or continuing on, and upon receiving legal advice, they may determine that negotiating terms of settlement containing an NDA is the best option. While the Commission recognizes the policy goal underlying this first requirement, the need to ensure that a complainant is informed and consents to being bound by the terms of an NDA, it does not believe that this requirement is necessarily the best way to achieve the goal. The Commission agrees with the commenters who advised that the “expressed wish and preference” requirement is vague and likely to lead to challenges to the enforceability of an NDA. Informed consent can be more properly addressed in NDA legislation by requiring that the complainant has an opportunity to receive independent legal advice.

²⁵⁴ Federal Bill, *supra* note 120, s 6-10.

Recommendation 11: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not require that it was the expressed wish and preference of a complainant to enter into an NDA in order for an NDA to be valid and enforceable.

ii. Independent Legal Advice

On the question of whether NDA legislation should mandate that a complainant must have had a reasonable opportunity to receive independent legal advice prior to entering an NDA settling a claim of misconduct in order for the NDA to be valid and enforceable, the feedback was overwhelmingly supportive. Everyone who commented on this second potential requirement during the consultation process acknowledged the general importance of independent legal advice in the execution of NDAs, and nearly all commenters expressed support for such a requirement in potential NDA legislation in Manitoba.

Likewise, the Commission recognizes the importance of a complainant having had an opportunity to receive independent legal advice before agreeing to enter into an NDA restricting their ability to disclose information about misconduct. There is often an inequality in bargaining power between parties to the particular types of NDAs discussed in this project, and this inequality is a major reason for the push for statutory regulation of NDAs. Complainants are often unable to adequately protect their interests in the negotiation process without the benefit of legal counsel, particularly because of an imbalance of power between the parties.

The Commission was advised that it is common practice for lawyers negotiating on behalf of clients in a dispute with a complainant to refer an unrepresented complainant out for independent legal advice. This is best practice to ensure the validity and enforceability of the agreement. Several lawyers also informed the Commission that they advise their clients to pay for the complainant to receive independent legal advice as it is in their clients' best interest to ensure that the other party is entering into the agreement informed. However, simply because this is best practice does not mean that there are not complainants that are executing NDAs without legal advice. In fact, the presentations of those who spoke to the Standing Committee on MB Bill 225 evidence the fact that this is occurring, at least from time to time.²⁵⁵

While it may already be ordinary practice for lawyers in Manitoba to provide parties with an opportunity to receive independent legal advice prior to signing an NDA, nonetheless, this requirement ought to be codified in statute, should a statute be enacted. This requirement squarely addresses the concerns underlying the movement for NDA legislation: agreements made between parties in uneven positions of power that result in further harm to complainants, because of a lack of understanding of the legal consequences of the agreement. By ensuring that a complainant has the opportunity to become fully informed of the obligations and consequences of signing an NDA, the requirement that parties have an opportunity to receive independent legal advice may protect

²⁵⁵ Legislative Assembly of Manitoba, Standing Committee on Legislative Affairs, *Hansard*, 42nd Leg, 4th Sess, Vol LXXVI, No 4 (2 November, 2022).

a complainant's interests in the contracting process, even the playing field between parties, and reduce the likelihood of the execution of unconscionable NDAs. Accordingly, it is advisable that such a requirement be codified in any NDA legislation that may be enacted in Manitoba.

It has also been suggested that if NDA legislation in Manitoba is to include a requirement that a complainant receive independent legal advice, the complainant should be required to provide evidence demonstrating that they received the independent legal advice (e.g. a certificate), or a formal acknowledgment that they are waiving their right to that advice.

There is precedent for this under Manitoba law. Prior to October 2021, *The Pension Benefits Act*²⁵⁶ of Manitoba expressly required a person wishing to waive their right to a division of their former spouse's or common-law partner's pension benefit credit to enter into an agreement expressly evidencing their intention.²⁵⁷ Among other requirements, the agreement had to evidence that the person had obtained independent legal advice before making their decision to waive this right.²⁵⁸

In 2021, s. 31(6) of the Act was repealed and replaced by a new requirement for a formal waiver of one's entitlement to a joint pension in an approved form.²⁵⁹ Now, in order to waive the right to a division of a former spouse's or common-law partner's pension benefit credit, the person seeking to waive the right must sign and file a formal waiver with the administrator of the pension plan.²⁶⁰ Among other requirements, the waiver must be signed by the spouse or common-law partner, in the presence of a witness and apart from their former spouse or common-law partner, within 60 days before the commencement of the pension.²⁶¹

Recommendation 12: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should require that a complainant has had a reasonable opportunity to receive independent legal advice in order for an NDA to be valid and enforceable. Further, such legislation (and/or regulations thereto) should require that the complainant either provide a certificate of independent legal advice, evidencing that the advice was received, or alternatively, a formal waiver of their right to receive said advice.

During consultations, a concern was raised that mandating the execution of either a certificate of independent legal advice or a waiver may not sufficiently protect “timid, stressed, and exhausted complainants” who may simply execute the waiver without fully understanding the consequences of the NDA. While the Commission acknowledges this concern, it is ultimately of the view that parties should have the ability to contract freely and as they so choose. As long as it is a statutory requirement that parties have the opportunity to receive independent legal advice in accordance

²⁵⁶ CCSM c P32 [PBA].

²⁵⁷ *Ibid.*, s 31(6) as it appeared on 30 September 2021.

²⁵⁸ *Pension Benefits Regulations*, Man Reg 39/2010 at s 11.9, online (pdf):

<[https://web2.gov.mb.ca/laws/regs/archived/039.10\(2013-12-30\).pdf](https://web2.gov.mb.ca/laws/regs/archived/039.10(2013-12-30).pdf)> [PBR].

²⁵⁹ *The Pension Benefits Amendment Act*, SM 2021, c 14, Bill 8, 3rd Sess, 42nd Leg.

²⁶⁰ PBA, *supra* note 256, s 23(4).

²⁶¹ PBR, *supra* note 258, s 3.35(2).

with the recommended validity and enforceability requirement, it is appropriate to allow a complainant to choose whether or not to pursue this right.

The Commission also heard certain practical concerns from commenters with respect to a statutory requirement that parties receive independent legal advice. For example, one concern raised by commenters was how to ensure the independence of the legal advice provided to complainants to satisfy this requirement. Specifically, the concern is whether a lawyer paid by the respondent party to provide advice to the complainant could be considered “independent.” The Commission is not of the view that legislation must ensure the quality or independence of the complainant’s legal advisors. Lawyers are bound by the Code of Professional Conduct and are regulated by the Law Society of Manitoba.

The Commission also considered whether NDA legislation should require a respondent to pay for a complainant’s independent legal advice. While commenters were split on this issue, even those in favor of this requirement raised practical concerns. For example, some commenters argued that if this were to be a requirement, the statute would need to clearly specify that the complainant selects the lawyer. They also argued that the statute should direct how the cost of the complainant’s legal fees should be assessed and monitored. Suggestions offered by commenters included: that there be a maximum amount of hours of legal advice prescribed; that the statute direct that the respondent pay a “reasonable amount” for the complainant’s legal fees; and that there be a fee tariff established or that an independent fee assessment structure akin to the Law Society of Manitoba’s fee dispute process be established.²⁶²

Other commenters are opposed to mandating that the respondent cover the cost of independent legal advice for a complainant. Some argued that this requirement is unnecessary given that many lawyers are already in the habit of advising their clients to cover the cost of legal advice for an unrepresented opposing party in a negotiation. Doing so minimizes future claims to invalidate a previously-executed agreement. Others simply argued that this is overreach. It was suggested by two commenters that if government wants to ensure that complainants are not financially impacted by a statutory requirement that parties obtain independent legal advice, it should implement a program to provide necessary funding through community legal services rather than requiring opposing parties to pay for the advice.

In light of the practical difficulties which may arise in implementing a requirement for respondents to pay for the complainant’s independent legal advice, the uniqueness of such a provision in statutory law, and its potential redundancy in the face of the ordinary practices of Manitoba lawyers today, the Commission does not recommend that this requirement be included in any potential NDA legislation in Manitoba.

²⁶² “Understanding Your Bill” (last visited 11 May, 2023), online: *Law Society of Manitoba* <<https://lawsociety.mb.ca/for-the-public/other-resolutions/lawyer-fee-disputes/>>.

iii. Undue Attempts to Influence

Feedback in response to this third statutory requirement for a valid and enforceable NDA, that there be no undue attempts to influence a complainant to enter into an NDA, was consistent. While those who commented on this requirement were not opposed to it, several commenters noted that it is already a basic legal requirement for any contract, according to common law.

Because the common law already holds that contracts will be deemed unenforceable if one party exerts undue influence on another in order to coerce, manipulate, or deceive that party into entering into the contract, the Commission is of the opinion that it is not necessary to codify this concept in any potential NDA legislation in Manitoba. Further, the Commission is of the view that it would be inappropriate to arbitrarily codify the concept of undue influence into NDA legislation while excluding other related common law concepts such as unconscionability, which are similarly intended to protect contracting parties who are perceived to be at a legally significant disadvantage.

Recommendation 13: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not require that there has been no attempts to unduly influence the complainant in respect of the decision to enter into an NDA, in order for an NDA to be valid and enforceable.

iv. Third Party Health and Safety & Public Interest

In the consultation paper, the Commission raised a number of questions and concerns regarding this proposed statutory requirement for an enforceable NDA: the requirement that the agreement not adversely affect the health or safety of a third party or the public interest. There is an obvious and laudable rationale behind this requirement- addressing the concern that NDAs may allow perpetrators of misconduct to hide their wrongdoing and go on to freely harm more people.²⁶³ This adversely affects both unsuspecting third parties who may be victimized by the perpetrator in the future, and the public at large, who has an interest in holding individuals accountable for their wrongdoings. It is the Commission's position, however, that the language used in the respective statutes and bills is overly vague and creates uncertainty as to the validity and enforceability of NDAs going forward.

For example, under the PEI NDAA, where a respondent or institutional respondent enters into a valid NDA with a complainant, that NDA will *only be enforceable* where the NDA *does not* adversely affect the health and safety of a third party or the public interest. One way to interpret this is that an NDA would be enforceable and binding on the parties unless and until the respondent harmed a third party in the same way that they harmed or are alleged to have harmed the complainant under the NDA. The triggering event that would invalidate the NDA -the harm to the third party- might never become known to the complainant, who would continue to believe themselves bound by an NDA that is actually unenforceable. This provision could also be

²⁶³ See e.g. Macfarlane, *supra* note 189 at 367.

interpreted to mean that, because an NDA always runs the risk of enabling a respondent to freely harm third parties, it will always adversely affect the safety of third parties and the public interest, and thus will never be enforceable.

The Irish Bill is almost identical, except it indicates that where an employer enters into a valid NDA with an employee, that NDA will *only be enforceable* where the NDA *does not* adversely affect the *future* health or safety of a third party or the public interest. The inclusion of the word “future” in the Irish Bill has significant implications. It creates somewhat of an impossibility. One could never know with certainty whether an NDA was enforceable or not under the Irish Bill given that it is impossible to determine with certainty whether or not a respondent who is party to an NDA will go on to harm a third party. Accordingly, this requirement under the Irish Bill can be construed as an outright ban on NDAs in this context.

Finally, under MB Bill 215, an NDA *will be invalid and unenforceable unless* the complainant’s compliance with the NDA *will not* adversely affect the health or safety of a third party or the public interest. This language seems to pose a question that cannot be answered with certainty: whether a complainant’s compliance with an NDA (their concealment of the details of the misconduct at issue) will result in adverse effects to the health and safety of a third party or to the public interest. Accordingly, the enforceability of an NDA also cannot be determined with certainty. This undermines the integrity of the NDA as a whole.

Notably, the requirements under the ON Acts to validate an otherwise invalid and unenforceable agreement between an institute or private career college and a student do *not* require that the agreement not adversely affect the health and safety of a third party or the public interest. Likewise, the validity and enforceability requirements under the Federal Bill do not include this requirement. It is likely that these exclusions were a deliberate choice made by the drafters of the Ontario and federal instruments.

Nearly everyone who commented on this requirement took similar issue with its breadth, vagueness, and potential to cause contractual uncertainty. One commenter refers to the requirement as “tricky”, while another calls it “ambiguous”, “political” and “probably legally unsustainable.” Another notes that if “public interest” and “health and safety of third parties” cannot be defined in the legislation, then it becomes difficult for the parties to enter into an agreement which provides certainty. Similarly, while others acknowledge the potential benefits of including a health and safety provision such as this one, they caution that if the requirement is defined too broadly, or, as it currently stands, is not defined at all, then potentially anything could be considered to pose a risk to health or safety, which would leave NDAs perpetually open to challenge.

Some commenters argue that the vagueness of the provision will result in expensive litigation in order to interpret it, which many complainants will be unable to pursue due to the costs. One commenter even goes so far as to say that this provision would be considered “void for vagueness.” They suggest that if such a requirement is to be included in NDA legislation, the legislation must provide a clear definition of “public interest” in order to avoid this fate. Further they suggest that additional requirements may need to be developed in connection with this one, such as, for example, a requirement that the adverse impact on the health and safety of a third party be “determined by a health practitioner.” This, they argue, could avoid this provision being used by a complainant as an override if they later have regrets about entering into the NDA or simply “don’t feel good about it.”

Importantly, in support of this requirement, one commenter, a lawyer and NDA reform advocate who assisted in creating the validity and enforceability requirements under review, explains that it is their belief that “*no current NDA could meet this requirement, or indeed all the six listed conditions.*” Therefore, they explain, “*no NDA in the most harmful way they are currently drafted and used could be enforceable.*”

This statement confirms that, in reality, this requirement may effectively preclude the enforceability of NDAs altogether, amounting to an outright prohibition against the use of NDAs in the settlement of misconduct allegations. The Commission strongly recommends that if the legislature determines that NDAs should be prohibited outright in the settlement of claims of misconduct, then the legislation should explicitly prohibit their use. The statutes that govern Manitobans should be straightforward and clear in their legal implications. Given the Commission’s recommendation that any potential NDA legislation in Manitoba *should* entitle parties to a settlement negotiation to contract freely when properly informed and advised, the Commission recommends that this requirement should not be included in any potential NDA legislation in Manitoba.

Recommendation 14: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not require that an NDA not adversely affect the health or safety of a third party, or the public interest, in order for an NDA to be valid and enforceable.

v. Waiver of Confidentiality

A minority of commenters argue that NDA legislation should require that a valid and enforceable NDA must create a mechanism for complainants to walk away from their previously agreed-upon undertaking to not disclose certain information without subjecting themselves to the ordinary legal liability for breach of contract. However, the Commission does not believe that this is practical or that it would have the desired effect of eliminating the use of problematic NDAs, and is therefore opposed to legislating such a requirement. The majority of commenters to the consultation paper agreed.

Those in favor of this requirement argue that the ability to waive the NDA should essentially be unfettered. One commenter argues that a complainant should always be able to change their mind and that all that should be required of them to absolve themselves from their promise to not disclose information is to simply advise the other party to the contract of their desire to waive the term. Another commenter, a lawyer practicing outside of Manitoba, states:

I do not believe that this will prevent the signing of NDAs, as many organizations will prefer to have a settlement and close off a matter than to not have things settled and face reputational risk by having a public trial to address the issues. It may seem “unfair” to have the complainant have this power, but if we are being realistic, there was a power imbalance in the first place that likely led to the opportunity for the abuse or harassment to have taken place. Sometimes tipping the balance is required, and even necessary when dealing with harm that primarily impacts vulnerable people.

Another lawyer argues that, while a party should not have the ability to waive the entire agreement unilaterally, a complainant should be entitled to unilaterally waive their promise not to disclose the fact that they were the victim of misconduct without consequence upon providing notice to the respondent.

The Commission questions the utility of an NDA which provides the complainant with an unfettered ability to unilaterally waive the most essential term at the heart of the contract. The Commission questions why a respondent or institutional respondent would ever agree to such an NDA with a complainant.

Commenters raised similar concerns. For instance, some argue that if a complainant were allowed to waive their promise not to disclose in the future at their sole discretion, this would completely defeat the purpose of an NDA. Others argue that this requirement could seriously undermine the value of NDAs and thus the prospect of settlement generally, as they cannot imagine a respondent being prepared to enter into a settlement where they know that the NDA could be waived by the complainant without consequence. In their view, agreement on confidentiality is part of the bargain and no party should be entitled to waive an essential term of the bargain without the consent of the other party.

The feedback received in response to this proposed waiver requirement leads the Commission to conclude that, in practice, this requirement could effectively prevent the execution of NDAs altogether, even in situations where a complainant truly wants one. Like several commenters, the Commission views it as unlikely that many respondents would agree to enter an NDA with a complainant knowing that the complainant could at any point in time, and for any reason, effectively repudiate the contract. This requirement would essentially defeat the purpose of an NDA, and in turn, seriously threaten the prospect of out-of-court settlements. This, the Commission fears, would lead to an increase in expensive, drawn-out, public and contentious court hearings, reduced access to justice, and additional strain on Manitoba’s legal system. In light of

these concerns, the Commission recommends that this particular requirement not be included in any potential NDA legislation in Manitoba.

It is worth noting that the Federal Bill, which was just recently introduced in May 2023, does not include this requirement.

Recommendation 15: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not require that an NDA include a mechanism for the complainant to decide to waive their own confidentiality in the future in order for an NDA to be valid and enforceable.

vi. Set and Limited Duration

The final condition precedent for a valid and enforceable NDA in the relevant statutes and bills is the requirement that an NDA be of a set and limited duration. Here again, the objective is understood. The argument in support of this legislative requirement is to limit the length of time that a complainant could be barred from disclosing information in order for the complainant to eventually be able to move on with their lives without the restrictions placed on them by virtue of the NDA. However, the majority of commenters do not support the inclusion of such a requirement in potential NDA legislation in Manitoba, and for the reasons outlined below, the Commission agrees.

One concern raised by commenters about this requirement was that, if legislation were to require that valid NDAs be of a set and limited duration without providing any direction as to what a reasonable duration might be, parties will simply enter into agreements with durations long enough to render the requirement meaningless (e.g. 50 years or 75 years). Commenters believe that this would frustrate the policy objective of the legislative requirement.

Moreover, commenters argue that NDAs are generally entered into with the expectation that they will not expire, and concern was expressed that if such a requirement were to be included in NDA legislation, it would discourage respondents from agreeing to settle a dispute in the first place. This concern was validated by one commenter who assisted in creating the validity and enforceability requirements under review, who explains that “this condition is designed to make the use of an NDA unattractive and even unworkable to a responsible party or perpetrator.”

The Commission is of the view that requiring that NDAs used to settle misconduct claims be of a set and limited duration would likely impact the ability of parties to settle disputes by way of agreement. The Commission recommends that this particular requirement not be included in any potential NDA legislation in Manitoba. Notably, the Federal Bill does not include this requirement in its statutory framework.

Recommendation 16: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not require that an NDA be of a set and limited duration in order for an NDA to be valid and enforceable.

4. Permitted Disclosures

The fourth major element considered by the Commission in its review of a potential statutory NDA framework for Manitoba is permitted disclosures: disclosures of information that are statutorily permissible, regardless of whether an NDA expressly allows for them. This is the most important and potentially beneficial feature of the enacted and proposed NDA statutes, as it goes to the heart of the major policy concern underlying such frameworks: ensuring that complainants are not unnecessarily prohibited from seeking supports to assist them in addressing the underlying harm.

The legislation in Prince Edward Island, and the proposed legislation in Manitoba, British Columbia, Canada, and Ireland provide for the following permitted disclosures:

- i. Disclosures of information that are protected or required under certain provincial enactments or Acts of Parliament;
- ii. Artistic expressions of a complainant that do not identify the perpetrator of the misconduct or the terms of the NDA;
- iii. Communication of information concerning the misconduct between the complainant and certain individuals such as lawyers, medical practitioners, psychologists, registered nurses, nurse practitioners, social workers, victim services workers, community elders, spiritual counselors, certain designated friends and family members, etc.; and
- iv. Communications made by complainants to prospective employers for the purpose of providing information about employment history and obtaining employment which do not disclose the particulars of the misconduct.

The purpose of permitted disclosure provisions is to statutorily read exceptions into the confidentiality requirements of NDAs that are used to settle claims of misconduct. The Commission notes that while many parties to NDAs will include certain exceptions in an NDA on their own accord (e.g. an exception for disclosures of information to legal counsel or immediate family members of a complainant), it has learned during the consultation process that this is not always the case. As such, permitted disclosure provisions protect complainants from overly restrictive confidentiality requirements in NDAs that would otherwise prevent complainants from making certain disclosures which may be necessary to mitigate ongoing harms that they may experience after entering into an NDA. For example, these provisions could ensure that complainants are not prevented by an NDA from accessing supports necessary to assist them in addressing the harm caused by misconduct perpetrated against them, fulfilling statutory duties, navigating the legal ramifications of an NDA, or obtaining subsequent employment.

i. Protected and Required Disclosures

The first category of permitted disclosure deals with disclosures of information protected or required under certain provincial and federal statutes and enactments of Parliament. These include, among others, provincial employment standards legislation, human rights legislation, workplace health and safety legislation, and whistle-blower protection legislation.

For example, MB Bill 215 states that a provision in an NDA is:

invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information protected or required under *The Employment Standards Code*, *The Human Rights Code*, *The Workplace Safety and Health Act*, or any disclosure protected or required under another enactment or an Act of Parliament.²⁶⁴

Both the PEI *NDAA* and the BC Bill invalidate provisions in NDAs which restrict or prohibit disclosures of information that are protected or required under analogous provincial legislation²⁶⁵ or any disclosure protected or required under another enactment or Act of the Parliament of Canada. The Federal Bill invalidates provisions in NDAs which restrict or prohibit disclosures of information protected or required under any federal, provincial, or territorial Act or law. Finally, the Irish Bill states only that an otherwise valid agreement in an NDA will not be permitted where it applies to any disclosure of information under the Protected Disclosures Act 2014²⁶⁶ - Ireland's whistleblower protection legislation.

It appears to the Commission that this category of permitted disclosure is intended to protect against NDAs that would prevent a person from being able to disclose information which, by virtue of a statutory scheme, they are either legally required or entitled to disclose. In particular, this permitted disclosure aims to protect against NDAs that would be in conflict with statutory schemes that address and protect against harassment and discrimination, the forms of misconduct which are at the heart of the abovementioned statutory NDA frameworks.

While the Commission supports a permitted disclosure which would allow complainants to disclose information that they may be legally *required* to disclose in accordance with provincial or federal legislation, it is of the opinion that NDA legislation should not statutorily permit a complainant to disclose information that they are merely statutorily *entitled* to disclose. By and large, the purpose of an NDA used in the context of a misconduct claim is to settle the underlying claim without resorting to the formal legal processes which a complainant is entitled to pursue. Parties should be entitled to contractually agree to settle disputes outside of any formal legal

²⁶⁴ MB Bill 215, *supra* note 13, s 4(1).

²⁶⁵ *Employment Standards Act*, RSPEI 1988, c E-6.2; *Human Rights Act*, RSPEI 1988, c H-12; *Occupational Health and Safety Act*, RSPEI 1988, c O-1.01; *Employment Standards Act*, RSBC 1996, c 113; *Human Rights Act*, SBC 1984, c 22; and *Workers Compensation Act*, RSBC 2019, c 1.

²⁶⁶ Irish Bill, *supra* note 85, s 2 (amended s 14B(8)(a)).

process with finality. As noted previously, the Commission’s view is that a statutory scheme which undermines that right will likely have negative impacts on complainants, by reducing the ability to achieve a resolution outside of an adjudicated process.

Recommendation 17: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, any NDA made under such legislation should be deemed invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information that is required under any provincial or federal legislation.

ii. Artistic Expressions

The second type of permitted disclosure contained in the PEI *NDAA*, MB Bill 215, BC Bill and Federal Bill, but not in the Irish Bill, is artistic expressions by complainants which do not identify another party to the NDA or the terms of the NDA. For example, this might include song lyrics or a painting depicting an instance of misconduct experienced by a complainant but which does not identify the respondent or any steps which have been taken to settle that claim. This permitted disclosure is intended to enable complainants to express their feelings about the misconduct claim in a limited capacity, perhaps as a therapeutic outlet.

A number of individuals who commented on this potential permitted disclosure during consultations raised concerns. For instance, while some believe that this form of expression should be protected to a certain extent, they recognize that it would be difficult to enforce and monitor these types of expressions to ensure that they do not reveal too much information. As a result, some commenters are concerned that artistic expression could be used as a loophole to undermine the confidentiality requirement of an NDA.

One commenter, a Canadian child protection organization, raises a different concern: that the artistic expression exception potentially permits disclosures that could be harmful to other complainants who may have separate NDAs in place involving the same respondent. They offer, as an example, a situation in which there has been abuse perpetrated against several individuals by the same person, and this is known to each of the victims. They argue: “[a] survivor’s artistic expression should not trump another survivor’s desire to remain silent.”

Ultimately, the Commission is concerned about the potential uncertainty that could arise in the interpretation of what constitutes an acceptable or unacceptable expression under this category of permitted disclosure. Given the subjectivity of artistic expression, the Commission worries that this permitted disclosure could result in unintended breaches by complainants, increased challenges to NDAs, and thus increased litigation which could exacerbate access to justice issues for complainants who are not financially able to challenge an NDA or defend themselves in court. Further, in light of one of the policy goals underlying NDA legislation: protection of third parties and the public, the Commission takes particular note of the concerns raised during consultation

about the potential harms that this permitted disclosure could cause to other victims of misconduct. Considering the foregoing, the Commission recommends that any potential NDA legislation in Manitoba should not include artistic expressions as a permitted disclosure.

Recommendation 18: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not include artistic expressions as a permitted disclosure.

iii. Communications to Certain Individuals

The third category of permitted disclosure examined by the Commission is communications about the misconduct to specified individuals and entities. The following table summarizes the individuals and entities specified in MB Bill 215, the PEI NDAA, the BC Bill, the Federal Bill, and the Irish Bill, to whom disclosures may always be made.

Table 2 –Individuals and Entities to whom Disclosures are Statutorily Permitted in NDA Legislation/Bills

Individual/Entity to whom Disclosure is Statutorily Permitted	MB Bill 215	PEI NDAA	BC Bill	Federal Bill	Irish Bill
A person whose duties include the enforcement of an enactment or an Act of Parliament, with respect to a matter within the person's power to investigate	✓	✓	✓	✓ ²⁶⁷	X
A person authorized to practice law	✓	✓	✓	✓	✓
A medical practitioner/physician	✓	✓	✓	✓	✓
A psychologist/psychological associate	✓	✓	✓	✓	✓
A clinical counsellor	X	X	✓	X	X
A registered nurse/nurse practitioner	✓	✓	✓	✓	X
A social worker	✓	✓	✓	✓	X
A person who provides victim services under victims' rights legislation	✓	✓	✓	✓	X
A community elder, spiritual counsellor or counsellor who is providing culturally specific services to the complainant	✓	✓	✓	✓	X
A friend, family member, or personal supporter	✓	✓	✓	✓	✓

²⁶⁷ The Federal Bill specifically includes a person whose duties include the enforcement of an Act of Parliament or the laws of a province or territory if the communication is in respect of a matter within the person's *official duties*, as opposed to within their powers of investigation.

The Office of the Ombudsman	✓	✓	X	X	✓
The Advocate for Children and Youth	✓ ²⁶⁸	X	X	X	X
The Office of the Revenue Commissioner	X	X	X	X	✓ ²⁶⁹
A police officer	X	X	X	X	✓ ²⁷⁰
A state regulator	X	X	X	X	✓

In analysing the necessity of these categories of individuals in NDA legislation that may be enacted in Manitoba, the Commission first considers the various professionals. The Commission is of the opinion that it is essential for complainants to be able to communicate information concerning a misconduct claim openly and freely with legal, medical, psychological, spiritual and other professionals who can assist them in properly navigating an NDA and accessing supports necessary to address the harm caused by an underlying misconduct claim. For example, a complainant should always be permitted to communicate with a lawyer about an NDA and the misconduct underlying it, to ensure that they are able to obtain the proper legal advice required to interpret the agreement or resolve any legal issues that may arise as a result of it. Furthermore, a complainant should always be permitted to communicate openly with a doctor, nurse, therapist, mental health professional, spiritual counsellor, or any other appropriately qualified individual who can assist them to heal medically, therapeutically, psychologically or spiritually. These rights should not be restricted by the terms of an NDA, and this belief was shared by most commenters.

The Commission notes that certain of these disclosures constitute basic and inherent human rights. According to the Universal Declaration of Human Rights (“UDHR”),²⁷¹ everyone has the right to ask for legal help,²⁷² to be helped when they are ill;²⁷³ and to practice their religion freely.²⁷⁴

²⁶⁸ MB Bill 215, *supra* note 13, s 4(c)(vii). The Manitoba Advocate for Children and Youth is an independent office of the Manitoba Legislative Assembly dedicated to representing “the rights, interests and viewpoints of children, youth, and young adults throughout Manitoba who are receiving, or should be receiving services from: child and family, adoption, mental health, addiction, education, disability, justice, and victim support.” See “What We Do” (last visited 16 June 2023), online: *Manitoba Advocate* <<https://manitobaadvocate.ca/adult/what-we-do/>>.

²⁶⁹ The mission of Ireland’s Office of the Revenue Commissioners is to “serve the community by fairly and efficiently collecting the taxes and duties and implementing Customs controls.” See “Role of Revenue” (28 June 2022), online: *Office of the Revenue Commissioners* <www.revenue.ie/en/corporate/information-about-revenue/role-of-revenue/index.aspx>. See also Irish Bill, *supra* note 85, s 2 (amended s 14B(8)(vii)).

²⁷⁰ The Irish Bill includes in this list a “Gardai Síochána”, which is an officer of the national police service of Ireland.

²⁷¹ *Universal Declaration of Human Rights*, 10 December 1948 [UDHR].

²⁷² Amnesty International, “Universal Declaration of Human Rights (Simplified)” (last visited 11 May 2023), online (pdf): *Amnesty International* <www.amnestyusa.org/wp-content/uploads/2017/11/Simplified-UDHR.pdf> at Art 8.

²⁷³ *Ibid* at Art 25.

²⁷⁴ *Ibid* at Art 18.

With respect to the treatment in the legislation of medical, psychological, spiritual and other therapeutic professionals, one commenter argued that drafters should focus on the type of support that they provide (e.g. “communications to a person qualified to provide medical, psychological, mental health or spiritual support”) rather than itemizing the particular categories of professionals to whom a disclosure may be made. They explain that itemizing the list in the way that the statute and bills currently do might be too restrictive, and may exclude certain professionals who, while unregulated, are qualified to provide supports to complainants that are important for their healing.

This recommendation would also address a related concern that was raised regarding the language currently used in the PEI *NDAA* and MB Bill 215 to describe this category of permitted disclosure. It was argued that the language in these instruments might restrict complainants from being able to disclose information to certain types of mental health counsellors and therapists who do not fit the narrow categories currently included. Commenters noted that in their current forms, the PEI *NDAA* and MB Bill 215 allow communications to medical professionals such as psychologists, psychological associates and nurses, as well as counsellors offering spiritual or culturally specific services, but not to other types of counsellors who might be able to provide services to complainants that could assist in their healing. For example, neither allow for disclosures to clinical counsellors, as does British Columbia’s bill.

An alternative suggestion made by commenters with respect to disclosures to professionals was for NDA legislation to permit complainants to disclose information about misconduct to any individual or entity that has a professional or legal duty of confidentiality.²⁷⁵ However, they note that while professionals such as lawyers are bound by solicitor-client privilege,²⁷⁶ others like doctors, therapists and spiritual counsellors may only be bound by what is known as “case-by-case privilege”,²⁷⁷ which, as the name suggests, is a form of privilege which only exists in certain circumstances, depending on the particular facts of a case.²⁷⁸ Given the legal nuances of privilege,

²⁷⁵ The Commission notes that there are certain exceptions to common law privilege that could require a professional to disclose confidential information which would otherwise be protected by that privilege. See, for instance, *Smith v. Jones*, [1999] 1 SCR 455, for a discussion of the public safety exception to solicitor-client privilege. However, the Commission has not considered how such exceptions would interact with or be impacted by potential NDA legislation.

²⁷⁶ A communication is protected by solicitor-client privilege where it is made between a solicitor and a client; where it entails the seeking or receiving of legal advice; and where the client intends for the communication to be confidential. See Halsbury’s Laws of Canada (Online), Evidence, “Privilege and Related Grounds of Exclusion: Solicitor-client Privilege: Elements of Solicitor-client Privilege” (VIII.2(1)) at HEV-178 (2022 Reissue).

²⁷⁷ According to the “Wigmore Test”, case-by-case privilege will apply to prevent a disclosure of information where: (1) the communication originated in a confidence that it would not be disclosed; (2) this element of confidentiality was essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation between the parties is one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would be caused to the relation by the disclosure of the communication would be greater than the benefit thereby gained for the correct disposal of litigation. See Halsbury’s Laws of Canada (Online), Evidence, “Privilege and Related Grounds of Exclusion: Case-by-Case Privilege: General Rules” (VIII.7(1)) at HEV-188 (2022 Reissue).

²⁷⁸ Interestingly, communications between patients and physicians are not necessarily protected by class privilege, and efforts to protect them on a case-by-case basis have often failed. See Halsbury’s Laws of Canada (Online),

and the novel issues surrounding privilege that might arise in the context of NDA legislation, commenters noted that if this suggestion were to be adopted, there may be a need to codify the common law test of privilege directly in NDA legislation, or to develop a new test for privilege in this particular context, and to incorporate that test into NDA legislation.

If legislation regulating NDA use is passed in Manitoba, permitted disclosures need to be sufficiently clear in order to provide certainty to contracting parties. This is especially so given that the ability of contracting parties to disclose otherwise confidential information to parties outside of NDAs may weaken the overall value of NDAs and thus risk them becoming obsolete and unavailable to those who would in fact benefit from their use. Permitted disclosures must also be broad enough to ensure that complainants can access the necessary supports that enable them to move on with their lives productively following a settlement and to address the underlying events. The Commission is of the opinion that both of these objectives can be achieved by carefully creating carve outs in the legislation for those groups or individuals authorized or qualified to provide the specific types of support discussed above: supports necessary to assist complainants in addressing the harm caused by misconduct and in navigating the consequences of the NDA itself.

Recommendation 19: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, any NDA made under such legislation should be deemed invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information concerning the misconduct to:

- (a) a person authorized to practise law in Canada; and
- (b) a person qualified to provide medical, psychological, mental health, spiritual, or other related support.

With respect to the individuals outlined in subsection (b) of this recommendation, legislative drafters should consider whether there are any other professionals that should be added to this list.

If Manitoba decides to enact NDA legislation, and the abovementioned recommendation is followed, there would be no need for such legislation to include specific statutory carve outs for social workers or persons who provide victim services under victims' rights legislation. The language of the recommended permitted disclosure is broad enough to enable complainants to communicate with social workers and victim services providers who are qualified to provide supports that may assist them in addressing the harms caused by misconduct, thus improving the complainant's overall health and well-being. This appears to be the main rationale for including

Evidence, "Privilege and Related Grounds of Exclusion: Case-by-Case Privilege: Examples" (VIII.7(2)) at HEV-189 (2022 Reissue). However, there is an argument to be made that if a patient were to disclose information to a physician or therapist on the understanding that they were doing so in breach of an NDA, but in order to promote their own healing and recovery, this communication could meet the four Wigmore criteria.

these individuals in the enacted and proposed statutory frameworks. This objective would be achieved through this broad permitted disclosure.

Next, the Commission will analyse permitted disclosures to individuals such as friends, family members, and personal supporters.²⁷⁹ While it recognizes that complainants of misconduct often receive support from these individuals, and that parties to an NDA are always free to negotiate the inclusion of such individuals into an NDA such that they may disclose otherwise confidential information to them, the Commission does not believe that this should be statutorily implied into every NDA for the following reasons.

First, the Commission distinguishes communications made to friends, family members and personal supporters from those made to individuals like lawyers, doctors, nurses, psychologists, therapists, spiritual counsellors and other similar service providers, as the former do not constitute basic and inherent human rights as do the latter disclosures, and thus do not warrant the same level of legal protection.

Second, under the relevant provisions of the PEI *NDAA*, MB Bill 215 and the BC Bill, a disclosure is permitted to a friend, family member or personal supporter only if that individual is “specified or approved in the non-disclosure agreement.” As such, while these individuals are included in the statute and bills under permitted disclosures, these provisions do little more than reiterate a right that already exists for all contracting parties to NDAs to carve out particular exceptions to confidentiality requirements. Such a statutory provision may therefore be unnecessary given the Commission’s recommendation that a complainant have a reasonable opportunity to receive independent legal advice regarding the terms of an NDA. A lawyer providing legal advice to a complainant on the terms of an NDA should advise the complainant of their right to negotiate these types of permitted disclosures.

Finally, the Commission considers permitted disclosures to bodies such as the Ombudsman, the Manitoba Advocate for Children and Youth, and persons with investigative duties under enactments or Acts of Parliament. The Commission recognizes the important role that these bodies and individuals play in raising awareness of, holding people accountable for, and protecting against misconduct, and understands this to be the reason why these entities are included as permitted disclosures in many of the enacted and proposed legislative frameworks. If Manitoba were to decide to enact NDA legislation, and, as per Recommendation 17, such legislation were to statutorily protect disclosures of information that is required under provincial enactments or Acts of Parliament, this, on its own, would enable complainants to disclose information to bodies like

²⁷⁹One commenter suggested that the Commission consider whether it would be appropriate for NDA legislation to statutorily permit complainants to make limited disclosures and communications to romantic partners. Others raised the possibility of permitted disclosures to spouses. The Commission is of the view that romantic partners and spouses may be viewed in the same light as friends, family members and personal supporters.

the Ombudsman, the Manitoba Advocate for Children and Youth, or to individuals with statutory investigative duties, if required by law.

The Commission recognizes that there are limitations in the enabling statutes of the Ombudsman,²⁸⁰ the Advocate for Children and Youth,²⁸¹ and other persons with statutory duties of investigation, on the types of information which these bodies can statutorily compel a person to disclose for purposes of an investigation. As such, there may be situations in which these entities would be unable to statutorily compel a complainant to disclose all information covered by an NDA settling a claim of misconduct. However, the Commission notes that these caveats are of a limited nature, still enabling these entities to compel information in the majority of circumstances.

Accordingly, while these bodies may not have the power under their enabling statutes to compel any and all information from a complainant covered by an NDA used to settle misconduct, the Commission is satisfied that the policy concern underlying the inclusion of these bodies in this separate category of permitted disclosure – the interference with or disruption of investigations by these entities into claims of misconduct - is adequately addressed by the permitted disclosure recommended by the Commission in Recommendation 17 – disclosures that are required under provincial or federal legislation. Therefore, the Commission is of the opinion that there is no need for NDA legislation to include specific statutory carve outs for these entities.

iv. Communications re: Prospective Employment

The fourth category of permitted disclosure examined by the Commission is disclosures made by complainants to prospective employers for the purpose of providing information about their employment history and obtaining employment. Under the PEI *NDAA*, MB Bill 215 and the BC Bill, complainants are always permitted to make such disclosures as long as the disclosure reveals no more than the fact that they entered into an NDA in respect of their previous employment. The complainant must not reveal the particulars of the misconduct which occurred or is alleged to have occurred during the previous employment. The Irish Bill states only that NDAs made under the legislation will not apply to any communication relating to a harassment or discrimination claim

²⁸⁰ E.g. By virtue of s. 13 of *The Ombudsman Act*, CCSM c 045, the Ombudsman has the protection and powers of a commissioner appointed under Part V of *The Manitoba Evidence Act*, CCSM E150, which include the powers to summon any witness and require them to give evidence, and to produce such documents and things as they deem requisite to the full investigation of the matter into which they are inquiring. However, as per s. 31 of *The Ombudsman Act*, where the Minister of Justice certifies that the giving of any information or the answering of any question or the production of any document, paper or thing might involve the disclosure of the deliberations or proceedings of the Lieutenant Governor in Council, the Executive Council, or any committee thereof, or matters of a secret or confidential nature, the Ombudsman *cannot* require the information or answer to be given or the document, paper or thing to be produced.

²⁸¹ E.g. While s 17(1) of *The Advocate for Children and Youth Act*, CCSM c A6.7, enables the Manitoba Advocate for Children and Youth to require a public body or other person to provide any information in its custody or under its control that is necessary to enable the Advocate to carry out responsibilities or exercise powers under the Act, s 17(3) limits this right, indicating that the Advocate may *not* require information that is subject to a legal privilege like solicitor-client privilege or the privilege respecting Cabinet confidences.

between an employee and prospective employer. The Federal Bill contains no permitted disclosures for communications to prospective employers.

This category of permitted disclosure is intended to assist a complainant who is bound by an NDA in obtaining subsequent employment. Specifically, it is meant to enable a complainant to explain to a prospective employer, albeit in a very limited capacity, the reason why their previous employment came to an end.

Commenters raised concerns during consultations that enabling complainants to reveal the existence of an NDA to a prospective employer without enabling them to provide details of the agreement would not have the intended consequences.

Interestingly, one lawyer explained that in their practice, when negotiating and drafting settlement agreements, they often include an explanation agreed upon by the parties to be used in the event that a prospective employer makes inquiries to the former employee and former employer about why the employment came to an end. In their view, this is a more appropriate method to assist an employee in obtaining subsequent employment than a blanket permission to provide limited information to a prospective employer under NDA legislation.

Considering the abovementioned feedback, it appears to the Commission that the objective of this permitted disclosure - assisting a complainant in obtaining future employment – can be achieved through the inclusion in NDA legislation of a requirement that complainants have a reasonable opportunity to receive independent legal advice before entering into an NDA. When properly advised, a complainant should be made aware of the potential challenges and risks that they could face in trying to obtain employment in light of their NDA, and should be presented with options to address these challenges, like the agreed statement of facts discussed by the lawyer above. The Commission agrees that an option of this nature would likely enable a complainant to provide a more satisfactory explanation to a prospective employer about their employment history than would be allowed by the very limited permitted disclosures currently provided for in the existing and contemplated statutory NDA frameworks. Therefore, the Commission recommends that any potential NDA legislation in Manitoba should not include this permitted disclosure.

Recommendation 20: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not include disclosures by complainants to prospective employers as a permitted disclosure.

v. Additional Permitted Disclosures

In addition to the abovementioned categories of permitted disclosures, the Commission considers it necessary to ensure that parties are not contractually barred from disclosing information otherwise covered by an NDA to one other group. The Commission heard from a commenter that NDA legislation should always permit a complainant to communicate such information to financial advisors, accountants, bankruptcy trustees, the Canada Revenue Agency, or any person

or entity to whom the source of any settlement funds may need to be disclosed for purposes of financially accounting for, disposing of or investing said funds. The Commission agrees.

Recommendation 21: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, any NDA made under such legislation should be deemed invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information otherwise covered by the NDA to a person or entity to whom the source of any settlement funds may need to be disclosed for purposes of financially accounting for, disposing of or investing funds, or for purposes of income tax reporting.

5. Miscellaneous Matters

i. **Restrictions on the Disclosure of Settlement Amount**

There is a long-standing practice that, in settling a dispute, the quantum of settlement is to remain between the parties. This is reflected in the PEI *NDAA*, MB Bill 215 and the BC Bill, which each state that the respective legislation does not apply to provisions in NDAs that preclude the disclosure of the amount paid in the settlement of a claim. In other words, none of these instruments preclude individuals from agreeing, in an NDA, to keep the *amount* of a settlement confidential. This is, however, subject to the aforementioned provisions addressing permitted disclosures. For instance, s. 7(2) of MB Bill 215 explicitly states that despite its terms, an NDA “does not prohibit a complainant from disclosing the amount they were paid to a person identified in section 4” (lawyers, physicians, victim service providers, community elders, etc.) No equivalent provisions exist in the Irish Bill.

Distinctively, the Federal Bill is the only instrument which expressly applies to provisions in NDAs that preclude the disclosure of the amount paid in the settlement of a claim. Its definition of NDA explicitly includes provisions of written settlement agreements under which a complainant agrees not to disclose any material information regarding the monetary value of a written settlement insofar as it relates to the allegation.²⁸² As such, all of the restrictions created under the bill apply equally to these types of provisions. Additionally, the Federal Bill would also require government entities and non-governmental entities receiving public funding to report annually to the President of the Treasury Board of Canada on the total dollar amount of agreements that they have entered into which contain NDAs. These numbers would be included in an annual report tabled in Parliament by the President.²⁸³

There was unanimous agreement amongst everyone who commented on this issue during consultations that if Manitoba were to enact NDA legislation, this legislation should allow parties to NDAs to prohibit or restrict the disclosure of the amount paid in a settlement. One reason

²⁸² Federal Bill, *supra* note 120, s 5.

²⁸³ *Ibid*, ss 4, 5.

provided in support of this position is that if monetary settlement amounts could be publicized, this could weaken a respondent's bargaining position in other negotiations in the future, thus discouraging them from settling. Another commenter argued that this type of disclosure could largely defeat the purpose of the NDA. Therefore, commenters argue that this information should be protected under an NDA, and that NDA legislation should explicitly allow for this protection. The Commission agrees.

Recommendation 22: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should not apply to provisions in NDAs which prohibit or restrict the disclosure of the monetary amount paid to the complainant in a settlement. However, this should be subject to the caveat that complainants are always permitted to disclose such information:

- (a) where the disclosure is required under any provincial or federal legislation;
- (b) to a person with whom the complainant has a solicitor-client relationship; or
- (c) to a person or entity to whom the source of any settlement funds may need to be disclosed for purposes of financially accounting for, disposing of or investing funds, or for purposes of income tax reporting.

ii. Offence Provisions

The Commission has also considered whether prospective NDA legislation in Manitoba should make non-compliance with the statute an offence or whether it should only make non-compliant agreements invalid and unenforceable.

The PEI *NDAA*, MB Bill 215, BC Bill and Irish Bill each contain a provision making it an offence to enter into an NDA that does not comply with the legislation. There is no equivalent provision in the Federal Bill. The existing offence provisions differ in certain respects. The PEI *NDAA* provides that a respondent or institutional respondent who, after the coming into force of the Act, enters into an NDA that is not made in accordance with s. 4 (the section which outlines when and how an NDA will be permitted, valid and enforceable), will be “guilty of an offence and [...] liable on summary conviction to a fine of not less than \$2,000 or more than \$10,000.”²⁸⁴ MB Bill 215 provides that “[a] respondent who contravenes this Act is guilty of an offence and is liable on conviction to a fine of not more than \$10,000.”²⁸⁵

The BC Bill creates two separate offences for different classes of individuals. Pursuant to s. 8(1) of the bill, an individual who contravenes the legislation is guilty of an offence and liable on conviction to a fine of not less than \$2,000 and not more than \$10,000. Pursuant to s. 8(2), corporations who contravene the legislation are liable on conviction to a fine of not less than \$10,000 and not more than \$50,000.

²⁸⁴ PEI *NDAA*, *supra* note 11, s 6.

²⁸⁵ MB Bill 215, *supra* note 13, s 10.

The Irish Bill differs from each of the Canadian instruments because, while it makes it an offence for employers to enter into NDAs that do not comply with the provision, it does not set out the liability or punishment for the offence.

The majority of commenters who spoke to this issue were either uncertain about whether NDA legislation should create an offence, or against it entirely. Some who were on the fence recognized that an offence provision would serve as a strong incentive for respondents to comply with the Act as it may further stigmatize those who negotiate in bad faith. They also recognize that, from an access to justice perspective, an offence provision would ensure consequences for a respondent's non-compliance with the Act in circumstances where a complainant cannot afford to challenge an NDA in court.

In contrast, many commenters feel strongly that NDA legislation in Manitoba should not make non-compliance with the statute an offence. Specifically, commenters noted that the codification of restrictions on the common-law right to contract is a civil matter and should therefore attract civil consequences.

One commenter argues that criminal consequences in NDA legislation are, at least at this time, overkill, and unnecessary to promote the purpose of the legislation. They directed the Commission to consider the offence provisions in *The Personal Health Information Act* (“PHIA”),²⁸⁶ noting that there have been minimal prosecutions under that Act since the offence provisions were introduced into the legislation 15 years ago, in 2008.

Commenters were also concerned that making non-compliance an offence could make it tougher to settle cases that should settle, and that it would require the implementation of an administrative/prosecutorial infrastructure for enforcement, requiring the expenditure of significant resources. Commenters also note that such a provision would raise additional issues, like: would the offence be an absolute liability offence or a strict liability offence? Would it require full *mens rea*? What defences would be available? Would the drafter of the NDA (e.g. the respondent's lawyer) potentially be a party? If so, how would this impact the relationship between a respondent and their lawyer?

Recommendation 23: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should make non-compliant agreements invalid and unenforceable, as opposed to making non-compliance with the statute an offence.

iii. Application of Legislation to Previous Agreements

Another issue that was raised during the consultation period is how potential NDA legislation in Manitoba should apply to NDAs made before the legislation comes into force. Specifically,

²⁸⁶ CCSM c P33.5 [PHIA].

commenters considered whether NDA legislation should apply only to NDAs made after the legislation has come into force, or whether it could or should apply retroactively or retrospectively.

Retroactivity and retrospectivity are two slightly different legal concepts. The standard definition of retroactivity in current Canadian law comes from *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*,²⁸⁷ in which the Supreme Court of Canada explained that legislation receives **retroactive** application “when the effect of applying it to particular facts is to deem the law to have been different from what it actually was when the facts occurred.”²⁸⁸ For example, a statute might state that a particular section shall be deemed to have come into force on a specific date in the past and that it is retroactive to the extent necessary to give it effect on and after that date.

There is a strong presumption against the retroactive application of legislation and even where it is clear that legislation is meant to have retroactive application, the extent of the retroactivity should be minimized to the greatest extent possible.²⁸⁹ Ruth Sullivan explains:

It is obvious that reaching into the past and declaring the law to be different from what it was when the relevant facts occurred is a serious violation of the rule of law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.²⁹⁰

In contrast, **retrospective** application does not change the law as of a time prior to its enactment, but instead, “changes the law for the future only by attaching new legal consequences to facts or conduct that occurred in the past.”²⁹¹ Like retroactive application, there is a general presumption against retrospective application, but this presumption may be rebutted. The two caveats to the presumption against retrospective application of legislation are:

- the presumption against retrospective application does not apply unless the new consequences are prejudicial ones, such as a new penalty, disability or duty; and
- the presumption against retrospective application does not apply if the new prejudicial consequences are intended to protect the public rather than punish the person affected for their prior behaviour.²⁹²

²⁸⁷ [1975] SCJ No 116, [1977] 1 SCR 271 [*Gustavson*].

²⁸⁸ Ruth Sullivan, *The Construction of Statutes*, 7th ed at ch 25, § 25.05 (Temporal Application: The Retroactive Application of Legislation).

²⁸⁹ *Ibid*.

²⁹⁰ *Ibid* [footnotes omitted].

²⁹¹ Halsbury’s Laws of Canada (Online), *Legislation*, “Application: Temporal Application: Retrospective Application” (V.1(3)) at HLG-32 (Cum Supp Release 58).

²⁹² *Ibid* at “Presumption against retrospective application.”

In order for the public protection exception to apply, there must be a “clear nexus between the [newly imposed] protective measure and the risks to the public associated with the prior conduct to which it attaches.”²⁹³ In other words “the scope of protection [must be] aligned with the specific risks posed by persons who have engaged in specific harmful conduct and [...] tailored to preventing those risks prospectively.”²⁹⁴

The Irish Bill has retrospective application. If enacted, s. 14B(7) of the legislation would state:

Where a non-disclosure agreement was made before the coming into operation of this Act, it shall only be enforceable if it was made in accordance with subsection (3)²⁹⁵, save for any provisions protecting the identity of the relevant employee, which shall remain in effect.

While this provision would not change the law regarding NDAs in Ireland as of a time prior to its enactment (i.e. retroactive application), it would create new legal consequences for people who entered NDAs before the new law existed: NDAs entered into before the coming into force of the Act would be deemed unenforceable if found to be non-compliant with the new protective measures set out in the legislation.

In contrast, the Federal Bill applies purely prospectively,²⁹⁶ and the PEI *NDAA*, MB Bill 215, and the BC Bill apply prospectively, subject to one major retrospective exception. Each instrument would invalidate provisions in existing NDAs that prevent complainants from disclosing information to those individuals and bodies listed in the statutes as permitted disclosures.

For example, s. 5 of the PEI *NDAA* states that no NDA entered into before the coming into force of the Act shall apply to disclosures permitted under ss. 4(6) and (7), which include disclosures protected or required under provincial employment, human rights, and workplace health and safety legislation, certain artistic expressions, communications about the harassment or discrimination to specific professionals and individuals, and disclosures made to prospective employers for the purpose of obtaining employment and providing information about one’s employment history.

MB Bill 215 is slightly less clear on its temporal application, but ultimately, it appears that the drafters intended the same results as in the PEI *NDAA*. Section 3(2) of the bill indicates that the requirements for validity and enforceability of an NDA set out in s. 3(1) do not apply to an NDA that was entered into before the Act comes into force. Sections 4 and 5 then indicate that a provision of an NDA will be invalid and unenforceable to the extent that it prohibits or restricts disclosures protected or required under provincial employment, human rights, and workplace

²⁹³ *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] SCJ No 50 at para 50.

²⁹⁴ *Ibid.*

²⁹⁵ Subsection 3 sets out the validity and enforceability requirements for NDAs.

²⁹⁶ “NDA” is defined in the Federal Bill as “a provision of a written agreement [...] that is entered into after [the amendments to the federal legislation come] into force.” See Federal Bill, *supra* note 120, s 5. Unlike the PEI *NDAA*, MB Bill 215, and BC Bill, there are no provisions in the Federal Bill which indicate that the federal permitted disclosures are to apply retrospectively to NDAs made before the bill comes into force.

health and safety legislation, certain artistic expressions, communications about the harassment or discrimination to certain individuals and professionals, and disclosures made to prospective employers for the purpose of obtaining employment and providing information about one's employment history. While there is no explicit provision which indicates how ss. 4 and 5 apply to NDAs which predate the legislation, the explanatory note to the bill states:

A non-disclosure agreement made before the law takes effect remains valid even if the agreement does not comply with the Act. But a complainant is allowed to make disclosures to certain persons, including health care providers and counsellors.

The BC Bill is clearer in this regard. Section 7(1)(b) states that the legislation does not apply in relation to an NDA entered into before the section comes into force, while s. 7(3) then indicates that s. 4 of the Act (the section outlining permitted disclosures) applies in relation to NDAs entered into *before* or after this section comes into force.

The question of retrospective or retroactive application was not put forward in the consultation paper and therefore, the Commission received little feedback on the issue. One commenter expressed support for retrospective application of NDA legislation, noting that “the growing tide of public pressure against NDAs, and the organizations that use them, combined with the passage of legislation making them unenforceable going forward, would make the chances of a responsible party or a perpetrator enforcing a past NDA quite small.”

It is commonly-understood to be essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid.²⁹⁷ It is contrary to the rule of law to impose a law upon an agreement, with the resulting legal consequences to the actors, that was not in place at the time that it occurred. Accordingly, the Commission would not support the retroactive application of NDA legislation in Manitoba overall. The Commission is, however, in favor of the hybrid approach taken in Prince Edward Island's legislation, and contemplated in MB Bill 215 and the BC Bill.

The general presumption against retrospective application of legislation may be rebutted where the new prejudicial consequences are intended to protect the public rather than punish the individual impacted by the retrospective application.²⁹⁸ The PEI NDAA, as well as MB Bill 215 and the BC Bill apply retrospectively in a limited manner- reading exceptions into valid pre-existing agreements which enable complainants to disclose information to the individuals and bodies enumerated in the legislation as entities to whom disclosures may always be made, regardless of whether this is allowed under an NDA. The rationale for this limited retrospective application is protective rather than punitive, as it is intended to ensure that no complainant is prevented by an NDA from accessing supports necessary to assist them in addressing the harm

²⁹⁷ Sullivan, *supra* note 288, citing *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), [1990] 1 SCR 1123 at 1152.

²⁹⁸ Halsbury's Laws of Canada (Online), *Legislation*, “Application: Temporal Application: Retrospective Application” (V.1(3)) at HLG-32 (Cum Supp Release 58).

caused by misconduct perpetrated against them, fulfilling statutory duties, or navigating the legal ramifications of an NDA.

Recommendation 24: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, such legislation should generally only apply to NDAs made after any such legislation takes effect. However, any provisions contained in such legislation which outline permitted disclosures should apply to NDAs made both before and after the law takes effect.

iv. Jurisdictional Issues and Choice of Law Provisions

Finally, the Commission wishes to flag certain jurisdictional issues for legislators in the event that Manitoba does make the decision to enact NDA legislation in the province. Specifically, it notes that consideration should be given to whether NDA legislation in Manitoba should necessarily establish jurisdiction in order to avoid “jurisdiction shopping” by parties to NDAs.

The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance.²⁹⁹ In practice, settlement contracts often include a choice of law clause that sets out which jurisdiction's laws will govern a contract. Where the parties have selected a governing law expressly, the law will govern the contract provided the choice is *bona fide*, legal and there is no reason for avoiding the choice on grounds of public policy.³⁰⁰ The state of the law has been described as “where parties select a law in the contract to govern their relationship, the courts will respect it as long as it was made in good faith, in the sense that it was not chosen deliberately to avoid the laws of a more appropriate jurisdiction.”³⁰¹

One commenter questioned whether there is cause to be concerned about possible “jurisdiction shopping” by parties to NDAs who view any legislation enacted in Manitoba as being either favorable or unfavorable to them. For instance, if, contrary to the Commission's recommendation, Manitoba enacted NDA legislation which provided for the unilateral waiver of the complainant's promise not to disclose information, this commenter contemplates the possibility of a complainant who is negotiating an NDA *outside* of Manitoba, attempting to benefit from Manitoba's unilateral waiver provision by including a Manitoba choice of law clause in their NDA. Conversely, they envision respondents negotiating NDAs *within* Manitoba attempting to include a choice of law clause establishing that another jurisdiction's laws will govern the NDA in order to avoid such a statutory provision.

²⁹⁹ See Fridman, *The Law of Contract in Canada*, 3rd ed (1994) at p. 65; and *Re Viscount Supply Co.*, [1963] 1 OR 640 (SC).

³⁰⁰ Halsbury's Laws of Canada (Online), *Conflict of Laws*, “Obligations: Contractual Obligations: Contracts: Expressly Chosen Governing Law” (V.1(1)(b)) at HCF-139 (Cum Supp Release 59), citing *Vita Food Products, Inc. v. Unus Shipping Co. Ltd.*, 1939 CanLII 269 (UK JCPC), [1939] A.C. 277, [1939] 1 at p. 290.

³⁰¹ Stikeman Elliott LLP, “Canada: Conflict of Laws Overview” (1 January 2008), online (pdf): *Stikeman Elliott* <www.stikeman.com/en-ca/kh/guides/Canada-Conflict-of-Laws-Overview>.

One possible way of addressing these potential concerns would be for NDA legislation to establish jurisdiction and invalidate choice of law provisions in NDAs entered into in Manitoba. A current example of this approach is s. 116 of *The Insurance Act*,³⁰² which states:

When a contract is made in Manitoba

116(1) A contract is deemed to have been made in Manitoba if

- (a) it insures an insurable interest of a person who is resident in Manitoba; or
- (b) its subject matter is property that is located in Manitoba.

Interpretation of contract

116(2) A contract that is deemed to have been made in Manitoba must be interpreted according to the laws of Manitoba.

Application despite agreement to the contrary

116(3) This section has effect despite any agreement, condition or stipulation to the contrary.

If an equivalent provision were to be included in NDA legislation in Manitoba, consideration should be given to how an NDA would be determined to have been made in this province. For example, such legislation might provide that a contract is deemed to have been made in Manitoba if the complainant or respondent was ordinarily resident in Manitoba when the misconduct is alleged to have occurred, or when the NDA is executed. Such contracts would be required to be interpreted according to the laws of Manitoba, regardless of any agreement to the contrary. This would restrain parties' ability to contract freely and the consequences would have to be balanced against the protection of complainants' interests. If the government of Manitoba decides to enact NDA legislation, it would be important to consider this issue.

<p>Recommendation 25: If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation, legislative drafters must consider whether and how such legislation should address potential jurisdictional issues.</p>

³⁰² CCSM c I40.

CHAPTER 4: SUMMARY OF RECOMMENDATIONS

The following list provides a summary of all recommendations contained in this final report.

Recommendation 1: Legislation that governs the content and use of NDAs in claims of misconduct (“NDA legislation”) should not be enacted in Manitoba at this time (page 47).

If, contrary to Recommendation 1, Manitoba decides to enact NDA legislation...

Recommendation 2: such legislation should include a review clause which requires a comprehensive review of the statute within 5 years of its coming into force (page 48).

Recommendation 3: such legislation should not be restricted to governing NDAs that are signed by individuals in an employment context (page 49).

Recommendation 4: such legislation should include a provision reflecting Rule 7.08(1), *No settlement of claim without judge’s approval*, of the Court of King’s Bench Rules, to be applied in addition to the other requirements set out in the legislation for a valid and enforceable NDA (page 53).

Recommendation 5: such legislation should govern NDAs which prohibit or restrict the disclosure of information concerning claims of abuse, in addition to claims of harassment and discrimination (page 55).

Recommendation 6: such legislation should define “harassment” broadly enough to capture all forms of harassment, and not just sexual harassment (page 56).

Recommendation 7: such legislation should define “discrimination” in accordance with the definition of “discrimination” contained in *The Human Rights Code* of Manitoba (page 57).

Recommendation 8: the term “abuse” should be defined in such legislation, and in drafting this definition, legislative drafters should consider existing definitions of abuse in Manitoba statutes with the objective of making the definition as consistent as possible with other legislation (page 61).

Recommendation 9: pre-dispute NDAs should be deemed unenforceable under such legislation (page 62).

Recommendation 10: legislative drafters ought to consider the distinct nature of NDAs made between respondents and institutional respondents in determining how such NDAs should be treated under this legislation (page 64).

Recommendation 11: such legislation should not require that it was the expressed wish and preference of a complainant to enter into an NDA in order for an NDA to be valid and enforceable (page 66).

Recommendation 12: such legislation should require that a complainant has had a reasonable opportunity to receive independent legal advice in order for an NDA to be valid and enforceable. Further, such legislation (and/or regulations thereto) should require that the complainant either provide a certificate of independent legal advice, evidencing that the advice was received, or alternatively, a formal waiver of their right to receive said advice (page 67).

Recommendation 13: such legislation should not require that there has been no attempts to unduly influence the complainant in respect of the decision to enter into an NDA, in order for an NDA to be valid and enforceable (page 69).

Recommendation 14: such legislation should not require that an NDA not adversely affect the health or safety of a third party, or the public interest, in order for an NDA to be valid and enforceable (page 71).

Recommendation 15: such legislation should not require that an NDA include a mechanism for the complainant to decide to waive their own confidentiality in the future in order for an NDA to be valid and enforceable (page 73).

Recommendation 16: such legislation should not require that an NDA be of a set and limited duration in order for an NDA to be valid and enforceable (page 74).

Recommendation 17: any NDA made under such legislation should be deemed invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information that is required under any provincial or federal legislation (page 76).

Recommendation 18: such legislation should not include artistic expressions as a permitted disclosure (page 77).

Recommendation 19: any NDA made under such legislation should be deemed invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information concerning the misconduct to:

- (a) a person authorized to practise law in Canada; and
- (b) a person qualified to provide medical, psychological, mental health, spiritual, or other related support.

Further, with respect to the individuals outlined in subsection (b) of this recommendation, legislative drafters should consider whether there are any other professionals that must be added to this list (page 80).

Recommendation 20: such legislation should not include disclosures by complainants to prospective employers as a permitted disclosure (page 83).

Recommendation 21: any NDA made under such legislation should be deemed invalid and unenforceable to the extent that it prohibits or restricts a party to the agreement from disclosing information otherwise covered by the NDA to a person or entity to whom the source of any settlement funds may need to be disclosed for purposes of financially accounting for, disposing of or investing funds, or for purposes of income tax reporting (page 84).

Recommendation 22: such legislation should not apply to provisions in NDAs which prohibit or restrict the disclosure of the monetary amount paid to the complainant in a settlement. However, this should be subject to the caveat that complainants are always permitted to disclose such information:

- (a) where the disclosure is required under any provincial or federal legislation;
- (b) to a person with whom the complainant has a solicitor-client relationship; or
- (c) to a person or entity to whom the source of any settlement funds may need to be disclosed for purposes of financially accounting for, disposing of or investing said funds, or for purposes of income tax reporting (page 85).

Recommendation 23: such legislation should make non-compliant agreements invalid and unenforceable, as opposed to making non-compliance with the statute an offence (page 86).

Recommendation 24: such legislation should generally only apply to NDAs made after any such legislation takes effect. However, any provisions contained in such legislation which outline permitted disclosures should apply to NDAs made both before and after the law takes effect (page 90).

Recommendation 25: legislative drafters must consider whether and how such legislation should address potential jurisdictional issues (page 91).

This is a report pursuant to section 15 of the *Law Reform Commission Act*, C.C.S.M. c. L95, signed this 27th day of June, 2023.

“Original Signed by”

Grant M. Driedger, President

“Original Signed by”

The Honourable Madam Justice Shawn D. Greenberg, Commissioner

“Original Signed by”

The Honourable Madam Justice Jennifer A. Pfuetzner, Commissioner

“Original Signed by”

Janesca Kydd, Commissioner

“Original Signed by”

Marc E. Marion, Commissioner

“Original Signed by”

Dr. Laura Reimer, Commissioner

“Original Signed by”

Dr. Mary J. Shariff, Commissioner

APPENDIX A: BILL 215, *THE NON-DISCLOSURE AGREEMENTS ACT*, MB

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

INTRODUCTORY PROVISIONS

Purpose

1 The purpose of this Act is to restrict or prohibit the use of non-disclosure agreements as they relate to claims of harassment and discrimination.

Definitions

2(1) The following definitions apply in this Act.

"complainant" means a person who has, or alleges to have, experienced harassment or discrimination.

"discrimination" means discrimination as defined in *The Human Rights Code*.

"harassment" means

- (a) a course of abusive or unwelcome conduct or comment that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person;
- (b) a series of objectionable and unwelcome sexual solicitations or advances;
- (c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

"non-disclosure agreement" means an agreement between a complainant and a respondent that prohibits or restricts a complainant from disclosing information concerning harassment or discrimination, or alleged harassment or discrimination, that the complainant experienced.

"respondent" means, as the case may be,

- (a) a person who committed or is alleged to have committed harassment or discrimination against the complainant; or
- (b) a responsible party.

"responsible party" means a person who has a legal obligation to take reasonable steps to terminate harassment and discrimination in the place where harassment or discrimination occurred or is alleged to have occurred.

Non-disparagement agreement

2(2) For certainty, **"non-disclosure agreement"** includes a non-disparagement agreement if the purpose or effect of the agreement is to conceal details about harassment or discrimination, or alleged harassment or discrimination, that a complainant experienced.

VALIDITY AND ENFORCEABILITY OF NON-DISCLOSURE AGREEMENTS

Requirements for validity and enforceability

3(1) To the extent that a provision of a non-disclosure agreement prohibits or restricts a complainant from disclosing information concerning harassment or discrimination, or alleged harassment or discrimination, the provision is invalid and unenforceable unless

- (a) it was the expressed wish and preference of the complainant to enter into a non-disclosure agreement;
- (b) the complainant had a reasonable opportunity to receive independent legal advice, including advice about
 - (i) entering into the agreement, and
 - (ii) the terms and conditions of the agreement;
- (c) there were no undue attempts to influence the complainant in respect of the decision to enter into the agreement;
- (d) the complainant's compliance with the agreement will not adversely affect
 - (i) the health or safety of a third party, or
 - (ii) the public interest;
- (e) the agreement includes an opportunity for the complainant to waive, by following a process set out in the agreement, the provisions of the agreement that prohibit or restrict the disclosure of information about harassment or discrimination or alleged harassment or discrimination; and
- (f) the agreement is of a set and limited duration.

Non-application — previous agreements

3(2) Subsection (1) does not apply to a non-disclosure agreement that was entered into before this Act comes into force.

Invalid and unenforceable provisions — communication

4 A provision of a non-disclosure agreement is invalid and unenforceable to the extent that it prohibits or restricts

- (a) a party to the agreement from disclosing information protected or required under *The Employment Standards Code*, *The Human Rights Code*, *The Workplace Safety and Health Act*, or any disclosure protected or required under another enactment or an Act of Parliament;
- (b) the complainant from engaging in artistic expression that does not identify
 - (i) another party to the agreement, or
 - (ii) the terms of the agreement; or
- (c) the complainant from communicating information concerning the harassment or discrimination, or the alleged harassment or discrimination, to
 - (i) a person whose duties include the enforcement of an enactment or an Act of Parliament, with respect to a matter within the person's power to investigate,
 - (ii) a person authorized to practise law in Canada,
 - (iii) a physician, psychologist or psychological associate, registered nurse or nurse practitioner, or registered social worker, authorized to practise in Canada,
 - (iv) a person who provides victim services under The Victims' Bill of Rights,
 - (v) a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the complainant,
 - (vi) the Ombudsman,
 - (vii) the Advocate for Children and Youth,
 - (viii) a friend, a family member or personal supporter as specified or approved in the non-disclosure agreement, or
 - (ix) a person or class of persons specified in the regulations.

Invalid and unenforceable provisions — employment history

5 A provision of a non-disclosure agreement arising from a complainant's previous employment is invalid and unenforceable to the extent that it prohibits or restricts the complainant from disclosing that they entered a non-disclosure agreement in respect of their previous employment if the complainant

- (a) does not disclose the particulars of the harassment or discrimination that occurred or is alleged to have occurred during their previous employment; and
- (b) makes the disclosure as part of providing information about their employment history for the purposes of obtaining new employment.

Prohibition on entering non-compliant agreement

6 A respondent must not enter into an agreement that does not comply with sections 3, 4 and 5.

Disclosure of amount may be prohibited or restricted

7(1) Except as provided in subsection (2), this Act does not apply to a provision in a non-disclosure agreement prohibiting or restricting the disclosure of an amount paid to the complainant.

Exception — permitted disclosures

7(2) Despite any of its terms, a non-disclosure agreement does not prohibit a complainant from disclosing the amount they were paid to a person identified in section 4.

AGREEMENTS PREVENTING INVESTIGATION

Agreement prohibited

8(1) A responsible party must not enter into an agreement with a person who committed or is alleged to have committed harassment or discrimination for the purpose of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination.

Agreement invalid and unenforceable

8(2) If a responsible party enters into an agreement contrary to subsection (1), any provision of the agreement that has the effect of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination is invalid and unenforceable.

GENERAL PROVISIONS

Agreement must be clear

9 A non-disclosure agreement must use language that is clear and understandable.

Offence

10 A respondent who contravenes this Act is guilty of an offence and is liable on conviction to a fine of not more than \$10,000.

Regulations

11 The Lieutenant Governor in Council may make regulations specifying persons or classes of persons for the purpose of subclause 4(c)(ix).

C.C.S.M. REFERENCE AND COMING INTO FORCE

C.C.S.M. reference

12 This Act may be referred to as chapter N91 of the *Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

13 This Act comes into force 90 days after it receives royal assent.

APPENDIX B: LIST OF COMMENTERS WHO PROVIDED FEEDBACK

The Commission is grateful to the following individuals and groups for their feedback and participation in this project:

- Melanie R. Bueckert;
- Canadian Centre for Child Protection;
- Laura Marie Fougere;
- Greg Gilhooly;
- Shannon Hancock;
- Gerald Jewers;
- Allison Kilgour;
- Dr. Julie Macfarlane;
- Manitoba Human Rights Commission;
- Manitoba Liberal Caucus;
- James E. McLandress, K.C.;
- Myers LLP, Labour Group;
- Jeffrey Palamar;
- Vivian Rachlis;
- Dr. Jennifer L. Schulz;
- Jo-Anne Stark;
- David Swayze;
- Robert Talach,
- TDS LLP, Labour and Employment Practice Group;
- Kevin D. Toyne;
- Alexander Vasserman;
- Sherri Walsh; and
- Students of the University of Manitoba Faculty of Law Rights Clinic.