
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 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.