



## NON-DISCLOSURE AGREEMENTS

### CONSULTATION PAPER

December 2022

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## **Non-Disclosure Agreements**

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## CONSULTATION PAPER

Comments on this consultation paper should reach the Manitoba Law Reform Commission (“the Commission”) by **February 24, 2023**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba’s law. Please refer to the issues for discussion identified in this paper, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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## EXECUTIVE SUMMARY

A non-disclosure agreement (“NDA”) is a contractual agreement between parties in which a person agrees to keep certain information confidential in return for a benefit. NDAs are regularly used to prevent the sharing of information pertaining to a wide variety of workplace experiences by employees, and have also become commonplace in the settlement of civil lawsuits. In these settlements, plaintiffs will often agree to release defendants from liability and to stay silent about the allegations at issue in exchange for a sum of money or other benefit. One particular context in which these agreements are executed is in the settlement of harassment and discrimination claims. These specific NDAs are the primary focus of this paper.

There are strong proponents both for and against the use of NDAs in the settlement of harassment and discrimination claims. Those in favor of these agreements in this context have emphasized benefits that these contracts can have for victims of harassment and discrimination, such as preservation of privacy, protection against further or re-traumatization, and enhanced bargaining power and agency. On the other hand, those who are against the use of NDAs in this context highlight negative implications of NDAs. These include potential power imbalances between contracting parties, third-party harms resulting from NDAs, the silencing effect that NDAs have on victims, which in some cases, may prevent them from speaking about their experiences with counsellors, therapists or spiritual advisors, and their contribution to a culture of silence and impunity.

These concerns have resulted in a push for legislation in Canada and around the world that would restrict the use of NDAs in the settlement of harassment and discrimination claims. This legislative reform movement ultimately led to the enactment of the *Non-Disclosure Agreements Act* of Prince Edward Island in March 2022, the first piece of legislation in Canada to govern the use of NDAs in the settlement of harassment and discrimination claims, and which invalidates NDAs made in this context that do not comply with a set of statutory criteria. Similar legislation has since been proposed elsewhere in Canada and around the world, including in Manitoba.

Bill 225, *The Non-Disclosure Agreements Act*, was introduced as a private members bill in the legislative assembly of Manitoba in April 2022. While the bill passed second reading in October of 2022 and was sent to Standing Committee in early November, it has since died on the Order Paper. Like the legislation in Prince Edward Island, the purpose of Bill 225 was to “restrict or prohibit the use of non-disclosure agreements as they relate to claims of harassment and discrimination.”

On June 2nd, 2022, the Minister of Justice and Attorney General of Manitoba recommended that the Commission consider whether Manitoba should implement legislation governing the use of NDAs in the settlement of allegations of harassment or discrimination, and if so, what this legislation should look like. In answering these questions, the Commission will consider the recently enacted *Non-Disclosure Agreements Act* of Prince Edward Island, and similar legislation that has been and is currently being contemplated in other Canadian and international jurisdictions.

This consultation paper invites readers to provide their comments on thirteen issues for discussion, a summary of which can be found at page 45. These issues for discussion are intended to gather input from the public with respect to whether Manitoba should enact legislation to govern the use of NDAs in the province, and if so, what provisions the legislation should include. These issues require input from lawyers, academics, advocates, and the public, so that the Commission can craft recommendations that will be practical and meaningful to those affected by any contemplated legislation. Based on the feedback received, the Commission may make recommendations for how best to configure a statutory regime which would govern the use of NDAs in Manitoba. Alternatively, this feedback may lead to a recommendation for a wait-and-see approach, which could allow Manitoba to learn from the developments in other provinces which have and may adopt such legislation, before implementing a law of its own.

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## RÉSUMÉ

Un accord de confidentialité est une entente contractuelle conclue entre des parties, dans laquelle une personne consent à préserver la confidentialité de certains renseignements en contrepartie d'un avantage. Utilisé de façon régulière pour empêcher les employés de divulguer des renseignements concernant un large éventail d'expériences professionnelles, ce type d'accord est également devenu monnaie courante pour le règlement des poursuites civiles. Dans un tel cas, le plaignant acceptera souvent de dégager le défendeur de sa responsabilité et de garder le silence au sujet des allégations en cause en échange d'une somme d'argent ou d'autres avantages. Certains accords de confidentialité sont conclus dans un contexte particulier, à savoir dans les situations d'allégations de harcèlement et de discrimination. C'est principalement sur ce type d'ententes que porte le présent document.

L'utilisation d'accords de confidentialité à l'égard d'allégations de harcèlement et de discrimination suscite des avis polarisés entre ses promoteurs et ses détracteurs. Les premiers soulignent les avantages que ces contrats peuvent présenter pour les victimes de harcèlement et de discrimination – en leur permettant de préserver leur vie privée, en leur évitant de vivre un nouveau traumatisme, ainsi qu'en renforçant leur pouvoir de négociation et leur capacité d'agir, par exemple. En revanche, leurs opposants insistent sur les répercussions négatives de ces ententes : déséquilibres de pouvoir potentiels entre les parties, préjudices causés à des tiers, effet de musellement sur les victimes (ce qui peut parfois les empêcher de parler de leurs expériences avec des conseillers, des thérapeutes ou des conseillers spirituels) et contribution à une culture du silence et de l'impunité.

Au Canada et à l'étranger, ces préoccupations ont donné une impulsion à l'adoption de lois ayant pour objet de régir et de restreindre l'utilisation d'accords de confidentialité à l'égard d'allégations de harcèlement et de discrimination. À l'Île-du-Prince-Édouard, ce mouvement de réforme du droit a finalement abouti à la promulgation de la *Non-Disclosure Agreements Act* en mars 2022, qui est devenue la première loi au Canada à encadrer l'utilisation d'accords de confidentialité à l'égard d'allégations de harcèlement et de discrimination et à invalider les accords antérieurs conclus dans ce contexte qui ne respectent pas certains critères précis. Depuis, des projets de loi semblables ont vu le jour ailleurs au pays et dans le monde. C'est notamment le cas au Manitoba.

Le projet de loi d'initiative parlementaire 225, Loi sur les accords de confidentialité, a été présenté à l'Assemblée législative du Manitoba en avril 2022. Adopté en deuxième lecture en octobre 2022 et renvoyé à un comité permanent au début de novembre, il est depuis mort au Feuilleton. À l'instar de la loi de l'Île-du-Prince-Édouard, il avait pour objet « de restreindre ou d'interdire l'utilisation d'accords de confidentialité à l'égard d'allégations de harcèlement et de discrimination ».



Le 2 juin 2022, le ministre de la Justice et procureur général du Manitoba a proposé que la Commission de réforme du droit détermine si la Province doit mettre en œuvre une loi régissant l'utilisation d'accords de confidentialité à l'égard d'allégations de harcèlement ou de discrimination et, dans l'affirmative, la forme que devrait prendre une telle loi. Pour répondre à ces questions, la Commission s'appuiera sur la récente *Non-Disclosure Agreements Act* adoptée par l'Île-du-Prince-Édouard et sur tout projet de loi similaire qui a été ou est actuellement envisagé au Canada et à l'étranger.

Le présent document de consultation vous invite à vous exprimer sur les 13 enjeux résumés à la page 45. Grâce à ces points de discussion, la Commission souhaite recueillir les commentaires du public pour déterminer si le Manitoba devrait adopter une loi pour régir l'utilisation d'accords de confidentialité dans la province et, dans l'affirmative, les dispositions qu'une telle loi devrait inclure. Pour l'étude de ces questions, la Commission sollicite la contribution de juristes, d'universitaires, de défenseurs des droits et de la population manitobaine afin d'être en mesure de formuler des recommandations concrètes et utiles pour les parties touchées par tout projet de loi qui pourrait être envisagé. De même, la Commission s'appuiera sur les observations reçues pour présenter des recommandations quant à la meilleure façon de mettre en place un régime réglementaire qui encadrerait l'utilisation d'accords de confidentialité au Manitoba. Elle pourrait aussi conseiller au gouvernement d'adopter une approche attentiste afin d'apprendre des expériences des autres provinces qui ont promulgué ou qui pourraient promulguer de telles lois avant de mettre en œuvre un texte législatif qui lui est propre.

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## CHAPTER 1: INTRODUCTION

Generally speaking, 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> One particular context in which these agreements are executed is in the settlement of harassment and discrimination claims. 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 Nygard<sup>4</sup> case and Hockey Canada<sup>5</sup> scandal, will be the primary focus of this paper.

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<sup>1</sup> Shubham Mishra, “Non-Disclosure Agreements for the Protection of Business” (2019) 6:10 Ct Uncourt 2.

<sup>2</sup> Professor 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].

<sup>3</sup> Kevin W. Saunders, “Non-Disclosure Agreements, Catch and Kill, and Political Speech” (2020) 58:2 U Louisville L Rev 283.

<sup>4</sup> 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: <[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.>](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)>.

<sup>5</sup> 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: <[www.cbc.ca/news/politics/growing-calls-outlaw-non-disclosure-agreements-canada-1.6546531](http://www.cbc.ca/news/politics/growing-calls-outlaw-non-disclosure-agreements-canada-1.6546531)>.

Commentators have recognized a number of potential benefits of NDAs for victims<sup>6</sup> of harassment and discrimination where they are crafted reasonably,<sup>7</sup> and entered into in good faith, with adequate consideration and mutual consent.<sup>8</sup> For instance, these agreements are said to protect the confidentiality and privacy of victims and to provide them with closure;<sup>9</sup> to shield victims 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 victim as litigious; to strengthen victims' bargaining power in settlement negotiation; and to restore in them a sense of agency and control.<sup>10</sup>

On the other hand, NDAs used in the settlement of harassment and discrimination claims have been recognized as problematic for a number of reasons. These include the silencing effect that they have on victims, which can prevent them from attaining support, closure and justice; the harms that they can cause to third parties, who may become unsuspecting victims of serial perpetrators<sup>11</sup> whose actions are hidden by NDAs; and more generally, their contribution to a culture of silence, impunity, and tolerance of wrongdoing.<sup>12</sup>

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"),<sup>13</sup> 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

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<sup>6</sup> NDA legislation and proposed NDA legislation use different terminology to describe individuals who have experienced or made allegations about harassment or discrimination (e.g. "relevant person," "complainant", etc.). When not directly quoting from or referencing these statutory instruments, for ease of reference, the Commission will use the term "victim" to refer both to actual victims of harassment or discrimination and alleged victims, meaning individuals who have made allegations about harassment or discrimination which have not necessarily been proven. While the term "victim" will be used throughout the paper in this way, the Commission acknowledges that there are many instances in which allegations of harassment or discrimination have not been proven.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> Austl, Commonwealth, Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) [*Respect@Work*] at 32.

<sup>10</sup> Prasad, *supra* note 7 at 2516.

<sup>11</sup> NDA legislation and proposed NDA legislation use different terminology to describe individuals who have committed or who are alleged to have committed harassment or discrimination (e.g. "respondent"). When not directly quoting from or referencing these statutory instruments, for ease of reference, the Commission will use the term "perpetrator" to refer both to actual perpetrators of harassment or discrimination and alleged perpetrators, meaning individuals who have actually harassed or discriminated against a victim, and those who are accused of having done so. The Commission acknowledges that there are many instances in which allegations of harassment or discrimination are not proven.

<sup>12</sup> Bernardi, *supra* note 8 at 12.

<sup>13</sup> *Non-Disclosure Agreements Act*, RSPEI 2021, c 51 [PEI NDAA].

rigid set of statutory criteria. Similar legislation has since been proposed elsewhere in Canada, including in Nova Scotia and Manitoba, and around the world.

In Manitoba, a private members' bill entitled *The Non-Disclosure Agreements Act* ("MB Bill 225")<sup>14</sup> 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 has since died on the Order Paper. Like the PEI NDAA, 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."<sup>15</sup>

Following the introduction of the bill, 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."<sup>16</sup> 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."<sup>17</sup> This request was the impetus for this paper and project.

Given these recent developments and reform efforts in Manitoba and other Canadian and common law jurisdictions, the Commission asks: *Should Manitoba implement legislation governing the use of NDAs in the context of allegations of harassment or discrimination, and if so, what should this legislation look like?*

This consultation paper invites readers to provide their comments on thirteen issues for discussion. The issues identified in this paper require input from legal professionals, academics, advocates, and the public so that the Commission can craft recommendations that are practical and meaningful to those affected by any contemplated legislation. Based on the feedback received, the Commission may make recommendations for how best to configure a statutory regime which would govern the use of NDAs in Manitoba. Alternatively, this feedback may lead to a recommendation for a wait-and-see approach, which could allow Manitoba to learn from the developments in other provinces which have and may adopt such legislation, before implementing a law of its own.

Chapter 2 provides background on the legal landscape and recent legislative reform efforts surrounding NDAs in Canada and around the world. Chapter 3 discusses possible reform in Manitoba, weighing the pros and cons of legislation which would govern the use of NDAs in the settlement of harassment and discrimination claims, and highlighting important questions for the government to consider should it wish to enact such legislation. Chapter 4 provides a summary of the issues for discussion identified throughout the consultation paper.

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<sup>14</sup> 4th Sess, 42nd Leg, Manitoba, 2022 (second reading 11 October 2022) [MB Bill 225]. See Appendix A.

<sup>15</sup> *Ibid.*, s 1.

<sup>16</sup> Letter from the Minister of Justice and Attorney General of Manitoba to the Manitoba Law Reform Commission (2 June, 2022).

<sup>17</sup> *Ibid.*

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## 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, NDAs, like many other contracts, and issues surrounding the legality and enforceability of NDAs, are governed by the common law. As such, NDAs made in the course of settling harassment and discrimination claims may be invalidated by the courts where, in accordance with established case law principles, they are deemed to be unconscionable, or it is found that a party entered into the agreement under duress or because of undue influence. The Commission has not located any reported Canadian decisions in which a court considers these issues surrounding the legality of NDAs in the particular context of harassment or discrimination. This does not mean, however, that the enforcement of NDAs in this context have not been pleaded, or that victims that have signed NDAs in this context have not been sued for breach of the agreement, with the matter being resolved before a judgment is made. In the absence of statutory regulation, these common law principles are the only current means to challenge the legality of an NDA. Therefore, the Commission will examine these doctrines and advise how they could apply to NDAs.

##### i. Unconscionability

Unconscionability is an equitable legal doctrine that is used to set aside certain types of unfair agreements.<sup>18</sup> 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.<sup>19</sup> 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*,<sup>20</sup> 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,”<sup>21</sup> 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.<sup>22</sup> The Court indicates

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<sup>18</sup> *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16 at para 54.

<sup>19</sup> *Ibid.*

<sup>20</sup> 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.

<sup>21</sup> *Ibid* at para 66.

<sup>22</sup> *Ibid* at para 68.

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:<sup>23</sup>

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".<sup>24</sup>

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.”<sup>25</sup> 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 unfortunate situation.”<sup>26</sup> “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.”<sup>27</sup> The Court explains:

[...] 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).

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.<sup>28</sup> 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.”<sup>29</sup>

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<sup>23</sup> *Ibid* at para 67.

<sup>24</sup> *Ibid* at para 67, citing Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont.: LexisNexis, 2014 at 525.

<sup>25</sup> *Ibid* at para 69.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* at para 71.

<sup>28</sup> 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.

<sup>29</sup> *Ibid* at para 75.

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.<sup>30</sup> 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.<sup>31</sup>

When individuals sign NDAs respecting allegations of harassment or discrimination, there may be an inequality in bargaining power between the parties to these agreements that results in an improvident bargain. For example, if a victim 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 victim, 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 harassment or discrimination 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.<sup>32</sup> This was

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<sup>30</sup> *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.

<sup>31</sup> *Ibid* at paras 64-65.

<sup>32</sup> “Silenced No More: Can a New Law Change How NDAs Silence the Abused?” (2 April 2021) at 00h:20m:25s, online (video): *YouTube* <[www.bing.com/videos/search?q=Ifeoma+Ozoma&view=detail&mid=C384EEEC8DEBB280B6D2C384EEEC8DEBB280B6D2&&FORM=VRDGAR&ru=%2Fvideos%2Fsearch%3Fq%3DIfeoma%2BOzoma%26FORM%3DHDRSC4](http://www.bing.com/videos/search?q=Ifeoma+Ozoma&view=detail&mid=C384EEEC8DEBB280B6D2C384EEEC8DEBB280B6D2&&FORM=VRDGAR&ru=%2Fvideos%2Fsearch%3Fq%3DIfeoma%2BOzoma%26FORM%3DHDRSC4)>.

particularly troubling for Ozoma given that she was terminated at the beginning of the COVID-19 pandemic.<sup>33</sup> 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 harassment and discrimination 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."<sup>34</sup> In other words, it is concerned with one party dominating the will of another person, or exercising a persuasive influence over them.<sup>35</sup>

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 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 [...]<sup>36</sup>

In one of the leading Canadian cases on this subject, *Geffen v. Goodman Estate*<sup>37</sup>, 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."<sup>38</sup> 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'."<sup>39</sup>

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<sup>33</sup> *Ibid.*

<sup>34</sup> Marshall Haughey, "The Fiduciary Explanation for Presumed Undue Influence" (2012) 50:1 Alta L Rev 129-156 at 142 [footnotes omitted].

<sup>35</sup> *Geffen v. Goodman Estate*, [1991] 2 SCR 353 [*Geffen*] at para 40.

<sup>36</sup> Haughey, *supra* note 34 at para 44.

<sup>37</sup> *Geffen*, *supra* note 35.

<sup>38</sup> *Ibid* at para 28.

<sup>39</sup> *Ibid* at paras 28-29.



In the case of NDAs pertaining to harassment or discrimination, 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 victim 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*, they are actually legally entitled to wages in lieu of notice, regardless of any outside agreement.

In terms of presumed undue influence, a victim 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 perpetrator in signing the NDA (particularly if they did not have an opportunity to receive independent legal advice); that the perpetrator was aware that they relied on them for their advice or guidance; and that the perpetrator then obtained a benefit from the transaction; in this case, the victim's silence.

Despite the availability of legal arguments such as unconscionability and undue influence, experts in this area have expressed concern about placing the burden on the victims of harassment or discrimination to challenge the enforceability of an NDA in court.<sup>40</sup> 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.<sup>41</sup> She states that she does not think that "leaving it to judicial scrutiny and the courts and individual legal action is the answer."<sup>42</sup> Therefore, while in theory, the doctrines of unconscionability, duress or undue influence are available to a victim, in reality, the process of pursuing such claims may be largely out of reach for many people.

Without easy and affordable access to those court processes, parties to harassment-based or discrimination-based NDAs in Manitoba do not currently have another avenue of legal redress. This brings the Commission back to the underlying question of this paper: *Should Manitoba implement legislation governing the use of NDAs in the context of allegations of harassment or discrimination, and if so, what should this legislation look like?*

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<sup>40</sup> "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>>.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

## 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")<sup>43</sup> in the Legislative Assembly of Manitoba. While the bill was sent to the Standing Committee on Legislative Affairs on November 2, 2022, it has since died on the Order Paper. 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."<sup>44</sup>

An NDA is defined in the bill 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."<sup>45</sup> A "complainant" is defined as a "person who has, or alleges to have, experienced harassment or discrimination."<sup>46</sup> 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."<sup>47</sup> "Discrimination" is given the same definition as in *The Human Rights Code* of Manitoba.<sup>48</sup> It 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)<sup>49</sup>; 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).<sup>50</sup>

"Harassment" is defined in the bill as follows:

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<sup>43</sup> MB Bill 225, *supra* note 14.

<sup>44</sup> *Ibid*, s 1.

<sup>45</sup> *Ibid*, s 2.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *The Human Rights Code*, SM 1987-88, c 45 [MB HRC].

<sup>49</sup> 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.

<sup>50</sup> MB HRC, *supra* note 48, s 9(1).

- (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.<sup>51</sup>

Pursuant to s. 3(1) of MB Bill 225, 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;
- (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.<sup>52</sup>

Additionally, in accordance with s. 4 of MB Bill 225, NDA provisions will be deemed invalid and unenforceable if they do any of the following:

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<sup>51</sup> MB Bill 225, *supra* note 14, s 2.

<sup>52</sup> *Ibid*, s 3(1).

- (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.<sup>53</sup>

Further, pursuant to s. 5 of the bill, a provision of an NDA arising from a complainant's previous employment 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.<sup>54</sup>

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

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<sup>53</sup> *Ibid*, s 4.

<sup>54</sup> *Ibid*, s 5.

Generally speaking, MB Bill 225 would not apply to a provision in an NDA that prohibits or restricts the complainant from disclosing the amount that they were paid.<sup>55</sup> In other words, such provisions would generally be considered valid, despite MB Bill 225, and a complainant could therefore be prohibited from disclosing that type of information. However, by virtue of s. 7(2) of MB Bill 225, these types of NDA provisions cannot actually prohibit a complainant 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.)<sup>56</sup>

Whereas the preceding sections address NDAs made between complainants and respondents, s. 8 of MB Bill 225 addresses agreements made between someone who has committed or is alleged to have committed harassment or discrimination and a responsible party (“respondents”). 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.”<sup>57</sup> Section 8(2) indicates that 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.<sup>58</sup>

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.”<sup>59</sup>

## **B. State of the Law on NDAs around Canada**

### **1. *Prince Edward Island***

The *Non-Disclosure Agreements Act* (“PEI NDAA”),<sup>60</sup> 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,

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<sup>55</sup> *Ibid*, s 7(1).

<sup>56</sup> *Ibid*, s 7(2).

<sup>57</sup> *Ibid*, s 8(1).

<sup>58</sup> *Ibid*, s 8(2).

<sup>59</sup> *Ibid*, s 6.

<sup>60</sup> PEI NDAA, *supra* note 13.

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 Canada<sup>61</sup>

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.<sup>62</sup>

Both Manitoba’s bill and Prince Edward Island’s statute define discrimination in accordance with the respective province’s human rights legislation, while harassment is independently defined in each instrument. Discrimination is defined in Prince Edward Island’s *Human Rights Act*<sup>63</sup> 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.”<sup>64</sup> 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,

(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 advance<sup>65</sup>

Sections 4(1) and (2) of the PEI NDAA 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,”<sup>66</sup> except where the NDA “is the expressed wish and preference of

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<sup>61</sup> *Ibid*, s 1(d).

<sup>62</sup> *Ibid*, ss 1(e), (f).

<sup>63</sup> RSPEI 1988, c H-12 [PEI HRA].

<sup>64</sup> *Ibid*, s 1(d).

<sup>65</sup> PEI NDAA, *supra* note 13, s 1(b).

<sup>66</sup> *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.

the relevant person concerned.”<sup>67</sup> 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 225, s. 4(4) of the PEI *NDAA* prohibits a party responsible from entering into a separate NDA with a person who has committed or who is alleged to have committed harassment or discrimination if the purpose of that NDA is to “[prevent] a lawful investigation into a complaint of harassment or discrimination.”<sup>68</sup> 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.<sup>69</sup>

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 225, 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 the perpetrator or the responsible party, 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.<sup>70</sup>

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<sup>67</sup> *Ibid*, s 4(2).

<sup>68</sup> *Ibid*, s 4(4).

<sup>69</sup> *Ibid*, s 4(5).

<sup>70</sup> *Ibid*, s 4(6).

Similarly, pursuant to s. 4(7), even where it is the expressed wish and preference of a relevant person to enter into an NDA, such an NDA will not apply to that person's communication with a prospective employer for the purpose of obtaining employment and providing information about their employment history."<sup>71</sup> In particular, the PEI *NDAA* specifies that such an NDA will not apply to:

(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.<sup>72</sup>

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 generally prohibit such provisions.<sup>73</sup>

While generally, NDAs which were made prior to the PEI *NDAA* coming into force will be 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 (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.).

A party responsible or a person who committed or is alleged to have committed harassment or discrimination 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."<sup>74</sup>

## **2. Other Canadian Jurisdictions**

Nova Scotia's private member's bill, Bill 144, the *Non-Disclosure Agreements Act* ("NS Bill 144")<sup>75</sup> was read for a first time on April 7, 2022. However, the bill did not receive the necessary support of the government to move it through the legislative process beyond this point.<sup>76</sup> 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

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<sup>71</sup> *Ibid*, s 4(7).

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid*, s 4(10).

<sup>74</sup> *Ibid*, s 6.

<sup>75</sup> Bill 144, *Non-Disclosure Agreements Act*, 1st Sess, 64th Leg, Nova Scotia, 2022 (first reading 7 April 2022) [NS Bill 144].

<sup>76</sup> 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](http://www.cbc.ca/news/canada/nova-scotia/nda-non-disclosure-agreement-sex-assault-hockey-canada-1.6618926)>.



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.”<sup>77</sup> 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.”<sup>78</sup>

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,”<sup>79</sup> and almost all of the same definitions and 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.

According to a CBC News report from July 2022, a spokesperson for British Columbia’s attorney general's office has indicated that similar to Nova Scotia, “the ministry is watching developments in other provinces to see whether any changes should be made to B.C. law.”<sup>80</sup> While recognizing the utility of NDAs in certain circumstances, that spokesperson indicated that the ministry “[does not] want NDAs to be misused to silence survivors of harassment, abuse and discrimination.”<sup>81</sup>

Meanwhile, on October 27, 2022, Jill Dunlop, Ontario’s Minister of Colleges and Universities, introduced Bill 26, the *Strengthening Post-secondary Institutions and Students Act, 2022*<sup>82</sup> in the legislature of Ontario. Among other things, the bill bans agreements made between publicly-assisted universities, colleges of applied arts and technology, private career colleges (“institutions”) and their employees, which “[prohibit] the [institution] or any person related to the [institution] from disclosing the fact that a court, arbitrator or other adjudicator has determined that an employee of the [institution] has committed an act of sexual abuse of a student enrolled at the [institution].”<sup>83</sup> In this way, the bill bans NDAs that might otherwise allow professors to hide a history of sexual misconduct when applying to other universities or colleges.<sup>84</sup> The bill received second reading on November 14th, 2022, and has been referred to the Standing Committee on Social Policy.

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> NS Bill 144, *supra* note 75, s 4.

<sup>80</sup> Bethany Lindsay, “Abuse and harassment survivors 'silenced' by non-disclosure agreements fight for change to B.C. law”, *CBC News* (23 July 2022), online: <[www.cbc.ca/news/canada/british-columbia/abuse-and-harrassment-survivors-silenced-1.6520001](http://www.cbc.ca/news/canada/british-columbia/abuse-and-harrassment-survivors-silenced-1.6520001)>.

<sup>81</sup> *Ibid.*

<sup>82</sup> Bill 26, *An Act to amend various Acts in respect of post-secondary education*, 1st Sess, 43rd Leg, Ontario, 2022.

<sup>83</sup> *Ibid.*, Schedule 1, s 3, Schedule 2, s 1.

<sup>84</sup> Kristin Rushowy, “Ontario to end secrecy behind campus sexual misconduct cases and let universities fire faculty who abuse students”, *Toronto Star* (27 October 2022), online: <[www.thestar.com/politics/provincial/2022/10/27/ontario-to-end-secrecy-behind-campus-sexual-misconduct-cases-and-let-universities-fire-faculty-who-abuse-students.html](http://www.thestar.com/politics/provincial/2022/10/27/ontario-to-end-secrecy-behind-campus-sexual-misconduct-cases-and-let-universities-fire-faculty-who-abuse-students.html)>.

Additionally, there has been discussion of legislative reform at the federal level. According to a *Winnipeg Free Press* article from August of 2022, federal Senator Marilou McPhedran has been consulting with Canadian lawyers and legislators from other countries over the past year “on how best to craft a bill that could prevent NDAs from being used to silence victims.”<sup>85</sup> She indicated an intention to table such federal legislation in the fall of 2022 when Parliament resumed, and she is optimistic that the federal government will either support her bill or make changes to its own recent harassment-related legislation to account for the treatment of NDAs in this particular context.<sup>86</sup>

## 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*,<sup>87</sup> the first federal statute in the United States which regulates the use of NDAs. This law “limit[s] the judicial enforceability of *predispute* nondisclosure and nondisparagement contract clauses relating to disputes involving *sexual assault* and *sexual harassment*.”<sup>88</sup> 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. These include Arizona, California, Illinois, Maryland, Nevada, New Jersey, New York, Oregon, Tennessee, Vermont, Virginia, and Washington<sup>89</sup>:

**Table 1:** US laws regulating the use of NDAs

Source: (Spooner, 2020)<sup>90</sup>

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.

<sup>85</sup> Dylan Robertson, “Senator wants to end federal non-disclosure agreements silencing misconduct victims”, *Winnipeg Free Press* (11 August 2022).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Speak Out Act*, Pub L No 117-224, §4524.

<sup>88</sup> *Ibid* [emphasis added]. An example of a “*predispute*” 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>>.

<sup>89</sup> 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, online: <[www.gov.ie/pdf/?file=https://assets.gov.ie/217724/f2b97bb1-dac8-4e06-9fdf-315362366dcf.pdf#page=null](http://www.gov.ie/pdf/?file=https://assets.gov.ie/217724/f2b97bb1-dac8-4e06-9fdf-315362366dcf.pdf#page=null)> [Irish Report].

<sup>90</sup> *Ibid* 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.

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.
New Jersey	Prohibits enforcement of all NDAs relating to discrimination or harassment after 18 <sup>th</sup> 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 <sup>th</sup> 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 were considering NDA-related legislation as of January 2020 included Connecticut, Florida, Hawaii, Iowa, Kansas, Massachusetts, Pennsylvania, Rhode Island, Texas and West Virginia. Like the existing laws, these proposed laws largely ban the use of NDAs in the context of employment agreements, as opposed to creating a ban on NDAs generally.<sup>91</sup>

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<sup>91</sup> *Ibid* at 22.

Since January 2020, significant changes have been made to California’s NDA-related laws. 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 prevented 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.”<sup>92</sup> 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 harassment, discrimination or retaliation, whether the protected characteristic is sex, age, national origin, race or others covered by California law.”<sup>93</sup>

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.<sup>94</sup>
- (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.<sup>95</sup>

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;

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<sup>92</sup> 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.

<sup>93</sup> 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](http://www.natlawreview.com/article/california-continues-to-whittle-away-non-disclosure-and-non-disparagement-clauses)> [emphasis added].

<sup>94</sup> 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.

<sup>95</sup> *Cal Civ Code*, §1001(a) [CCC].

- 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.<sup>96</sup>

## 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")<sup>97</sup> was presented to the Seanad Eireann, the upper house of the Irish legislature. The framework of this bill is unique in that it amends the *Employment Equality Act 1998* of Ireland to restrict the use of NDAs in connection with allegations of sexual harassment or discrimination, as opposed to creating new standalone NDA legislation, like the law and bills in Canada. Moreover, 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."<sup>98</sup> 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."<sup>99</sup> 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.<sup>100</sup>

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<sup>96</sup> 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.

<sup>97</sup> *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021* [Irish Bill].

<sup>98</sup> *Ibid*, s 1 [emphasis added].

<sup>99</sup> *Employment Equality Act 1998*, ss 6(1), (2) [EEA 1998].

<sup>100</sup> *Ibid*, s 23.

While the framework of this bill is unique, the substantive law contemplated in the Irish Bill is very similar to that in the statute of Prince Edward Island and MB Bill 225. 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).

(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.”<sup>101</sup>

On July 6, 2022, the bill entered into the Seanad Eireann in the Fourth Stage (Report Stage).<sup>102</sup>

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<sup>101</sup> Irish Bill, *supra* note 97, s 2.

<sup>102</sup> 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”

### 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.”<sup>103</sup> 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:

- 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.<sup>104</sup>

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(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](http://www.oireachtas.ie/en/visit-and-learn/how-parliament-works/how-laws-are-made/#Stages)>.

<sup>103</sup> 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](http://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf)>.

<sup>104</sup> *Ibid* at 16-17.



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.<sup>105</sup> 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.”<sup>106</sup>

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.”<sup>107</sup> While the EHRC explains that the “guidance” is not a statutory code, and therefore, 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.”<sup>108</sup>

Further, in January 2020, the EHRC released additional technical guidance on sexual harassment and harassment at work, which it describes as “the authoritative and comprehensive guide to the law and best practice in tackling harassment.”<sup>109</sup> Again, the EHRC makes it clear that this is not a binding statutory code, but rather, can be used as evidence where relevant. With respect to NDAs, these guidelines state:

Employers must only use confidentiality agreements (also known as confidentiality clauses, non-disclosure agreements, NDAs, or gagging clauses) where it is lawful. It will not be lawful to use confidentiality agreements to prevent workers from whistleblowing, reporting a criminal offence or doing anything required by law such as complying with a regulatory duty. Confidentiality agreements should only be used where necessary and appropriate and the employer should follow best practice where they are used. See our guidance on confidentiality agreements for further details.<sup>110</sup>

This technical guidance was circulated to “large employers” across Great Britain in January 2020, asking that they take measures to safeguard their employees from harassment in accordance with the guidelines.

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<sup>105</sup> *Ibid* at 17.

<sup>106</sup> *Ibid* at 18.

<sup>107</sup> 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](http://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 *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.

<sup>108</sup> *Ibid* at 4.

<sup>109</sup> Equality and Human Rights Commission, “Sexual harassment and harassment at work: Technical Guidance” (January 2020) at 3, online (pdf): <[www.equalityhumanrights.com/sites/default/files/sexual\\_harassment\\_and\\_harassment\\_at\\_work.pdf](http://www.equalityhumanrights.com/sites/default/files/sexual_harassment_and_harassment_at_work.pdf)>.

<sup>110</sup> *Ibid* at 65.

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.*

[...]

*[...] the Government should make it an offence for an employer or their professional adviser to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence.*

[...]

*[...] the use of provisions in confidentiality agreements that can reasonably be regarded as potentially unenforceable should be clearly understood to be a professional disciplinary offence for lawyers advising on such agreements.*

[...]

*The Government should require employers to make a financial contribution sufficient to cover the costs of the worker’s legal advice on any settlement agreement proposed by the employer. This advice should cover, as a minimum, the content and effect of any confidentiality, non-derogatory or similar clauses, and any concerns about the reasonableness or enforceability of those clauses. Where the worker wishes to negotiate the terms of those clauses, further contributions should also be payable by the employer to cover the costs of legal advice and representation for those negotiations. These contributions should be payable regardless of whether the employee signs the agreement.<sup>111</sup>*

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.”<sup>112</sup> The Department, which had launched its consultation in March

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<sup>111</sup> 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>>.

<sup>112</sup> 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):

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 582 responses from respondents which included "trade unions, campaign organisations, legal institutes, individuals and businesses",<sup>113</sup> 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;
- 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.<sup>114</sup>

To date, the British Government has not acted on the Department's statutory recommendations.<sup>115</sup> However, 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."<sup>116</sup> The second reading of this bill is scheduled to take place on March 17, 2023.

#### 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").<sup>117</sup> 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

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<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/818324/confidentiality-clause-consultation-govt-response.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].

<sup>113</sup> *Ibid* at 7.

<sup>114</sup> "Second Special Report" (29 October 2019), online: *UK Parliament*

<<https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/215/21502.htm#footnote-001-backlink>>.

<sup>115</sup> Business, Energy & Industrial Strategy Report, *supra* note 112 at 19.

<sup>116</sup> "Non-Disclosure Agreements Bill", online: *UK Parliament* <<https://bills.parliament.uk/bills/3303/news>>.

<sup>117</sup> *Respect@ Work*, *supra* note 9.

and safety legislative schemes.”<sup>118</sup> In establishing this new system, the Commission addresses the issue of the use of NDAs in workplace sexual harassment matters.<sup>119</sup>

While the Commission heard in its inquiry about certain benefits of NDAs in sexual harassment matters (i.e. the protection of confidentiality and privacy of victims and the ability for NDAs to provide closure), it also heard concerns. Namely, it heard that “NDAs could be used to protect the reputation of the business or the harasser and contribute to a culture of silence.”<sup>120</sup> 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.”<sup>121</sup>

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.”<sup>122</sup> 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.”<sup>123</sup>

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<sup>118</sup> *Ibid* at 10.

<sup>119</sup> *Ibid* at 32.

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid* at 47.

<sup>122</sup> 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](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2122a/22bd011#_ftnref10)>.

<sup>123</sup> Austl, Commonwealth, Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (2021) at 8.

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## CHAPTER 3: POTENTIAL REFORM IN MANITOBA

The Commission seeks input from the public with respect to whether Manitoba should enact legislation which would govern the use of NDAs in the province, and if so, what provisions the legislation should include. Accordingly, this chapter will consider the major arguments for and against such legislation and the key elements of existing and contemplated NDA legislation, with the ultimate goal of identifying how Manitoba might craft such a law if the government were to decide to enact it. Rather than make recommendations at this time, the Commission seeks input into the issues for discussion posed in this chapter.

### A. Should Manitoba adopt NDA Legislation?

There are strong proponents both for and against the use of NDAs in the settlement of claims of harassment and discrimination. Those in favor of these agreements in this context have emphasized benefits that these contracts can have for victims of harassment and discrimination, such as preservation of privacy, protection against further or re-traumatization, and enhanced bargaining power and agency. Proponents in this camp have also highlighted potential negative implications of adopting NDA legislation, such as infringement on parties' freedom of contract, and their potential to exacerbate issues surrounding access to justice.<sup>124</sup> On the other hand, those who are against the use of NDAs in this context, and who are thus advocates for legislative reform in this area, highlight negative implications of NDAs such as power imbalances which can exist between contracting parties, the silencing effect that NDAs have on victims, third-party harms resulting from NDAs, and their contribution to a culture of silence and impunity.<sup>125</sup>

Vasundhara Prasad, in the *Boston College Law Review*, highlights a number of potential benefits that NDAs may offer to victims of sexual harassment and abuse in particular. She explains:

NDAs also provide several benefits to victims of sexual abuse. This is especially true because sexual assault and sexual harassment still carry a lot of stigma for victims and the publicity can be personally embarrassing and scarring, both in the short-term and in the long-term. Often, victims do not want to talk about their traumatic histories of abuse and their related personal circumstances; thus, being party to NDAs protects them from ever discussing the painful events that led to the settlement. Victims of harassment also tend to fear that knowledge of a settlement will harm future job prospects by tainting them as litigious. Furthermore, the difficulties of litigating such claims, which often involve a "he-said, she-said" scenario and a lack of concrete evidence, often force victims to settle with their abusers out-of-court. Moreover, it is possible that employers and harassers might be less willing to negotiate or pay a settlement if they could not acquire an NDA, which could diminish victims' bargaining power in recovering damages. Thus, NDAs, when crafted meticulously and reasonably, can indeed protect both abusers and their victim.<sup>126</sup>

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<sup>124</sup> Bernardi, *supra* note 8 at 14-17.

<sup>125</sup> *Ibid* at 12.

<sup>126</sup> Prasad, *supra* note 7 at 2516 [footnotes omitted].

The potential for an NDA to operate as a viable alternative to adversarial, time-consuming, public and costly litigation is reflected in a survey of Australians conducted by the Australian Human Rights Commission in 2018. Survey respondents noted the following benefits of NDAs in the settlement of workplace sexual harassment matters:

- providing complainants, employers, respondents and other parties involved, with privacy or anonymity to protect their reputation, professional standing or workplace wellbeing;
- greater bargaining power for the complainant in negotiating a more favourable settlement or compensation payment;
- providing the complainant with a better chance of reaching a settlement, and avoiding the uncertainty and financial and emotional costs associated with litigation;
- incentivizing the employer to settle a legal claim, rather than proceeding to litigation, which can be costly for both the complainant and employer; and
- providing a definitive resolution to the matter.<sup>127</sup>

Similar ideas are expressed by Vancouver-based lawyer Nico Bernardi in a recent edition of the *Canadian Journal of Women and the Law*, in which she urges provincial legislators in Canada *not* to adopt legislation which “completely ban[s] the use of confidentiality clauses in settlement agreements related to matters of sexual harassment.”<sup>128</sup> Bernardi provides four main reasons to support her position.

First, she argues that there may not be a need to ban NDAs because existing employment and human rights legislation already protects victims by establishing a right for employees to know about hazards in the workplace, and a right to safe, harassment and discrimination-free work environments.<sup>129</sup> Further, she notes that existing legal tools like the doctrine of unconscionability “already prevent the misuse or abuse of confidentiality clauses and offer recourse if parties have entered into an agreement with unjust provisions.”<sup>130</sup> Second, she argues that bans on NDAs do not achieve what they are intended to achieve: to encourage victims to come forward and ultimately eliminate sexual harassment.<sup>131</sup> Specifically, she contends that NDAs are “not the sole barrier to access to justice for survivors” and thus, “outright prohibition of these clauses is unlikely to reverse the general trend of silence among survivors.”<sup>132</sup> Third, she makes the argument that victims should retain the freedom to contract into confidentiality if they so choose, because confidentiality both improves victims’ negotiating positions, and protects their reputation and mental health.<sup>133</sup> Barring access to these types of settlement, she argues, “means denying survivors quicker settlements and larger payouts, which can be further traumatizing.”<sup>134</sup>

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<sup>127</sup> *Respect@Work*, *supra* note 9 at 557.

<sup>128</sup> Bernardi, *supra* note 8 at 2.

<sup>129</sup> *Ibid* at 2.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid*.

<sup>132</sup> *Ibid* at 3.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid*.

Finally, Bernardi argues that blanket prohibitions against NDAs in cases of sexual harassment selectively benefit certain groups of victims over others. She argues that these bans “[relegate] homophobic, transphobic, xenophobic, racist, and intersectional discrimination or harassment to a less prioritized position”, and thus overlook vulnerable communities such as “youth, queer, trans, and disabled folks and communities of colour.”<sup>135</sup> However, Bernardi makes this argument focusing only on the American prohibitions, which focus exclusively on NDAs that pertain to harassment that is sexual in nature. Given that this article predates any Canadian NDA legislation or bill, she does not consider any of the Canadian legal instruments considered by the Commission in this paper, which, as will be demonstrated in Part B of this chapter, are each based on prohibitions against NDAs pertaining to harassment generally as opposed to sexual harassment in particular. While she notes that simply “broadening outright bans to include all types of harassment is a complicated and imperfect solution [which] may unintentionally create loopholes, petty definitional arguments, and semantics that ultimately add to the very problem it is trying to correct,” this final argument does not necessarily speak to the type of NDA legislation being contemplated in Canada today.<sup>136</sup>

Conversely, others, like legal scholar Dr. Julie Macfarlane,<sup>137</sup> denounce the use of NDAs in this context, arguing that they perpetuate harassment and discrimination; protect employers and perpetrators and not the victim; gag victims permanently; make victims and others lie; and chill the climate for anyone wishing to speak up about abuse in the workplace.<sup>138</sup> In fact, Macfarlane argues,

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.<sup>139</sup>

Macfarlane, along with Zelda Perkins, another advocate in this area who was the first person to break an NDA that was signed with Harvey Weinstein, has founded the Can’t Buy My Silence campaign (“CBMS”) in Canada, the United States, and United Kingdom, which advocates for “legislation to limit the utility of NDAs as an all-purpose muzzle, especially in cases involving

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Macfarlane is a Canadian law professor and member of the Order of Canada with 40 years of experience working in universities. Her focus on NDAs arose in 2016 after she “discovered a secret settlement had been made to protect [her] university employer (the University of Windsor) and a former colleague after his termination for the harassment and intimidation of students.” See Dr. Julie Macfarlane, “How NDAs serve the interests of the powerful and revictimise the powerless...” (2022), online (blog): *Rogue Collective* <<https://roguecollective.ie/how-ndas-serve-the-interests-of-the-powerful-and-revictimize-the-powerless>>.

<sup>138</sup> “What’s the Problem with NDAs?” (last visited 20 October, 2022), online: *Can’t Buy My Silence* <<https://www.cantbuymysilence.com/>>.

<sup>139</sup> 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.

allegations of wrongdoing.”<sup>140</sup> 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, including the PEI NDAA, MB Bill 225, California’s *Silenced No More Act*, and the Irish Bill.

In discussing the potential disadvantages and harms that NDAs may cause to victims of harassment and discrimination and society at large, an important consideration is the power differentials amongst parties. NDAs arising out of allegations of harassment, abuse, or discrimination are often made by individuals who are lower in rank in an organization than the individuals against whom they are making a claim (i.e. a university student against a professor; a junior staff member against a senior manager, etc.).<sup>141</sup> These perpetrators often have the power to influence the victim’s future within that organization and their future goals more broadly, thus placing the victim in an inferior negotiating position from the get-go. In many cases, NDAs are actually made between a victim and the organization itself, acting on behalf of a perpetrator, making the uneven power dynamic even more pronounced. This may be the case because a perpetrator’s reputation is often “entangled with that of the institution,” and thus, it is in the interest of both the perpetrator *and* the organization, to keep certain allegations hidden by virtue of an NDA.<sup>142</sup>

Moreover, given that a perpetrator’s wrongdoings (and an organization’s efforts or lack thereof to address those wrongdoings) may reflect negatively on the organization as a whole,<sup>143</sup> NDAs may be made between a perpetrator and an organization exclusively, in an effort to ensure that allegations do not come to light.<sup>144</sup> Generally, these NDAs involve an agreement by the perpetrator to step down from their position and leave the institution in exchange for the organization’s silence in respect of the allegations against them. In some cases, organizations may even agree, by way of NDA, to provide the perpetrator with a positive letter of reference.<sup>145</sup> These types of NDAs benefit both the institution and the perpetrator by facilitating the quick and quiet removal of the problematic actor from the organization, and by enabling the perpetrator to avoid disciplinary action and a negative personnel record which might impact their ability to find other employment. Victims are not involved in these arrangements whatsoever, and so are 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 are left without the support of the organization within which the alleged harassment or discrimination occurred, which could potentially be detrimental to any legal claim they may try to put forward.

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<sup>140</sup> “The Campaign to End NDAs” (13 September 2021), online: *CANADALAND* <[www.canadaland.com/julie-macfarlane-campaign-to-end-nondisclosure-agreements/](http://www.canadaland.com/julie-macfarlane-campaign-to-end-nondisclosure-agreements/)>.

<sup>141</sup> Irish Report, *supra* note 89 at 34.

<sup>142</sup> *Ibid* at 5.

<sup>143</sup> Macfarlane, *supra* note 139 at 364-365.

<sup>144</sup> *Ibid* at 363.

<sup>145</sup> *Ibid* at 365.



In addition to these inherent power imbalances, perpetrators and institutions also often have greater access to the resources needed to be successful in contractual negotiations.<sup>146</sup> Namely, they may have more money, and thus greater access to legal advice than a victim, who may not even be able to hire a lawyer.<sup>147</sup> Therefore, perpetrators and institutions may enter negotiations better prepared and more informed than victims, who, by and large, will be unfamiliar with the applicable laws of contract which should govern an NDA. This makes victims more susceptible to enter into an unfair or even unconscionable agreement. As a result, unethical practices may ensue, and a victim could be none the wiser until after they sign a binding agreement.<sup>148</sup>

Additionally, the secrecy created by these NDAs can have negative emotional consequences for victims.<sup>149</sup> 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.<sup>150</sup> It has been said that the silencing effect that some NDAs may have can “halt or slow down a victim's healing process.”<sup>151</sup>

Another problematic aspect of NDAs that are used in the context of harassment or discrimination claims is their role in perpetuating toxic work environments and facilitating continued harassment, abuse and discrimination. The Irish Department of Children, Equality, Disability, Integration and Youth (the “Department”) in a 2022 Report on the use of NDAs in cases of discrimination and harassment, 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’.”<sup>152</sup> 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.”<sup>153</sup> By allowing perpetrators 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 the perpetrator.

Considering the foregoing, the first question posed by the Commission is whether NDAs used in the settlement of harassment or discrimination claims should be statutorily governed.

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<sup>146</sup> Irish Report, *supra* note 89 at 34.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid* at 35.

<sup>149</sup> *Ibid* at 36.

<sup>150</sup> *Ibid* at 37.

<sup>151</sup> Glennisha Morgan, “Reconsidering Non-Disclosure Agreements”, *Business NH Magazine* 35:1 (January 2018) 50 at 51.

<sup>152</sup> Irish Report, *supra* note 89 at 42.

<sup>153</sup> *Ibid.*

<b>ISSUE FOR DISCUSSION 1: Should Manitoba enact legislation that governs the content and use of NDAs pertaining to claims of harassment or discrimination (“NDA legislation”)?</b>
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## **B. Elements of a Statutory NDA Regime in Manitoba, should it be Recommended**

Depending on whether you believe that it is necessary or desirable for Manitoba to implement legislation that governs the content and use of NDAs pertaining to claims of harassment or discrimination, the Commission asks you to consider the appropriate configuration of such a statutory regime, having regard for the following key statutory elements:

1. Parties to NDAs;
2. Treatment of harassment and discrimination;
3. Prohibitions against NDAs;
4. Requirements for validity and enforceability of NDAs; and
- 4.1. Invalid and Unenforceable Provisions.

The following sections will compare and contrast how these key elements and certain miscellaneous statutory elements are represented in Prince Edward Island’s NDA legislation, and the legislation proposed in Manitoba and Ireland. The Commission will analyze these three statutory frameworks in particular given that they each represent analogous versions of a particular model of NDA legislation which seems to be gaining traction across jurisdictions. Considering the comparisons between these statutory schemes, the issues for discussion will contemplate how these elements should be reflected in any potential NDA legislation in Manitoba.

### **1. *Parties to NDAs***

The legislation enacted and proposed in Prince Edward Island and Manitoba, respectively, each govern NDAs signed between a broad cast of parties. The PEI NDAA addresses NDAs made between a “*relevant person*” and either the “*party responsible*” or the “*person who committed or is alleged to have committed the harassment or discrimination*.”<sup>154</sup> A “relevant person” is defined in the legislation as a “person who has experienced or made allegations about harassment or discrimination”,<sup>155</sup> and a “party responsible” is defined as 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.”<sup>156</sup>

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<sup>154</sup> PEI NDAA, *supra* note 13, s 1(d) [emphasis added].

<sup>155</sup> *Ibid*, s 1(f).

<sup>156</sup> *Ibid*, s 1(e).

Manitoba's proposed opposition bill contains slightly different terminology with respect to the parties to an NDA, but, practically speaking, the parties regulated under the proposed legislation are the same as under the legislation in Prince Edward Island. Like a "relevant person" under the PEI NDAA, MB Bill 225 refers to "**complainant**", which is a "person who has, or alleges to have, experienced harassment or discrimination."<sup>157</sup> The term "**respondent**", which is used in MB Bill 225, encompasses both a person who committed or is alleged to have committed harassment or discrimination against the complainant *and* a "**responsible party**", which has the same meaning as in the PEI NDAA.<sup>158</sup> Accordingly, MB Bill 225, like the PEI NDAA, applies to NDAs made between individuals involved in a claim of harassment or discrimination in any number of contexts, and not just in the employment context.

In contrast with the legislation enacted or proposed in Canada, Ireland's *Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021* (the "Irish Bill") applies more narrowly. Rather than NDAs made between "relevant persons", "parties responsible", "complainants" or "respondents", the Irish Bill applies only to NDAs made between *employers* and *employees*,<sup>159</sup> thus limiting the scope of the legislation to agreements made in an employment context only.

**ISSUE FOR DISCUSSION 2:** If Manitoba were to enact NDA legislation, should this legislation apply to anyone who enters into an NDA pertaining to a claim of harassment or discrimination, or only to individuals who enter into an NDA pertaining to a claim of harassment or discrimination in the employment context?

## **2. Treatment of Harassment and Discrimination**

The PEI NDAA as well as the bills proposed in other jurisdictions apply to NDAs that prohibit or restrict a party from disclosing information about both harassment and discrimination. They differ significantly, however, in how they define "harassment". While the Irish Bill applies only to NDAs made in the settlement of sexual harassment cases and requires that the harassing conduct must "reasonably be regarded as *sexually* offensive, humiliating or intimidating,"<sup>160</sup> to date, the frameworks enacted and proposed in Canada apply to NDAs made in the settlement of harassment claims, generally speaking. These claims may involve 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.<sup>161</sup>

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<sup>157</sup> MB Bill 225, *supra* note 14, s 2.

<sup>158</sup> *Ibid.*

<sup>159</sup> Irish Bill, *supra* note 97, s 1 [emphasis added].

<sup>160</sup> EEA 1998, *supra* note 99, s 23 [emphasis added].

<sup>161</sup> PEI NDAA, *supra* note 13, s 1(b); MB Bill 225, *supra* note 14, s 2.

In terms of the treatment of discrimination, the legislation and bills are fairly consistent. The PEI *NDAA* and MB Bill 225 each adopt the definitions of “discrimination” found in the respective province’s human rights legislation,<sup>162</sup> and the Irish Bill adopts the definition contained in the *Employment Equality Act 1998*.<sup>163</sup> In essence, each statute describes discrimination as the differential treatment of an individual or group of individuals which causes disadvantage, and which is based not on personal merit, but on characteristics or perceived characteristics such as age, disability, religion, gender identity, sexual orientation, marital or family status, etc. Uniquely, Prince Edward Island’s human rights legislation includes colour, creed, political belief and gender expression, in addition to gender identity, as protected characteristics;<sup>164</sup> *The Human Rights Code* of Manitoba includes ancestry and social disadvantage as protected characteristics;<sup>165</sup> and Ireland’s *Employment Equality Act 1998* includes “membership in the traveller community.”<sup>166</sup>

### **ISSUE FOR DISCUSSION 3:**

**(a) If Manitoba were to enact NDA legislation, how should harassment be defined? Should this legislation apply to NDAs pertaining to claims of harassment generally, or only to NDAs pertaining to claims of sexual harassment?**

**(b) If Manitoba were to enact NDA legislation, are there any particular issues or matters that the government should consider in determining how this legislation should address the definition and treatment of “discrimination”?**

### ***3. Prohibitions Against NDAs***

Each of the existing and proposed NDA-related statutes establishes a general prohibition against NDAs which restrict or prohibit a victim from disclosing information relating to a claim of harassment or discrimination. The majority of the remaining provisions contained in these statutes and bills, which will be discussed in subsection four, below, set out the exceptions to this general prohibition, or the elements which are required in order for these otherwise invalid and unenforceable NDAs to be valid and enforceable.

Section 4(1) of the PEI *NDAA* and s. 2 of the Irish Bill each establish this prohibition by indicating that no perpetrator, party responsible, or employer shall enter into an NDA with a relevant person or employee where that person has experienced or made allegations of harassment or discrimination and the NDA has the purpose or effect of concealing the details of that claim, unless the NDA is made in accordance with the statutory exceptions to this general prohibition. MB Bill 225 establishes this prohibition in s. 3(1), which states, “to the extent that a provision of a non-

<sup>162</sup> *Ibid*, s 1(a); *Ibid*, s 2.

<sup>163</sup> *EEA 1998*, *supra* note 99, s 6(2).

<sup>164</sup> *PEI HRA*, *supra* note 63, s 1(d).

<sup>165</sup> *MB HRC*, *supra* note 48, s 9(2).

<sup>166</sup> *EEA 1998*, *supra* note 99, s 6(2).

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 the NDA is made in accordance with the statutory exceptions to this general prohibition.

Additionally, each statute and proposed statute contains a provision which prohibits the “responsible party”, “party responsible”, or “employer” from entering into a separate NDA with the individual who committed or is alleged to have committed the harassment or discrimination. Under Prince Edward Island’s legislation, such agreements are prohibited where the agreement is entered into “for the purpose of preventing a lawful investigation into a complaint of harassment or discrimination.”<sup>167</sup> Almost identically, Manitoba’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.”<sup>168</sup> Ireland’s proposed legislation may provide more comprehensive protection than the Canadian schemes in this regard in that the ban that it creates on these separate agreements is much broader.

Under the Irish Bill, employers may not enter these separate agreements with perpetrators where the agreement “has the purpose or effect of concealing the details of a complaint relating to the sexual harassment or discrimination concerned.”<sup>169</sup> 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 harassment or discrimination claim. In essence, this prohibition is the same as the prohibition that the legislation creates against NDAs made between employers and employees, although the prohibition is absolute, and may not be rebutted by any exceptions.

**ISSUE FOR DISCUSSION 4:** If Manitoba were to enact NDA legislation, how should it address NDAs made between perpetrators and responsible parties? Should this legislation prohibit perpetrators and responsible parties from entering NDAs that are made for the purpose of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination? Should this legislation create an outright ban on NDAs made between perpetrators and responsible parties?

#### **4. *Requirements for Validity and Enforceability***

As indicated in the previous subsection, the majority of the provisions contained in the existing and proposed NDA-related legislation establish the exceptions to the general prohibition against NDAs, or the requisite elements needed to validate NDAs and to make them enforceable. These validity and enforceability requirements are largely identical in the legislation of Prince Edward

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<sup>167</sup> PEI NDAA, *supra* note 13, s 4(4).

<sup>168</sup> MB Bill 225, *supra* note 14, s 8(1) [emphasis added].

<sup>169</sup> Irish Bill, *supra* note 97, s 2 (amended s 14B(4)).

Island and the bills of Manitoba and Ireland. Generally speaking, NDAs will only be valid and enforceable in the respective jurisdictions when each of the following requirements are met:

1. It was the expressed wish and preference of the victim to enter the NDA;<sup>170</sup>
2. The victim has had a reasonable opportunity to receive independent legal advice;<sup>171</sup>
3. There have been no undue attempts to influence the victim in respect of the decision to enter into an NDA;<sup>172</sup>
4. The NDA does not adversely affect the health or safety of a third party, or the public interest;<sup>173</sup>
5. The NDA includes an opportunity for the victim to decide to waive their own confidentiality in the future and the process for doing so;<sup>174</sup> and
6. The NDA is of a set and limited duration.<sup>175</sup>

**ISSUE FOR DISCUSSION 5: If Manitoba were to enact NDA legislation...**

**(a) Which of the six abovementioned elements should be included in this legislation as statutory requirements for a valid and enforceable NDA (if any)? Why or why not?**

**(b) Should this legislation include any other statutory requirements for a valid and enforceable NDA? If so, why?**

**ISSUE FOR DISCUSSION 6: If you believe that it must be the expressed wish and preference of a victim to enter into an NDA in order for an NDA to be considered valid and enforceable under MB NDA legislation, how should this wish and preference be evidenced in order to comply with this requirement? (I.e. does it need to be stated in writing? Does the expression need to be witnessed?)**

There are a few notable differences between the jurisdictions with respect to the second requirement (independent legal advice). First, whereas the PEI NDAA simply states that the relevant person must have had a reasonable opportunity to receive independent legal advice, MB Bill 225 further specifies the scope of the required advice (advice about entering into the NDA, and advice about the terms and conditions of the NDA).<sup>176</sup> Second, Ireland is the only jurisdiction contemplating that the independent legal advice must be in writing, and provided at the expense of the employer.<sup>177</sup>

<sup>170</sup> PEI NDAA, *supra* note 13, s 4(2); MB Bill 225, *supra* note 14, s 3(1)(a); Irish Bill, *supra* note 97, s 2.

<sup>171</sup> PEI NDAA, *supra* note 13, s 4(3)(a); MB Bill 225, *supra* note 14, s 3(1)(b); Irish Bill, *supra* note 97, s 2.

<sup>172</sup> PEI NDAA, *supra* note 13, s 4(3)(b); MB Bill 225, *supra* note 14, s 3(1)(c); Irish Bill, *supra* note 97, s 2.

<sup>173</sup> PEI NDAA, *supra* note 13, s 4(3)(c); MB Bill 225, *supra* note 14, s 3(1)(d); Irish Bill, *supra* note 97, s 2.

<sup>174</sup> PEI NDAA, *supra* note 13, s 4(3)(d); MB Bill 225, *supra* note 14, s 3(1)(e); Irish Bill, *supra* note 97, s 2.

<sup>175</sup> PEI NDAA, *supra* note 13, s 4(3)(e); MB Bill 225, *supra* note 14, s 3(1)(f); Irish Bill, *supra* note 97, s 2.

<sup>176</sup> MB Bill 225, *supra* note 14, s 3(1)(b).

<sup>177</sup> Irish Bill, *supra* note 97, s 2 (amended s 14B(3)(a)).

**ISSUE FOR DISCUSSION 7: If you believe that a victim must have had a reasonable opportunity to receive independent legal advice in order for an NDA to be considered valid and enforceable under MB NDA legislation...**

- (a) Should this legislation require that the independent legal advice be provided in writing?**
- (b) Should the perpetrator or party responsible be required to cover the cost of the independent legal advice for the victim?**
- (c) Should the victim be required to provide a certificate of independent legal advice, proving that advice was received, or alternatively, a formal waiver of their right to independent legal advice, if they choose not to seek that advice?**

The Commission has a number of questions and concerns regarding the fourth statutory requirement for validity and enforceability: the requirement that an NDA not adversely effect the health or safety of a third party or the public interest. It appears to the Commission that there is a meaningful and laudable rationale behind this statutory requirement: to address the concern that NDAs allow perpetrators of harassment and discrimination to hide the fact of their wrongdoings and thus, to go on to freely harm more victims.<sup>178</sup> This possibility can adversely effect both unsuspecting third parties who may fall victim to a perpetrator whose tendencies are concealed by an NDA, and the public at large, which has an interest in holding offenders accountable for their wrongdoings so as to maintain public safety.

It is the Commission's position, however, at this point in time, that the language used to describe this requirement in the respective statutes and bills may result in contractual uncertainty; namely, situations in which parties contracting into NDAs are caught by surprise "either as a result of being bound where they did not expect to be bound or as a result of being denied enforcement where they expected that their agreement would be binding."<sup>179</sup>

For instance, according to the PEI NDAA, where a perpetrator or party responsible enters into a valid NDA with a victim, that NDA will *only be enforceable* where the NDA *does not* adversely effect the health and safety of a third party or the public interest. One way to interpret this would be to say that an NDA would be enforceable and binding on the parties unless and until the perpetrator harmed a third party in the same way that they harmed or are alleged to have harmed the victim under the NDA. In any case, the triggering event under this interpretation which would invalidate the NDA (the harm to the third party), might never become known to the victim, who would therefore continue believing that they are bound by an NDA which, in reality, is unenforceable. Another way to interpret this would be to say that because an NDA always runs

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<sup>178</sup> See e.g. Macfarlane, *supra* note 139 at 367.

<sup>179</sup> Halsbury's Laws of Canada (online), *Contracts*, "Criteria of Enforcement: Reasons for enforcing some promises: Justification for enforcement of certain promises" (III.1) at HCO-39 (Cum Supp Release 55).

the risk of enabling a perpetrator to freely harm third parties, it will always adversely effect 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 effect the *future* health and safety of a third party or the public interest. The inclusion of the word “future” in the Irish Bill has big implications, in that it creates somewhat of an impossibility. It seems that 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 perpetrator who is party to an NDA will go on to harm a third party. In this sense, this requirement under the Irish Bill almost seems to amount to an outright ban on NDAs in this context.

Finally, under MB Bill 225, an NDA *will be invalid and unenforceable unless* the victim’s compliance with the NDA *will not* adversely effect the health or safety of a third party or the public interest. Like the requirement under the Irish Bill, this language seems to pose a question that cannot be answered with certainty: whether a victim’s compliance with an NDA, in other words, their concealment of the details of the harassment or discrimination claim at issue, will in some way result in adverse effects to the health and safety of a third party or to the public interest. Given that this question cannot be answered with certainty, the enforceability of an NDA also cannot be determined with certainty, and this may ultimately compromise the protection of the reasonable expectations of the contracting parties, and thus, the integrity of the NDA as a whole.

#### **ISSUE FOR DISCUSSION 8:**

**(a) Could an NDA ever be considered enforceable under NDA legislation if enforceability requires that an NDA not adversely affect the health or safety of a third party or the public interest? If so, please explain how.**

**(b) How else could NDA legislation address the concerns underlying the rationale for this enforceability requirement (protection of third parties and the public interest) without creating uncertainty?**

With respect to the fifth requirement for enforceability, that NDAs include an opportunity for victims to decide to waive their own confidentiality in the future, there are also small nuances between the statute and bills. Whereas the Irish Bill only indicates that an NDA must include this opportunity for a relevant employee to decide to waive their own confidentiality in the future, the PEI NDAA and MB Bill 225 each also indicate that the NDA must set out the process for waiving confidentiality in the future.<sup>180</sup> Aside from these small nuances, the Commission also wishes to highlight certain concerns that it has with respect to this particular requirement.

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<sup>180</sup> PEI NDAA, *supra* note 13, s 4(3)(d); MB Bill 225, *supra* note 14, s 3(1)(e).



First, the Commission questions whether such a contractual term would stand up to judicial scrutiny. The courts have found that a party may unilaterally waive a contractual condition where it was included in a contract and intended for the sole benefit of the party seeking to waive it, and where the contract expressly provides such a power to waive.<sup>181</sup> However, this would not apply to the circumstances contemplated in this fifth enforceability requirement. While the requirement of confidentiality in an NDA pertaining to a harassment or discrimination claim could be beneficial to victims in certain circumstances for the reasons discussed earlier in this chapter, it is more likely that the confidentiality condition of an NDA is intended either in part or exclusively for the benefit of the perpetrator or other party.

Of course, there is precedent for the law treating special classes of contracts differently given their unique nature. For example, insurance contracts purchased by consumers have been found to require rules and principles other than the basic principles of contract law given the unique role that insurance contracts play in providing peace of mind and security.<sup>182</sup> This may also be the case for NDAs, however, the Commission is unsure of what this would look like in practice.

Second, the Commission questions the utility of an NDA which provides one party with an unfettered ability to waive the most essential condition at the heart of the contract, and wonders whether it does not simply amount to an invitation for victims to renege on an NDA at will. If this is the practical implication of this enforceability requirement, that a victim may for any reason, and at any point in time, declare that the NDA is no longer binding on the parties, then the Commission questions why a perpetrator or responsible party would ever agree to an NDA with a victim in the first place.

**ISSUE FOR DISCUSSION 9: If you believe that an NDA must include an opportunity for the victim to waive their own confidentiality in the future in order for an NDA to be considered valid and enforceable under MB NDA legislation...**

**(a) Should this legislation require that the process for waiving confidentiality be set out in the NDA?**

**(b) Should this legislation establish certain grounds upon which a victim may waive their confidentiality (i.e. upon a material change in circumstances that has occurred since the NDA was made), or should the victim be able to unilaterally terminate the NDA at will?**

**(c) Should this legislation also provide an opportunity for the perpetrator or party responsible to waive their confidentiality in the future? If so, in what circumstances?**

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<sup>181</sup> Halsbury's Laws of Canada (online), *Contracts*, "Conditions: Express conditions" (X.2) at HCO-160 "Waiver of express conditions" (Cum Supp Release 55).

<sup>182</sup> See e.g. *FN Scott v Wawanese Mutual Insurance Co.*, [1989] 1 SCR 1445, 59 DLR (4th) 660; *Fidler v Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 SCR 3.

**ISSUE FOR DISCUSSION 10:** If you believe that an NDA must be of a set and limited duration in order for an NDA to be considered valid and enforceable under MB NDA legislation, should this legislation (or regulations thereto) provide guidance or rules surrounding duration of NDAs? (I.e. should the legislation or regulations require that the duration of an NDA not exceed a certain number of years?) If so, what should this guidance or these rules provide?

#### **4.1     *Invalid and Unenforceable Provisions***

The legislation in Prince Edward Island, and the proposed legislation in Manitoba and Ireland, each outline provisions which will never be valid or enforceable in an NDA, despite the aforementioned requirements being met. These include provisions which prohibit or restrict:

1. Disclosures of information that are protected or required under certain provincial enactments or other Acts of Parliament;
2. Artistic expressions that do not identify the perpetrator of the harassment or discrimination or the responsible party, or the terms of the NDA; and
3. Communication relating to the harassment or discrimination between the victim and certain professionals, 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.

With respect to the first example, each statute and bill names specific enactments under which disclosures are protected and/or required. The PEI *NDAA* and MB Bill 225 each specifically state that an otherwise valid agreement in an NDA will not be permitted where it applies to disclosures of information that are protected or required under its province's respective employment standards legislation,<sup>183</sup> human rights legislation,<sup>184</sup> and workplace health and safety legislation<sup>185</sup> in addition to other enactments or Acts of Parliament. Ireland's bill, on the other hand, only indicates 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 2014.<sup>186</sup>

Ireland's bill also differs from Prince Edward Island's legislation and MB Bill 225 in that it does not invalidate provisions in NDAs pertaining to particular types of artistic expressions. However, the statute and bills of all three jurisdictions indicate that even a valid NDA cannot stop victims from disclosing information about a claim of harassment or discrimination to particular individuals and entities outlined in the Act or bill. Specifically, an otherwise valid NDA cannot prevent a relevant person, complainant or relevant employee in any of the jurisdictions from communicating

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<sup>183</sup> *Employment Standards Act*, RSPEI 1988, c E-6.2; *The Employment Standards Code*, SM 1998, c. 29.

<sup>184</sup> *Human Rights Act*, RSPEI 1988, c H-12; MB *HRC*, *supra* note 48.

<sup>185</sup> *Occupational Health and Safety Act*, RSPEI 1988, c O-1.01; *The Workplace Safety and Health Act*, RSM 1987, c. W210.

<sup>186</sup> Irish Bill, *supra* note 97, s 2 (amended s 14B(8)(a)).

about the harassment or discrimination claim with a person authorized to practice law,<sup>187</sup> a medical practitioner,<sup>188</sup> a psychologist or psychological associate,<sup>189</sup> the Office of the Ombudsman, or a friend, family member, or personal supporter.<sup>190</sup>

In both Canadian jurisdictions, but not in Ireland, an otherwise valid NDA also cannot prevent a relevant person or complainant from communicating about the harassment or discrimination claim with a person whose duties include the enforcement of an enactment or Act of the Parliament, with respect to a matter within the person's power to investigate, a registered nurse or nurse practitioner,<sup>191</sup> a social worker,<sup>192</sup> a person who provides victim services pursuant to victims' rights legislation, and community elders, spiritual counsellors or counsellors who are providing the person with culturally specific services.

Unique to Manitoba's bill is the addition in this list of communications made by a complainant about a claim of harassment or discrimination to Manitoba's Advocate for Children and Youth.<sup>193</sup> This 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."<sup>194</sup> According to MB Bill 225, an NDA which makes agreements with respect to such communications shall not be valid or enforceable, even where the requirements for validity and enforceability are otherwise met.

The Irish Bill also includes additional communications which are not covered by the PEI *NDAA*, or MB Bill 225. Under the Irish Bill, an otherwise valid and enforceable agreement in an NDA will not be valid or enforceable if it applies to a communication relating to the harassment or discrimination made by the relevant employee to a "Gardai Síochána", which is an officer of the

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<sup>187</sup> The PEI *NDAA* requires that the person be authorized to practice law in Prince Edward Island, while MB Bill 225 requires that the person be authorized to practice law anywhere in Canada. Under Ireland's Bill, the person must simply be a "legal professional."

<sup>188</sup> The PEI *NDAA* requires that the person be entitled to practice medicine in Prince Edward Island, while MB Bill 225 requires that the person be a physician authorized to practice anywhere in Canada. Under Ireland's Bill, the person must simply be a "medical professional."

<sup>189</sup> The PEI *NDAA* requires that the person be registered as a psychologist or psychological associate in Prince Edward Island, while MB Bill 225 requires that the person be a psychologist or psychological associate authorized to practice anywhere in Canada. Under Ireland's Bill, the person must simply be a "mental health professional."

<sup>190</sup> The Irish Bill is the only instrument which does not require that the family member, friend, or personal supporter be specified or approved in the NDA. On the other hand, the PEI *NDAA* and MB Bill 225 require that the family member, friend or personal support be specified or approved in the NDA in order for a communication with them to be automatically invalidated.

<sup>191</sup> The PEI *NDAA* requires that the person be registered as a registered nurse or nurse practitioner in Prince Edward Island, while MB Bill 225 requires that the person be a registered nurse or nurse practitioner authorized to practice anywhere in Canada.

<sup>192</sup> The PEI *NDAA* requires that the person be registered as a social workers in Prince Edward Island, while MB Bill 225 requires that the person be a registered social worker authorized to practice anywhere in Canada.

<sup>193</sup> MB Bill 225, *supra* note 14, s 4(c)(vii).

<sup>194</sup> "What we do", online: *Manitoba Advocate* <<https://manitobaadvocate.ca/adult/what-we-do/>>.

national police service of Ireland, a “relevant State regulator”, the Office of the Revenue Commissioners,<sup>195</sup> or to a prospective employer.<sup>196</sup> Communications between relevant persons, complainants and prospective employers are, however, dealt with in the PEI *NDAA* and MB Bill 225; just in a slightly different way.

Under the legislation of Prince Edward Island and MB Bill 225, communications between relevant persons, complainants and prospective employers are dealt with as a distinct category of communications which may not form the basis of a valid or enforceable NDA. Specifically, these instruments indicate that a provision in an NDA arising from a relevant person’s or complainant’s previous employment will be invalid and unenforceable to the extent that it prohibits or restricts that person from disclosing the existence of a settlement agreement and/or NDA to a prospective employer, so long as the person does not disclose the particulars of the harassment or discrimination that occurred or is alleged to have occurred, and the disclosure is made for the purpose of providing information about their employment history and obtaining employment.<sup>197</sup>

**ISSUE FOR DISCUSSION 11: If Manitoba were to enact NDA legislation...**

**(a) Which of the abovementioned types of disclosures/communications (disclosures protected or required by Act or enactment, artistic expressions, communications to designated professionals, individuals and entities, and communications with prospective employers) should never be subject to an NDA under this legislation (if any)? Why or why not?**

**(b) Should this legislation include any other types of disclosures/communications that should never be subject to an NDA under this legislation?**

## ***5. Miscellaneous Provisions***

Outside of the foregoing statutory elements, each statute and bill contains additional miscellaneous provisions which are worth considering when contemplating NDA legislation for Manitoba.

For instance, both the PEI *NDAA* and MB Bill 225 indicate that the respective legislation does not prohibit the inclusion or enforcement of a provision in a settlement agreement that precludes the disclosure of the amount paid in the settlement of a claim. In other words, neither precludes individuals from agreeing, in an NDA, to keep the *amount* of a settlement confidential. This is, however, subject to the aforementioned provisions in each instrument which protect certain disclosures and expressions made in specific contexts and to certain individuals (protected and required disclosures, artistic expressions, and communication to designated individuals). For

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<sup>195</sup> The mission of the Office of the Revenue Commissioners is to “serve the community by fairly and efficiently collecting 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](http://www.revenue.ie/en/corporate/information-about-revenue/role-of-revenue/index.aspx)>. See also Irish Bill, *supra* note 97, s 2 (amended s 14B(8)(vii)).

<sup>196</sup> Irish Bill, *supra* note 97, s 2 (amended s 14B(8)(viii)).

<sup>197</sup> PEI *NDAA*, *supra* note 13, s 4(7); MB Bill 225, *supra* note 14, s 5.

instance, MB Bill 225 explicitly states in s. 7(2) 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 provision exists in the Irish Bill.

**ISSUE FOR DISCUSSION 12: If Manitoba were to enact NDA legislation, how should this legislation treat provisions in NDAs which prohibit or restrict the disclosure of an amount paid to the victim?**

Finally, the PEI NDAA, MB Bill 225, and Irish Bill each contain a provision which makes it an offence for a perpetrator, party responsible, or employer to enter into an NDA that does not comply with the legislation. These provisions differ, however, in certain respects.

The PEI NDAA indicates that a perpetrator or party responsible 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.”<sup>198</sup>

Manitoba’s bill is similar, although less specific. It merely states 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.”<sup>199</sup> Unlike the PEI NDAA, this offence provision does not mention the impact of the date that the Act comes into force. However, s. 3(2) of the bill indicates that the requirements for validity and enforceability of NDAs under the bill, outlined in s. 3(1), do not apply to an NDA that was entered into before the Act comes into force.<sup>200</sup>

The Irish Bill differs from the Canadian instruments in that while it makes it an offence for employers to, after the coming into operation of the new provision, enter into NDAs that do not comply with the provision, it does not indicate the liability or punishment for this offence.

**ISSUE FOR DISCUSSION 13: If Manitoba were to enact NDA legislation, should this legislation make non-compliance with the Act an offence, or should it just make non-compliant agreements invalid and unenforceable?**

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<sup>198</sup> PEI NDAA, *supra* note 13, s 6.

<sup>199</sup> MB Bill 225, *supra* note 14, s 10.

<sup>200</sup> *Ibid*, s 3(2).

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## CHAPTER 4: SUMMARY OF ISSUES FOR DISCUSSION

The following list provides a summary of all issues for discussion contained in this consultation paper.

**ISSUE FOR DISCUSSION 1:** Should Manitoba enact legislation that governs the content and use of NDAs pertaining to claims of harassment or discrimination (“NDA legislation”)? (p. 33)

**ISSUE FOR DISCUSSION 2:** If Manitoba were to enact NDA legislation, should this legislation apply to anyone who enters into an NDA pertaining to a claim of harassment or discrimination, or only to individuals who enter into an NDA pertaining to a claim of harassment or discrimination in the employment context? (p. 34)

**ISSUE FOR DISCUSSION 3:**

- (a) If Manitoba were to enact NDA legislation, how should harassment be defined? Should this legislation apply to NDAs pertaining to claims of harassment generally, or only to NDAs pertaining to claims of sexual harassment?
- (b) If Manitoba were to enact NDA legislation, are there any particular issues or matters that the government should consider in determining how this legislation should address the definition and treatment of “discrimination”? (p. 35)

**ISSUE FOR DISCUSSION 4:** If Manitoba were to enact NDA legislation, how should it address NDAs made between perpetrators and responsible parties? Should this legislation prohibit perpetrators and responsible parties from entering NDAs that are made for the purpose of preventing or interfering with a lawful investigation into a complaint of harassment or discrimination? Should this legislation create an outright ban on NDAs made between perpetrators and responsible parties? (p. 36)

**ISSUE FOR DISCUSSION 5:** If Manitoba were to enact NDA legislation...

- (a) Which of the six abovementioned elements should be included in this legislation as statutory requirements for a valid and enforceable NDA (if any)? Why or why not?
- (b) Should this legislation include any other statutory requirements for a valid and enforceable NDA? If so, why? (p. 37)

**ISSUE FOR DISCUSSION 6:** If you believe that it must be the expressed wish and preference of a victim to enter into an NDA in order for an NDA to be considered valid and enforceable under MB NDA legislation, how should this wish and preference be evidenced in order to comply with this requirement? (I.e. does it need to be stated in writing? Does the expression need to be witnessed?) (p. 37)

**ISSUE FOR DISCUSSION 7:** If you believe that a victim must have had a reasonable opportunity to receive independent legal advice in order for an NDA to be considered valid and enforceable under MB NDA legislation...

- (a) Should this legislation require that the independent legal advice be provided in writing?
- (b) Should the perpetrator or party responsible be required to cover the cost of the independent legal advice for the victim?
- (c) Should the victim be required to provide a certificate of independent legal advice, proving that advice was received, or alternatively, a formal waiver of their right to independent legal advice, if they choose not to seek that advice? (p. 38)

**ISSUE FOR DISCUSSION 8:**

- (a) Could an NDA ever be considered enforceable under NDA legislation if enforceability requires that an NDA not adversely affect the health or safety of a third party or the public interest? If so, please explain how.
- (b) How else could NDA legislation address the concerns underlying the rationale for this enforceability requirement (protection of third parties and the public interest) without creating uncertainty? (p. 39)

**ISSUE FOR DISCUSSION 9:** If you believe that an NDA must include an opportunity for the victim to waive their own confidentiality in the future in order for an NDA to be considered valid and enforceable under MB NDA legislation...

- (a) Should this legislation require that the process for waiving confidentiality be set out in the NDA?
- (b) Should this legislation establish certain grounds upon which a victim may waive their confidentiality (i.e. upon a material change in circumstances that has occurred since the NDA was made), or should the victim be able to unilaterally terminate the NDA at will?
- (c) Should this legislation also provide an opportunity for the perpetrator or party responsible to waive their confidentiality in the future? If so, in what circumstances? (p. 40)

**ISSUE FOR DISCUSSION 10:** If you believe that an NDA must be of a set and limited duration in order for an NDA to be considered valid and enforceable under MB NDA legislation, should this legislation (or regulations thereto) provide guidance or rules surrounding duration of NDAs? (I.e. should the legislation or regulations require that the duration of an NDA not exceed a certain number of years?) If so, what should this guidance or these rules provide? (p. 41)

**ISSUE FOR DISCUSSION 11:** If Manitoba were to enact NDA legislation...

- (a) Which of the abovementioned types of disclosures/communications (disclosures protected or required by Act or enactment, artistic expressions, communications to designated professionals, individuals and entities, and communications with prospective employers) should never be subject to an NDA under this legislation (if any)? Why or why not?
- (b) Should this legislation include any other types of disclosures/communications that should never be subject to an NDA under this legislation? (p. 43)

**ISSUE FOR DISCUSSION 12:** If Manitoba were to enact NDA legislation, how should this legislation treat provisions in NDAs which prohibit or restrict the disclosure of an amount paid to the victim? (p. 44)

**ISSUE FOR DISCUSSION 13:** If Manitoba were to enact NDA legislation, should this legislation make non-compliance with the Act an offence, or should it just make non-compliant agreements invalid and unenforceable? (p. 44)



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## APPENDIX A: BILL 225, *THE NON-DISCLOSURE AGREEMENTS ACT*, MB

HER 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 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.

## 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.