

# Non-Disclosure Agreements in Cases of Abuse, Discrimination, or Harassment

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## Introduction

Non-disclosure agreements (“NDAs”) are legally enforceable contracts that require the parties to keep specific information confidential. They can be stand-alone contracts, but are often clauses in larger contracts. Their goal is to keep private information from becoming public. Also known as confidentiality agreements, NDAs do not typically have a time limit and are intended to silence the parties forever.

Although NDAs had been used in maritime law as early as the 1940s, they became common in the tech industry in the 1980s.<sup>1</sup> The tech industry popularized NDAs to protect trade secrets and intellectual property. That is, employers in the tech industry began using NDAs to ensure their former employees did not share trade secrets and intellectual property with their new employers.

Today, NDAs are ubiquitous. They are used in a wide variety of contexts, including litigation arising from allegations of abuse, harassment, or discrimination. A 2018 study estimated that one-third of the US population had signed an NDA as part of their employment contracts.<sup>2</sup>

## Criticisms

In the wake of the #MeToo and #TimesUp movements, many advocates have criticized the use of NDAs in cases of sexual abuse or harassment. They argue that NDAs harm victims and protect wrongdoers. Closer to home, critics say that NDAs enabled Hockey Canada to cover up several incidents of sexual assault over decades.<sup>3</sup>

Common criticisms of NDAs include that they silence and intimidate victims and whistleblowers. In other words, NDAs prevent victims and whistleblowers from

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<sup>1</sup> <https://clasbc.net/wp-content/uploads/2022/09/NDA-Quick-Facts-.pdf>

<sup>2</sup> <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/states-take-action-against-nondisclosure-agreements.aspx>

<sup>3</sup> <https://www.ctvnews.ca/canada/advocates-say-use-of-ndas-should-be-banned-in-sexual-misconduct-settlements-1.6032371>

discussing the abuse or discrimination. This, in turn, can lead to a “chilling effect”, whereby victims and whistleblowers are discouraged from speaking out and reporting further instances of abuse or discrimination. Women are disproportionately affected by NDAs, and are more likely to have signed an NDA than men (29% of women vs. 18% of men).<sup>4</sup> Further, racialized women are more likely to sign an NDA than their white counterparts.<sup>5</sup>

Many NDAs are broadly worded, and do not include exceptions for family and friends or, in some cases, even therapists. As a result, NDAs can prevent victims from seeking support and disclosing the abuse to their loved ones. The Wavaw Rape Crisis Centre in Vancouver says survivors of abuse frequently use their crisis line because they do not know how to talk about the abuse without breaching their NDAs.<sup>6</sup> NDAs can also affect career prospects, as victims may not be able to explain why they left a certain job to future employers.

NDAs do not typically include a time limit or an option for the victim of the abuse to change their mind. For example, Susan MacRae signed an NDA in 1997 as part of a settlement arising from child sexual abuse that she suffered at the hands of her father. MacRae regrets signing the NDA. Although her father has since died, MacRae is still forbidden from discussing the abuse due to the NDA. Her application to nullify the NDA was dismissed by a BC judge in 2018.<sup>7</sup>

Further, NDAs can hide important information about wrongdoers from the public. As a result, many wrongdoers are not held publicly accountable for their wrongs and have the opportunity to repeat the abuse or discrimination in the future. In 2004, the Federal Justice Centre estimated that 40% of NDAs were for cases of “special public interest”, such as sexual abuse, professional malpractice, or environmental concerns.<sup>8</sup>

However, the tides are turning. The “Can’t Buy My Silence” campaign developed by Canadian law professor, Julie MacFarlane, and former assistant to Harvey Weinstein, Zelda Perkins, aims to end the use of NDAs in cases of abuse, harassment, or discrimination. They have been lobbying governments around the world to make NDAs unenforceable for anything other than the protection of confidential business information and trade secrets.<sup>9</sup>

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<sup>4</sup> <https://www.speakoutrevolution.co.uk/dashboard>

<sup>5</sup> <https://www.speakoutrevolution.co.uk/dashboard>

<sup>6</sup> <https://thetyee.ca/News/2023/03/22/Greens-Lead-Stopping-NDA-Silencing/>

<sup>7</sup> <https://www.cbc.ca/news/canada/british-columbia/abuse-and-harrasment-survivors-silenced-1.6520001>

<sup>8</sup> <https://www.uscourts.gov/file/document/sealed-settlement-agreements-federal-district-court-2004>

<sup>9</sup> <https://www.cantbuymysilence.com/about>

Passing with 94% of the vote, the Canadian Bar Association also recently adopted a resolution to restrict the use of NDAs to silence victims and whistleblowers of abuse, discrimination, or harassment in February 2023.<sup>10</sup>

In terms of legislative change, Prince Edward Island recently introduced legislation limiting the use of NDAs in cases of discrimination or harassment. Several other Canadian provinces, including British Columbia, are considering doing the same. Across the border, the US has introduced the federal *Speak Out Act* and many US states, including California, have enacted their own legislation. Further, in March 2023, the US National Labor Relations Board ruled that it is illegal for companies to offer severance agreements that prohibit workers from making disparaging comments about the employer or disclosing the contents of the severance agreement.<sup>11</sup>

### **Legislative Developments in Prince Edward Island**

Prince Edward Island became the first Canadian province to introduce legislation limiting the use of NDAs.<sup>12</sup> The *Non-Disclosure Agreements Act* (the “Act”) came into force on May 17, 2022. The Act limits the use of NDAs in cases of discrimination or harassment. Discrimination means discrimination as defined under the PEI *Human Rights Act*. Harassment means as 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 including, but not limited to:

- sexual advances;
- sexually suggestive remarks, jokes, or gestures;
- circulating or sharing inappropriate images;
- unwanted physical contact;
- any action, conduct, or comment that might reasonably be perceived as placing a condition of a sexual nature on employment (including a promotion); and
- a reprisal or threat of reprisal for rejecting a sexual advance.

In these circumstances, an NDA is only permitted if it is the express wish of the person making the allegations of discrimination or harassment (the “relevant person”), and the following conditions are met:

- the relevant person has had an opportunity to receive independent legal advice;
- there have been no undue attempts to influence the relevant person to agree to the NDA;

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<sup>10</sup> <https://www.cba.org/AGM/Resolutions/23-05-A>

<sup>11</sup> <https://www.reuters.com/legal/government/us-employers-should-be-careful-drafting-severance-pacts-labor-board-warns-2023-03-22/>

<sup>12</sup> <https://www.princeedwardisland.ca/en/legislation/non-disclosure-agreements-act>

- the NDA does not adversely affect a third party or the public interest<sup>13</sup>;
- the NDA includes an option for the relevant person to waive their confidentiality in the future and the process for doing so; and
- the NDA is of a set and limited duration.

NDA's that do not comply with the above requirements are null and void.

Even if an NDA complies with the Act, disclosure of the subject matter of the NDA will be permitted in specific circumstances. These specific circumstances include:

- disclosure to lawyers, or disclosure as required by law;
- disclosure to medical practitioners, nurses, psychologists, or social workers;
- disclosure to community elders or spiritual counselors; and
- artistic expression that does not identify the party who committed the discrimination or harassment or the terms of the NDA.

The Act does not preclude the parties from entering into an agreement to prohibit the disclosure of a settlement amount.

A person who is alleged to have committed discrimination or harassment and does not comply with the Act is guilty of an offence, and is liable on summary conviction to a fine between \$2,000 and \$10,000.

## **Other Jurisdictions**

In March 2023, the British Columbia Green Party introduced a private member's bill to limit the use of NDA's in cases of discrimination or harassment.<sup>14</sup> The bill is nearly identical to the Act in PEI, and prohibits the use of NDA's in cases of discrimination or harassment unless it is the express wish of the person harmed.

The Manitoba and Nova Scotia governments are also considering implementing legislation to limit the use of NDA's. The Manitoba Liberals introduced Bill 215 in 2022<sup>15</sup>, and the Manitoba Law Reform Commission is currently considering whether the province should implement the legislation.<sup>16</sup> Similarly, in spring 2022, the Nova Scotia NDP introduced Bill 144 to limit the use of NDA's in cases of discrimination or harassment.<sup>17</sup>

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<sup>13</sup> Public interest is not defined in the *Non-Disclosure Agreements Act*.

<sup>14</sup> <https://theyee.ca/News/2023/03/22/Greens-Lead-Stopping-NDA-Silencing/>

<sup>15</sup> <https://web2.gov.mb.ca/bills/42-4/b225e.php>

<sup>16</sup> <http://www.manitobalawreform.ca/projects.html>

<sup>17</sup> [https://nslegislature.ca/legc/bills/64th\\_1st/1st\\_read/b144.htm](https://nslegislature.ca/legc/bills/64th_1st/1st_read/b144.htm)

Although Ontario has not proposed general legislation to address the use of NDAs at this time, it has implemented the *Strengthening Post-Secondary Institutions and Students Act*.<sup>18</sup> The *Strengthening Post-Secondary Institutions and Students Act* prohibits post-secondary institutions from entering into NDAs for sexual misconduct, unless it is the express wish of the complainant. The legislation received royal assent on December 8, 2022.

Across the border, the federal *Speak Out Act* came into force in the US in December 2022.<sup>19</sup> The *Speak Out Act* prohibits NDAs relating to sexual assault or harassment allegations. Several US states have also imposed restrictions on NDAs. The California *Silenced No More Act* restricts NDAs in employment-related settlement agreements arising from complaints of discrimination or harassment.<sup>20</sup>

In February 2023, the UK Parliament voted in favour of prohibiting post-secondary institutions from entering into NDAs with staff and students with respect to allegations of sexual misconduct, harassment, or discrimination.<sup>21</sup> Other jurisdictions, such as Australia and Ireland, are also considering reforming the use of NDAs in cases of abuse, discrimination, or harassment.

## **Conclusion**

It is clear from the foregoing that we are on the cusp of an evolution with respect to NDAs, both in Canada and around the world. To the extent that NDAs are utilized in the next decade, they will no doubt be far narrower than their present day counterparts.

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<sup>18</sup> <https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-26>

<sup>19</sup> <https://www.congress.gov/bill/117th-congress/senate-bill/4524>

<sup>20</sup> [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220SB331](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB331)

<sup>21</sup> <https://www.cantbuymysilence.com/>