THE MANITOBA HUMAN RIGHTS COMMISSION

LA COMMISSION DES DROITS DE LA PERSONNE DU MANITOBA

March 8, 2023

Grant Driedger
President
Manitoba Law Reform Commission
432-405 Broadway
Winnipeg, Manitoba R3C 3L6

BY EMAIL

Dear Grant Driedger,

RE: Written Submission to the Manitoba Law Reform Commission on December 2022 Consultation Paper re Non-Disclosure Agreements and Bill 225 – *The Non-Disclosure Agreements Act*

Background

The Manitoba Law Reform Commission ("MLRC") published a consultation paper in December 2022 examining proposed legislation governing the use of non-disclosure agreements ("NDAs") in Manitoba and inviting comments from stakeholders on the issues it outlined for discussion.

The Manitoba Human Rights Commission ("the Commission") is an independent agency of the Government of Manitoba, responsible for carrying out the objectives of *The Human Rights Code* ("*The Code*"). The Commission administers Manitoba's human rights complaints process and is also responsible for promoting and protecting human rights principles in the public's interest, through education, research, and advocacy. *The Code* was enacted to protect human rights and to protect against discrimination, in recognition of the equal worth and dignity of every individual. The human rights compliance system under *The Code* was created with the understanding that discrimination is often rooted in ignorance and consequently, education is essential to its eradication.

The use of NDAs, particularly in the context of claims involving harassment, discrimination, or abuse, has emerged as a topic of critical importance all over the world. In processing, mediating, and resolving human rights complaints, the Commission has seen the operation and impact of NDAs first-hand. We have been examining this issue internally and offer the following observations in response to the MLRC's invitation for submissions.

The Human Rights Complaints System and the Settlement of Human Rights Complaints

As part of its statutory mandate, the Commission is responsible for administering the human rights complaints system in Manitoba. Any person may file a complaint alleging they experienced discrimination, harassment, or reprisal in the areas of employment, publicly available services, housing, or contracts. The Commission is responsible for investigating complaints of discrimination to determine if they should be advanced to a public hearing before the Manitoba Human Rights Adjudication Panel ("the Adjudication Panel"). *The Code* provides the Commission and the Adjudication Panel with the authority to explore settlement amongst the parties.

The Commission exercises this statutory authority through its Mediation Program, which began in 1999. The purpose of the Mediation Program is to support parties in achieving a voluntary resolution to a complaint, in accordance with the remedies set out in subsection 43(2) of *The Code*. The Mediation Program is available at all stages of the complaints process (i.e. prior to investigation of the complaint, before a complaint is referred to adjudication, and during the adjudication process). Under subsection 24.3(1), a Respondent may make a settlement offer at any time before an adjudicator is appointed to hear a complaint and have the Executive Director assess whether that offer is reasonable. Under subsection 34.1(1) of *The Code*, parties are also given the opportunity to engage in Commission Directed Mediation after the Executive Director has determined that there is enough evidence to warrant a public hearing of the complaint, but before that hearing takes place. If the parties are unable to reach an agreement voluntarily, the Respondent may make a settlement offer under subsection 34.1(2) – similar to the process under subsection 24.3(1) – and have an adjudicator appointed to determine whether that offer is reasonable.

Since the Commission's Mediation Program was introduced, it has been very effective in helping parties voluntarily resolve complaints. For example, from 2020 to 2022, the Commission resolved 173 complaints through mediation, which represents 25% of all complaints registered during this period. The Commission's complaints process and Mediation Program are the principal channels through which discrimination and harassment issues are examined and resolved in our province. The Commission and its staff interact with the use and implications of NDAs on a daily basis.

In the context of human rights complaints, mediated resolutions can offer a less adversarial process with significant benefits to the parties, including: reduced legal costs; less stress; speedier resolution; privacy; greater remedial flexibility—including the availability of remedies that may not be achieved through adjudication; greater participant control over, or involvement in, the process; greater acceptance of the resolution and therefore greater long-term sustainability; and avoidance of enforcement costs and expensive judicial reviews of decisions. For those parties with ongoing relationships, the opportunity to mediate their dispute may also transform their relationship and have wide-ranging benefits beyond resolution of a specific complaint.

Over the past decade, the Commission has observed requests for confidentiality provisions and/or non-disclosure agreements become increasingly common in the settlement of human rights complaints. These provisions are requested far more frequently by the Respondent[1] party. While some Complainants have sought to include confidentiality provisions in agreements, their requests are typically limited to keeping the financial terms of a settlement confidential.

The Commission's Concerns Regarding the Use of NDAs

Over the past two years, the Commission has become increasingly concerned with the widespread use of NDAs and confidentiality provisions in the settlement of human rights complaints. These concerns stem from Complainants in our process who have voiced significant reservations with signing NDAs in the settlement of their complaint. Our concerns are further motivated and reinforced by increased critical reflection on NDAs within the legal profession[2] as well as the broader judicial and administrative legal systems; the introduction of legislation limiting the use of NDAs in some jurisdictions; and public campaigns calling for limitations on the use of NDAs.

Many of the Commission's concerns are summarized in the MLRC's consultation paper, including that:

- NDAs create, exacerbate, and are influenced by power imbalances between the contracting parties;
- NDAs can harm third-parties and the public interest;
- NDAs can have a silencing and stigmatizing effect on Complainants, preventing them from seeking medical and other supports related to their experience, or otherwise sharing their experiences both privately and publicly; and ultimately,
- NDAs may cast a chill over Complainants, creating additional barriers to coming forward with allegations of discrimination, harassment, or abuse.

In addition, the Commission is mindful that NDAs do not necessarily provide any benefit in the resolution of human rights complaints and they may, in fact, further protract negotiations and lessen the finality of settlement, given the possibility of future litigation related to the NDA itself. In the human rights complaints process, Complainants are increasingly hesitant or unwilling to sign an NDA, or express regret after doing so, which only serves to prolong and undermine settlement negotiations. *The Code* and the Commission's Mediation Program provide numerous opportunities for parties to negotiate and settle instead of proceeding to an adjudication hearing. The Commission

[1] Please note that the Manitoba human rights complaints process uses the term "Complainant" to refer to the party making a human rights complaint and "Respondent" to refer to the party/parties that the human rights complaint is made against.
[2] See for example the resolution passed by the Canadian Bar Association on February 9, 2023, which can be viewed online at: https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2023/Principles-to-Prevent-Misuse-of-Non-Disclosure-Agr/23-05-A.pdf.

submits that the possibility of an NDA should be eliminated entirely from these negotiations, with very limited exceptions, so that parties can focus on the substantive issues, without the burden or influence of terms that would silence them.

Finally, the Commission is also concerned that the use of NDAs in the settlement of human rights complaints does not align with the underlying remedial and educational objectives of *The Code*. NDAs originated in matters involving intellectual property and trade secrets, but any legitimate purpose served in their original context does not translate to circumstances involving discrimination, harassment, or abuse. Beyond the potential harm to Complainants, the use of NDAs in these claims harms our collective ability to give full effect to the rights of all Manitobans enshrined under *The Code*.

The purpose of human rights legislation is not to shame, punish, or stigmatize Complainants or Respondents, but rather to protect against discrimination, to substantively remedy contraventions of *The Code*, and promote equality for all. The widespread use of NDAs encourages a culture of silence and can be used to avoid genuine accountability by individual and organizational perpetrators as well as the systems that protect them. The Commission fears that normalizing NDAs in claims involving discrimination, harassment, and abuse will yield more superficial resolutions with less meaningful, lasting, positive impact. This culture of silence may reinforce the status quo and further embed systemic inequality. The Commission serves in the public interest and we do not believe that the interests of third-parties or the public are served by forgoing opportunities to educate, learn from experiences of discrimination, and model sincere remediation. It is in the interest of all Manitobans to live in a society where human rights are understood, protected, and promoted.

In response to these numerous concerns, the Commission has recently established a practice of encouraging parties to *not* use an NDA or confidentiality provision in their settlement agreement, particularly at the pre-adjudication stage. Through this initiative, the Commission has focused on educating parties about their rights and the potential risks involved in using NDAs. The Commission has had considerable success in limiting the use of confidentiality provisions to the monetary terms of settlement or excluding these types of provisions altogether. While a Complainant can ultimately decide whether to settle or accept an offer from the Respondent, through the processes outlined above under subsections 24.3(1) and 34.1(2) of *The Code*, the Commission can signal to parties and adjudicators what it does and does not consider reasonable in the settlement of a human rights complaint.

There has also been success in influencing Respondents' positions on this issue. Some Respondents have voluntarily shifted their perspective and recognized that an NDA would not be appropriate in resolving a complaint of discrimination, harassment, or abuse. In some cases, Complainants and Respondents have even jointly issued a public statement regarding the issues underlying the complaint and the steps taken to address these concerns. This example, in particular, demonstrates the power of

mediated agreements as creative, collaborative, and effective tools for resolution and remediation.

The Commission has been contemplating and exploring further change at a policy level in the human rights complaints process, to restrict the use of NDAs in Commission-supported resolutions through its Mediation Program. The restriction would expressly prohibit the use of NDAs in our Mediation Program, except in limited circumstances (i.e. where it is the express will and preference of the Complainant to have an NDA and where they have had the opportunity to obtain independent legal advice or where confidentiality is limited to the financial terms of a settlement). While the Commission believes this could help address concerns related to the use of NDAs in settling human rights complaints through its Mediation Program, we are aware that parties can still settle outside of our process, without support from Commission mediators. Consequently, the Commission believes that the broader public policy interest necessitates formal legislation to address this issue and provide consistency throughout the province.

The Commission is mindful of the MLRC's observations regarding the potential benefits of NDAs; however, based on the Commission's experiences, we disagree with two of the arguments in favour of using NDAs: that they protect Complainants against further or re-traumatization and that the possibility of an NDA affords Complainants greater bargaining power and agency in settlement negotiations. In the Commission's experience, NDAs have negatively impacted a Complainant's ability to heal and move forward because of the looming, ongoing obligations set out in these agreements. This lack of finality and the fear of consequences or further litigation arising from a breach of an NDA serves as a reminder of the Complainant's experiences and could negatively impact their health and well-being. The Commission also submits that Complainants of discrimination, harassment, and abuse are already giving up something substantial by agreeing not to pursue their claim(s) through a settlement agreement. We do not believe they should be required to agree to an NDA to have bargaining power. The Commission submits that removing the option of an NDA altogether is the only way to actually level the negotiation playing field. The MLRC also raised Complainant privacy as a third potential argument in favour of using an NDA; however, the Commission believes that this option is easily protected through a narrow carve-out allowing for an NDA when it is the explicit will and preference of the Complainant to have one and they have also been given the opportunity to receive independent legal advice.

The Importance of Legislation Limiting the Use of NDAs

The Commission strongly supports the creation of legislation in Manitoba to govern the use of NDAs, but any such legislation should clearly state at the outset that NDAs are not to be used in the context of claims involving harassment, discrimination, or abuse, except in very limited circumstances. We do not see a benefit to restricting the application of this legislation to the employment context or to claims of sexual harassment, because the power imbalances, stigma, and sensitive nature of these

claims are not limited to those that occur in employment or those of a sexual nature. Harassment should be defined broadly in the legislation to encompass both incidents of a sexual and non-sexual nature as well as one serious incident as opposed to a series.

The Commission believes that a prohibition on NDAs in these contexts is critical to moving away from the widespread reliance on these agreements and the culture of fear that they perpetuate. The Commission also submits that this prohibition would not prevent parties from agreeing to a non-disparagement clause and/or pursuing a claim for defamation following settlement, if necessary.

Bill 225 – The Non-Disclosure Agreements Act

The Commission finds that the proposed statute to govern the use of NDAs in Manitoba, Bill 225, misconstrues the purpose behind this kind of legislation, which is to prohibit the use of NDAs in contexts where they are not appropriate, with limited exceptions. Despite this purpose, the proposed language under Bill 225 does not include a clear prohibition against the use of NDAs to resolve claims of harassment, discrimination, or abuse. Rather, subsection 3(1) of Bill 225 outlines a number of circumstances in which an NDA *would* be valid and enforceable. We also find some of the language in this subsection to be internally inconsistent and/or impracticable. For example, subsections 3(1)(d) - (f) read as follows:

> "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…
>
> (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."

The idea that a Complainant must be able to waive an NDA or that it must only apply for a limited duration for it to be legal just reinforces that these kinds of agreements are not suitable for use in claims of discrimination, harassment, or abuse. Being able to waive one's agreement to non-disclosure or have it expire at the end of a defined period renders an NDA – and any potential resulting increase in bargaining power for Complainants – meaningless in practice. Subsection 3(1)(d) also creates an impossible scenario in which potential harm to a third-party or the public interest must either be predictable or must have already occurred, which would extinguish any protection provided by the agreement in the first place.

The Issues for Discussion Raised in the MLRC's Consultation Paper

The Commission finds many of the issues for discussion identified in the MLRC's consultation paper concerning, primarily because the overarching focus is on what elements are required for an NDA to be valid and enforceable in the context of discrimination, harassment, or abuse claims. The Commission believes that the default approach should be that NDAs are *not* used in resolving these kinds of claims, with limited exceptions. Any exceptions to this prohibition should be clearly identified and should align with a trauma-informed legal system that does not further victimize or disadvantage those who have experienced discrimination, harassment, or abuse.

Recommendations

In accordance with the submissions set out above, the Commission respectfully provides the following recommendations to the Manitoba Law Reform Commission:

1. That the MLRC strongly recommend the creation of legislation governing NDAs in Manitoba that clearly states they should not be used in the context of discrimination, harassment, or abuse claims, except in limited circumstances;
2. That the MLRC strongly recommend that legislation governing NDAs in Manitoba broadly applies to claims of discrimination, harassment, or abuse arising out of any context and is not limited to employment or claims of sexual harassment;
3. That the MLRC strongly recommend that NDAs in Manitoba *only* be used in resolution of discrimination, harassment, or abuse claims where the Complainant explicitly requests an NDA to prevent the Respondent(s) from disclosing information about their claim and is able to receive independent legal advice and/or if the NDA only applies to the amount of compensation provided to the Complainant;
4. That the MLRC strongly recommend that legislation governing NDAs in Manitoba makes a clear distinction between NDAs or confidentiality provisions and a mutual non-disparagement clause in a settlement agreement;
5. That the MLRC strongly recommend that legislation governing NDAs in Manitoba includes the language in subsections 8(1) and (2) of Bill 225, which prevents and nullifies NDAs used for the purpose of preventing or interfering with a lawful investigation into a complaint of harassment, discrimination, or abuse; and,
6. That the MLRC strongly recommend that legislation governing NDAs in Manitoba allows Complainants to speak publicly and privately about their experiences, should they wish to do so. We believe that the ability to share these experiences publicly and privately will destigmatize Complainants and help them feel less isolated. We also believe that more transparency and public accountability will support greater adherence to *The Code* in the future.

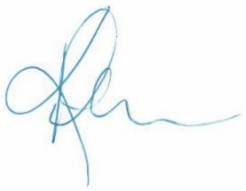
The Commission believes that Manitoba is poised to lead by example on the use of NDAs in claims of discrimination, harassment, or abuse, rather than follow or 'wait and see' how legislation from other jurisdictions is interpreted and applied.

Conclusion

The Commission believes strongly that the use of NDAs in the context of discrimination, harassment, or abuse does not align with the remedial or educational purposes of *The Code* or its underlying objectives. The Commission also believes that the use of NDAs in these contexts exacerbates the power imbalance in favour of perpetrators and fosters an environment of fear, secrecy, shame, and stigma for Complainants. The Commission feels strongly that NDAs do not provide any benefit in the resolution of these claims and they may, in fact, further protract negotiations and lessen the finality of settlement, given the possibility of future litigation related to the NDA itself. The Commission is concerned that the use of NDAs in these kinds of complaints will have a silencing and chilling effect on Complainants, making it even harder to disclose allegations of discrimination, harassment, or abuse. Further, the Commission believes that the use of NDAs in these contexts is not in the public's interest as it undermines the transparency, public accountability, and education required to learn from incidents of discrimination, harassment, or abuse, prevent them from happening in the future, and to effectively dismantle systems of oppression.

In keeping with the Commission's commitment to public accountability and its duties in serving the people of Manitoba, this submission will be made publicly available on our website.

Sincerely,



Karen Sharma
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Manitoba Human Rights Commission