New Brunswick Women's Council | Conseil des femmes du Nouveau-Brunswick

# Regulating the use of non-disclosure agreements

## About the New Brunswick Women's Council

The New Brunswick Women's Council is an independent advisory body for study and consultation on matters of importance, interest, and concern to women and their substantive equality. Its objectives are:

a) to be an independent body that provides advice to the Minister on matters of importance to women and their substantive equality;

b) to bring to the attention of government and the public issues of interest and concern to women and their substantive equality;

c) to include and engage women of diverse identities, experiences and communities, women's groups and society in general;

d) to be strategic and provide advice on emerging and future issues; and

e) to represent New Brunswick women.

In delivering on these objectives, the Council may conduct or commission research and publish reports, studies, and recommendations. The Council is directed by an appointed volunteer membership that includes both organizations and individuals. The work is executed by a small staff team.

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## Introduction

Government is considering introducing legislation to regulate or restrict the use of non-disclosure agreements (NDAs) related to wrongful conduct, which government is considering defining as "discrimination, inappropriate sexual conduct and abuse, harassment (including bullying and violence) and reprisal."[1] This brief explores the issue and shares the advice and recommendations that the Council provided to government.

Please note:

- Unless otherwise noted, references to NDAs should be understood to mean NDAs relating to wrongful conduct specifically.
- This brief predominantly uses the language of *parties*, *alleged wrongdoers*, *complainants*, and *wrongful conduct*. This is not to be euphemistic regarding discrimination, harassment, and sexual abuse but to enable easier cross-referencing with the materials that government has shared on the issue.
- The brief is based on the Law Reform Notes published in February 2026; any legislation that is tabled may differ from the approach they contemplate.

## Background

Within the Government of New Brunswick, the Legislative Services Branch of the Office of the Attorney General periodically publishes Law Reform Notes. These Notes share the Branch's thinking on law reform issues at a given moment. The February 2026 Notes explain:

> On a basic level, an NDA is a type of contract, or a provision in a contract, whereby the parties involved agree to keep certain information confidential—they agree to silence themselves…NDAs sometimes have legitimate uses such as protecting trade secrets, intellectual property and other confidential business information, the disclosure of which could cause economic harm to its owner. However, NDAs have more recently been used as part of the settlement of many types of disputes—a party usually seeks to suppress information that could expose it to civil liability. In this context, NDAs can potentially be used to conceal criminal or tortious conduct or information relating to public safety.[2]

[1] Legislative Services Branch, Office of the Attorney General, Government of New Brunswick, *Law Reform Notes* (#50, February 2026) p. 2.

[2] P. 2. Note: The first two references to NDAs in this quotation are the only instances in this brief in which NDAs are being discussed broadly; all other instances are specific to wrongful conduct.

The Notes share that the Branch is:

> considering recommending legislation that regulates the use of non-disclosure agreements (NDAs) in New Brunswick, the overarching goal of which would be to prevent the misuse of NDAs by restricting or limiting their use in relation to the settlement of claims involving certain types of wrongful conduct (e.g. sexual abuse, harassment, discrimination) and by clarifying situations where valid NDAs cannot prevent disclosure (e.g. to law enforcement, treating therapists, etc.).[3]

Settlements are civil[4] contracts (often called agreements) that are reached between two or more parties to resolve a matter. They can be reached outside of (or to avoid) civil lawsuits or as part of civil lawsuits if a judge has not yet made a decision. They can also be reached through bodies like the New Brunswick Human Rights Commission.

Settlements typically release alleged wrongdoers from liability in the civil system in exchange for a payment or some other consideration. This means that they cannot be sued in the future for what the settlement covers. These releases do not shield them from the criminal justice system if their actions were criminal.

For complainants, settlements can involve compensation. When settlements are between a current or former employee and employer, they can also include access to benefits like health care plans, insurance, or pension plans for a period of time.

Settlements can also involve negotiated statements to be used to describe a dispute and/or its resolution. Settlements can include NDAs, but don't have to.

Agreeing to a settlement is voluntary, though parties may be facing financial and social pressure or constraints that funnel them toward that outcome.

[3] P. 2.

[4]More information on the civil system and how it differs from the criminal system is available in the Council's brief on limitation periods in civil actions, particularly the "What is the civil justice system?" and "The civil justice system and gender-based violence" sections.

Many jurisdictions are trying to address the misuse of NDAs in settlements, often focusing on wrongful conduct in workplaces and institutions. There are two main approaches: regulating vs. outright bans. The Notes outline an approach based on regulating through legislation and that would apply in any setting (i.e., it would not be limited to workplaces and educational institutions). It would have a few main components:

1) Prohibiting the use of pre-emptive NDAs (pre-emptive NDAs that existed before this legislation would not be enforceable in situations where wrongful conduct occurs after the legislation is in place).[5]
2) Establishing preconditions for validity (i.e., requirements) that must be met for an NDA to be enforceable.[6]
3) Clarifying permitted disclosures for complainants (i.e., when they can disclose information despite an NDA). This would apply retrospectively (i.e., retroactively) to existing NDAs.[7]
4) Requiring that anyone who is party to an NDA be provided with a full copy of it and that "the relevant provisions (likely, at minimum, the validity preconditions and permitted disclosures sections) of the legislation" be attached.[8]
5) Clarifying the rights and obligations of "people or entities who are, at law, responsible for the actions of the wrongdoer and/or responsible for protecting a complainant from wrongful conduct (for example, employers, post-secondary institutions, sports, religious and other organizations, etc.)"[9] when they have entered an NDA with an alleged wrongdoer that does not include the complainant. The approach being considered would affirm that such NDAs cannot prevent responsible parties from conducting investigations into allegations or complaints or making certain disclosures about the allegations, complaints, or findings. This would apply retrospectively.

The Council supports the above approach in principle. This brief explains the Council's rationale and shares the recommendations it provided to government on items 2, 3, and 5.

[5] P. 6.

[6] Pp. 4-5.

[7] P. 6.

[8] P. 6.

[9] P. 6.

### Support for regulating NDAs

Addressing NDAs requires grounding the discussion in the conditions that survivors and victims of wrongful conduct are facing. This includes the reality that:

- institutions often protect alleged wrongdoers and fail victims and survivors;
- coming forward often involves tremendous professional and social risk for victims and survivors, which can lead to economic and health consequences;
- most wrongful conduct goes unreported to responsible people and entities (e.g., human resources, boards, etc.) or law enforcement—and when it is reported, the resulting processes often (re)traumatize victims and survivors and too rarely provide adequate resolution or justice.[10]

In this context, civil settlements can be a path that victims and survivors choose or are effectively forced by circumstance, to take. They can be a way for victims and survivors to get some acknowledgement of what they endured and to obtain compensation, which may be critical to their healing or survival.

Given this, it may seem obvious that NDAs should simply be banned. This would enable complainants to potentially receive some redress through settlements without being silenced by NDAs.

The challenge is that in recent decades alleged wrongdoers have come to value NDAs as part of settlements as tools to manage the risk of reputational damage. They may be less likely to enter settlements if NDAs are not included, which could lead to fewer settlements for complainants. There is little research currently available on this and many of those who have relevant experience as complainants are unable, or believe they are unable, to share their perspectives.[11]

The impact of NDAs is not limited to the complainants who sign them, though. NDAs can help enable ongoing harm by covering up wrongful conduct that is prolific and systemic. In light of this, is a potential reduction in settlements for complainants a necessary short-term reality to enable longer-term culture change? Or is this simply another form of limiting the options for victims and survivors?

To navigate these questions, the Council returned to a core principle of its work on gender-based violence: we must work to prevent, reduce, and ultimately eliminate violence long-term while also supporting victims and survivors here and now. Work on the long-term vision and the current on-the-ground reality must be mutually reinforcing, not based on a strategy of sometimes abandoning one for the sake of the other.

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[10] For more information on dynamics specific to the criminal justice system, see the Council's brief on time limits in civil actions, particularly the "What is the civil justice system?" and "The civil justice system and gender-based violence" sections.

[11] Much of the research that exists on this comes from the United States, which has a different legal system than Canada. Most of it is also focused on wrongful conduct in workplaces and educational settings, while the legislation being contemplated for New Brunswick would apply more broadly. Finally, changes in rates of reporting, complaints, and settlements relating to wrongful conduct in recent years must be understood in the context of the impact of the #metoo movement, not just legislation on NDAs.

Figuring out how to support success on both horizons requires individuals and organizations with diverse perspectives work together to co-create potential solutions.

At this time, that work of co-creation has not taken place on NDAs. Consultation on this issue has largely happened within the legal profession and without discussion of programs and services to surround new legislation. This increases the chances of negative unintended consequences arising. The status quo, however, cannot stand. Given this, the Council supports regulating the use of NDAs rather than banning them.

### Preconditions for validity

The Council is concerned that the preconditions for set time and duration as well as the prohibition on liquidated damages may reduce the likelihood of settlements, while also seeing these as important potential protections for complainants.[12]

The most critical precondition for validity is also the most at-risk of being strong in principle but not practice: the opportunity to obtain legal advice (which intersects with the precondition that there be no undue influence).[13] For this condition to meaningfully address power imbalances between parties—and not just give the illusion of having done so—complainants need to actually be able to obtain to legal advice. For many complainants, this means that it must be free. This would require a new publicly funded program, likely delivered through the not-for-profit sector.[14]

### Permitted disclosures

Most, if not all, of the permitted disclosures listed in the Notes[15] are likely already allowed by law but this is not adequately clear. Confusion on this is likely to disproportionately impact complainants who do not (or did not) have access to independent legal advice and/or who are facing (or faced) coercion or intimidation from another party. The Council recommended that plain-language resources be produced on permitted disclosures, perhaps via the Public Legal Education and Information Service of New Brunswick.

The Council also provided the Branch with feedback on three of the permitted disclosures.

First, on disclosures in terms of employment: the Council recommended expanding this to capture scenarios such as applications for scholarships, grants, fellowships, training, placements, residencies, etc.

[12] Pp. 4-5.

[13] P. 5.

[14] The Council's rationale for some publicly funded services being delivered by not-for-profit organizations is available in its submission to the "Right Thing, Right Now" consultation by the Child, Youth and Senior Advocate (recommendation 4, pages 6-7).

[15] P. 5.

These opportunities are not about securing a specific job but professional advancement and they may involve a review of an applicant's work history.

Second, on disclosures for the purpose of obtaining personal support: the Council recommended expanding the list to account for types of supportive relationships outside of family units, such as close personal friends. Recognizing that support may need to come from outside of families may be particularly relevant to individuals from vulnerable communities, such as people who are 2SLGBTQIA+ or immigrants.

Third, on disclosures where another person's health and safety may be at risk: the Council supports this permitted disclosure but is concerned about how this exception will apply in practice to wrongful conduct. The dynamics of wrongful conduct are often poorly understood. Many people's assumptions about how alleged wrongdoers and complainants behave are shaped by incorrect information and harmful myths. Consider, for example: a woman who has been the victim of sexual harassment in a social club sees her harasser beginning to test boundaries with a new club member—but her harasser is subtle and strategic, ensuring there's always plausible deniability. If she warns the new member, would this exception protect her if she's party to an NDA?

Finally, the Notes propose to "not prohibit a provision in a settlement agreement that precludes the disclosure of the amount paid in settlement of a dispute"[16] (i.e., to allow settlement amounts to be covered by NDAs). The Council advised the Branch of a possible conflict with the new *Pay Transparency Act,* which prohibits employers from entering NDAs with employees that restrict discussion of compensation, including severance.[17] Depending on the structure of settlements, some may fall under this prohibition.

### Responsible persons

Under the approach that the Notes contemplate, the permitted disclosures would ensure that complainants can participate in investigations despite an NDA. This includes criminal investigations as well as investigations at workplaces or educational institutions.

There are, however, instances where an NDA does not include the complainant—and therefore does not invoke their permitted disclosures. The provision that the Notes contemplate on responsible persons addresses such instances.

The Notes define responsible persons as "people or entities who are, at law, responsible for the actions of the wrongdoer and/or responsible for protecting a complainant from wrongful conduct (for example, employers, post-secondary institutions, sports, religious and other organizations, etc.)."[18] The Notes propose clarifying that an NDA between a responsible person and an alleged wrongdoer (but not a

[16] P. 4.

[17] *Pay Transparency Act*, SNB 2026, c 1, s 10(2).

[18] P. 6.

complainant) cannot prevent the responsible person from conducting investigations into allegations or complaints.[19] The NDA also cannot prevent the responsible person from disclosing

> that allegations, complaints or substantiated have been made against a wrongdoer, provided that when such disclosure is made, the responsible person must also disclose whether an investigation was carried out and the conclusion or result of any investigation and must not disclose the identity of the complainant.[20]

The Council supports this but does have concerns about complainants' identities being meaningfully protected given the size of New Brunswick. This may be a particular issue when the complainant belongs to a minority population in the province or in a particular sector and the wrongful conduct relates to their minority status (e.g., if a responsible person discloses racist harassment and their workplace only has one racialized employee, withholding a name will not protect that complainant's identity).

[19] P. 6.

[20] P. 6.