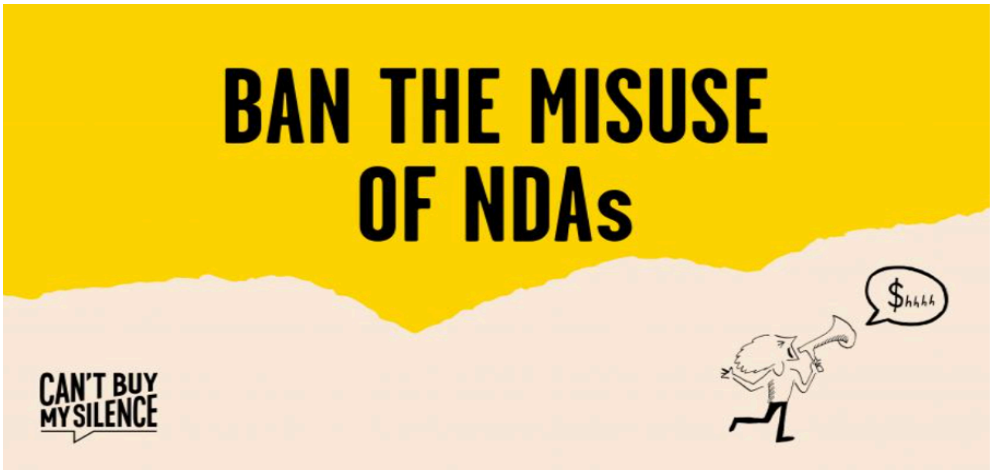

Submission to Ombuds for Banking Services & Investments from Can't Buy My Silence Canada

Written by Dr Julie Macfarlane, Founder and Director

Overview

The expertise I wish to share and the goal of *Can't Buy My Silence Canada* relates to stopping the abuse of non-disclosure agreements, or NDAs. My submission will be limited to this issue, which I see from other submissions is being discussed and critiqued by many.

The use of non-disclosure agreements, or NDAs, is now widespread in financial and banking services. These clauses - which are commonly presented to clients as standard practice, "everyone signs them" - prevent the client from speaking with anyone about the harm they have suffered and the losses they have incurred after poor advice and services.

NDAs typically prohibit speaking with family, friends and even counsellors. The only exceptions I see regularly are for a lawyer or a financial advisor for tax advice.

An NDA does not typically make an exception for a regulator; in fact, its purpose is often to prevent a complaint to the regulator (here OBSI). OBSI should be deeply concerned about the usurpation of its jurisdiction and consumer protection mandate by these private contractual obligations, and take back responsibility.

NDAs are templates and the most common version I have seen in hundreds of agreements is as follows:

> "The parties confirm that they agree to keep the existence and terms of this Agreement confidential and the circumstances concerning the (resolution of dispute, termination of employment) confidential."

OBSI's position on NDAs

The OBSI website states that:

> "OBSI accepts that releases and NDAs can be a reasonable and sometimes helpful part of the settlement process. They can be effective with promoting a settlement because they give the firm an incentive to resolve the dispute and the confidence that when they pay the settlement the claim is truly behind them. For these reasons, they are commonly used in settlements during legal proceedings."

This statement repeats a trope that has been thoroughly discredited by the actual experiences of NDA signers and mischaracterises the reasons it is being used by a firm or bank. NDA signers say consistently that signing an NDA is not closure; in fact it is the opposite, because the fact that they cannot speak about what happened for the rest of their life means that this continues to hang over them. For example,

> "I realised I had been put in a position where I would always have to withhold a part of myself from the people closest to me, and I felt very isolated." (testimony 95[1])

> "To recover one needs closure. NDAs might appear to offer that, but sadly they do not. They do not quell …the sense that injustice has been allowed to happen" (testimony 48)

In addition, this statement and others that follow on OBSI's website fundamentally confuse a settlement release or "waiver", which is essential to settlement and a non-disclosure agreement, which is not required for settlement and is optional. A recent Ontario decision has made this clear: see Bouzanis v Greenwood 2022 ONSC 5262.

I would strongly recommend that the information OBSI provides to clients and consumers is revised to remove these errors.

To address other misinformation about NDAs:

A. The claim that NDAs encourage settlement

Again, OBSI's website suggests that NDAs are good for settlement. Certainly this is what a form or a bank wants to settle, in order to avoid any negative publicity. However it is surprising and shocking to see OBSI supporting this.

[1] See the Testimonies on the CBMS website at www.cantbuymysilence.com/cn

There is now ample research and empirical evidence showing that NDAs do not lead to more settlements. First, settlement rates in courts and tribunals where records are kept has been at 90-95% for over 30 years, long before NDAs were used pervasively. Second, before-and-after studies in jurisdictions where laws restricting NDAs have been introduced show that there is no significant change in settlement as a result (see for example "Shedding Light on Secret Settlements" 2025 in California). My analysis of before-and-after settlement rates at the Prince Edward Island Human Rights Tribunal shows very little difference[2]. A far larger sample I analysed using data from the US Employment Equality Opportunity Commission shows that in the first 6 US states to pass legislation restricting NDAs, settlement rates went up by an average of almost 10% when NDAs were prohibited[3]. In short, there is no evidence that NDAs are necessary to maintain settlement rates and keep consumers out of court and tribunal proceedings and growing evidence that settlement without NDAs is higher or significantly unchanged. The reason for this is that the party asking for the NDA will not allow the matter to go to a "public domain" hearing in court or tribunal where the information they wanted to keep secret will be widely available.

B. The claim that NDAs increase monetary relief for consumers

There is also a widespread and incorrect narrative that NDAs increase the amount of monetary relief paid to complainants, because they are being paid for their silence.

Again, there is no evidence that monetary relief is larger in settlement with NDAs. The same studies described above also show that levels of monetary relief do not change after legislation to restrict NDAs.

Other problems with NDAs

The OBSI website also states that:

> "OBSI's position on releases and NDAs is that they should be reasonable and fair. This means that they should be limited to the facts and issues directly related to the consumer's claim and not unduly restrictive. "

It is unclear to me what this means in practice, or how this would be applied. Every NDA is extremely broad (see the discussion above) and prohibits the complainant from speaking about anything that relates to their dispute and its resolution. In the US, caselaw has now struck down many NDSAs for unreasonableness and vagueness (for example, *Denson v Trump* US District Court 20 Civ 4727). There is no similar case law presently in Canada, but the same arguments can be made and new cases are increasingly being brought to challenge the broadness and hence the validity of an NDA.

[2] Macfarlane forthcoming "The Dangerous Growth of NDAs" 2026
[3] Macfarlane forthcoming "The Dangerous Growth of NDAs" 2026

A related problem is the widespread lack of understanding that NDA signers speak of. This lack of informed consent to an NDA appears over and over in our research. Many NDA signers in the case of financial services will not have been advised by a lawyer before they sign, and even where they are, are frequently told "everyone signs these".

A third problem where the agreement relates to financial services is that an NDA obligation does not typically - unless expressly negotiated - exempt a complaint to a regulator. NDAs are in fact usurping the function of the regulator. This takes place in other industries also (for example the construction industry regulator Tarion). The same problem was recognized by the Real Estate Council of Ontario in 2023 when after some very bad press, the regulator (RECO) banned the use of NDAs by real estate agents[4].

These three issues raise clear red flags for the OBSI's "hands off" approach to the use of NDAs. It is not sufficient for the OBSI to allow financial services and banks to use NDAs at their discretion. Once something - for example a prohibition on complaining to the regulator - is part of an NDA, it cannot be spoken about and there is no way for OBSI to monitor just how many potential complaints are getting cut off this way.

Non-disparagement clauses

It is important not to forget that most NDAs include in addition a non-disparagement clause that prohibits anything (even something truthful) being said about the financial service agent that is bad for their reputation. Here is a typical non-disparagement clause:

> "The client/ customer/ consumer shall not make any adverse or derogatory comment about the agent/ financial organization and shall not do anything which shall, or may, bring the agent/ financial organization into disrepute."

This means that a client who has received poor advice and/or services can say nothing to anyone about their experience. This is unfair and burdensome for the consumer and undermines even informal accountability. Florida recognized this back in 2016 by passing the Consumer Review Fairness Act.

Solutions and recommendations

The simplest and cleanest solution is for the OBSI to *prohibit the use of NDAs by banking and financial services.* There is ample support for adopting this position as well as precedent. Legislation is rapidly passing around the common law world to restrict the use of NDAs in relation to sexual misconduct and discrimination (33 US states, England & Wales, Ireland,

[4] See for example https://cottagelife.com/realestate/ontario-is-banning-ndas-on-real-estate-deals-what-does-it-mean-for-the-market/ and https://www.theglobeandmail.com/real-estate/article-ontario-moves-to-ban-use-of-non-disclosure-agreements-in-real-estate/

Victoria Australia) and aside from PEI, Bills are pending in Canada in 5 provinces and at a federal level (Bill S-232)[5]. California is now taking steps to legislate against NDAs in consumer disputes.

I recommend that as concerns grow about the use of NDAs - especially about the use of NDAs with elderly and vulnerable clients[6] - the OBSI should take decisive action and stop this practice. The only interests served by these NDAs are those agents and firms that want to cover up their bad practice. The regulator needs to stand up to that.

A second approach - but far weaker - would be for OBSI to prescribe an acceptable form of NDA for financial agents and forms. This would include exceptions for family, friends and any other individual whom the complainant wishes to write in; a time-limited period for the NDA; and a specific exception for making a complaint to the OBSI. Another provision which would be welcome in the absence of a full ban (and let me stress that that is the clearest and simplest solution here) would be one that allowed the complainant to change their mind and resile from the NDA at any point in the future.. Many if not most NDA signers do not appreciate the implications of what they have signed until well after the "deal" has been made and they have had a chance to recover emotionally.

I would be very happy to discuss any of the points made in this submission, and the research studies behind them, further with you.

Thank you.

Dr Julie Macfarlane, C.M.

Emerita Distinguished Professor of Law

Director, Can' t Buy My Silence Canada

[5] See https://www.cantbuymysilence.com/canada-legislation
[6] https://www.osc.ca/sites/default/files/2025-12/com_20251215_11-7101_carp.pdf

OBSI's approach to releases and non-disclosure agreements

At OBSI, once an investigation is complete and we make a recommendation to compensate a consumer, a final settlement is reached between the consumer and firm. When this happens, firms often require a release and/or non-disclosure agreement. Below we explain the nature of releases and non-disclosure agreements – what they are, how they work and why they are and how they relate to our process for resolving consumer complaints.

How do releases and NDAs work?

When a consumer has signed a release promising not to pursue any additional claims, a firm can use it as a complete defense against any subsequent claims from the consumer in the future. NDAs can be used in legal and other settings to prevent the consumer from using confidential information or publishing it. In extreme cases, the NDA can be used to get a court injunction or even sue the consumer.

Does OBSI support the use of releases and NDAs?

OBSI accepts that releases and NDAs can be a reasonable and sometimes helpful part of the settlement process. They can be effective with promoting a settlement because they give the firm an incentive to resolve the dispute and the confidence that when they pay the settlement the claim is truly behind them. For these reasons, they are commonly used in settlements during legal proceedings.

Are there any limits to the use of releases and NDAs?

OBSI's position on releases and NDAs is that they should be reasonable and fair. This means that they should be limited to the facts and issues directly related to the consumer's claim and not unduly restrictive.

What should consumers do when they are asked to sign a release and NDA?

Consumers should read the release and NDA carefully and make sure they understand the promises that it requires from them. If they have concerns or do not want to agree to the terms, they can talk to the firm and ask about the changes they would like to see. If the consumer has doubts or concerns about what the release and NDA mean to them or how it applies, they should seek legal advice before signing.

What can OBSI do?

If a consumer expresses concern to us that a firm has presented them with a release and NDA that is unfair, unreasonable or feels wrong to them, we try to answer their questions about it without providing legal advice.

Additionally, if a consumer raises a concern that the NDA does not accurately describe the claim and we agree, we may contact the firm to discuss our concerns and encourage them to adopt narrower language. In extreme cases, we may report firm conduct that is repeatedly unfair to a regulator.