

# Enforcing Non-Solicitation and Non-Competition Clauses

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## *Non-Compete versus Non-Solicit Clauses*

While a non-competition provision restricts a former employee from competing against the former employer's business, a non-solicitation provision is a less restrictive covenant and is narrowly aimed at preventing a former employee from soliciting his or her former employer's (past, present and sometimes even potential) clients and sometimes employees.

## *Restraint of Trade*

The law has been generally hostile towards non-competition clauses. Although both non-competition and non-solicitation clauses are considered by Courts to be a restraint of trade, Courts are more inclined to declare non-competition clauses to be void on public policy grounds unless they can be justified as reasonable both in the interests of the public and in the interests of the parties.

Non-solicitation clauses are more likely to be enforceable, as long as they are clear, unambiguous, and reasonable in light of the employee's position, knowledge and responsibilities.

## *Geographical Scope*

While a non-competition clause must be geographically limited, a non-solicitation clause does not need to be geographically limited to be valid. Due to new technological developments and social media, customers are no longer limited geographically, and the Supreme Court of Canada has concluded that geographical limitations in non-solicitation agreements have generally

become obsolete.[1]

There is no rule of thumb as to what a reasonable geographical scope/ limit for a non-competition clause will be and will depend on a number of factors, including the scope of competition and industry practice. If your business is in Brampton and you service clients only within the Province of Ontario then a Court will likely not enforce a non-competition clause that restricts competition “anywhere within Canada.”

### *Temporal Scope*

It would not be reasonable to prevent a former employee from competing indefinitely. Each situation will be different, but generally the shorter the restriction period, the more likely it will be to resist the Court’s scrutiny. A six month restriction on competition will seem more reasonable than a five year restriction.

It may be reasonable to impose a longer time limit on a former employee from soliciting the employer’s employees and/or clients. However, to do so the clause must be carefully drafted to reasonably protect the employer’s interest without unduly impacting the employee’s ability to earn a living. A good example of an enforceable non-solicitation clause can be found in the case of *Edward Jones v Mirminachi*, 2011 BCCA 493.[2]

### *Don’t use a Non-Compete when a Non-Solicit will do*

As a general rule, Court will not enforce non-competition provisions in situations where it determines that a non-solicitation provision would have sufficed to protect the employer’s interests, as the former has been described by the Courts as the “more drastic weapon in the employer’s arsenal.”[3]

[1] *Payette v. Guay Inc.*, 2013 SCC 45 at para 73.

[2] At para 5, “[Y]ou agree for a period of one year following the termination of your employment, that you will not solicit by mail, phone, electronic communication, personal meeting, or any other means, either directly or indirectly, business from any customer of Edward Jones who you served or whose name became known to you during your employment with Edward Jones. Your agreement not to solicit means that you will not, during your employment in any capacity, and for a period of one year thereafter, initiate any contact or communication, of any kind whatsoever, for the purpose of inviting, encouraging or requesting any Edward Jones customer to transfer from Edward Jones to you or to your new employer, to open a new account with you or with your new employer, or to otherwise discontinue its patronage and business relationship with Edward Jones.”

[3] *Lyons v Multari*, 2000 CanLII 16851 (ON CA) at para 31.

*Our team of experienced lawyers at Simmons da Silva LLP have drafted, interpreted, defended and challenged countless non-compete and non-*

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*solicitation clauses.*

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