

## Courts Refuse To Restrain Former Salesperson From Competing

**Greg McGinnis and Jeremy Schwartz**

The Ontario Superior Court recently refused to grant an injunction restraining a salesperson from competing with his former employer and soliciting its customers, despite the fact that he had signed a non-competition agreement and had resigned his employment.

The case of *Allstate Insurance Company of Canada v. Laroque*<sup>1</sup> highlights many of the challenges that employers face when trying to enforce non-competition and non-solicitation agreements.

Among other things, it highlights how difficult it is to enforce the non-compete obligations of salespeople, and how salespeople will not normally be regarded as "fiduciaries".

Equally important, it highlights the challenge of enforcing non-competes where an employee is wrongfully dismissed, and even where he quits.

### THE CASE

Mr. Laroque began working for Allstate as an agent in training. After several months

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<sup>1</sup> *Allstate Insurance Company of Canada v. Laroque, et. al.*, 2008 CanLII 3959 (Ont. Sup. Ct. Jus.) [[Click here to view](#)].

Breakfast Briefing

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he completed his training and Allstate appointed him as a full-time sales agent and had him sign a new contract with a non-compete clause.

20 years later, Allstate notified Laroque that it was changing his commission structure and dramatically altering its sales model and territories. These changes were to be phased in over a 24-month transitional period.

As a result of the changes, Laroque would have lost a great deal of autonomy in his work; he would have had to relocate his office; and he would have lost about \$50,000.00 per year in commission income. He quit and sued for constructive dismissal.

Believing that Laroque was soliciting its customers for his new employer, Allstate brought a motion for a pre-trial injunction, relying on the non-compete clause in his original contract and claiming that he was a "fiduciary".

The Court refused to grant the injunction.

## WHY THE EMPLOYER LOST

### 1. "Wrongful Dismissal" May Void a Non-Compete Obligation

If an employee is "wrongfully dismissed," any non-compete obligations in an employment agreement may be unenforceable.

In this case, Laroque alleged constructive dismissal (which is a branch of "wrongful dismissal"). Although Allstate argued the 24-month transitional period was reasonable notice of the changes, some significant changes were to take effect immediately. As a result, the court held that Allstate failed to demonstrate that Laroque was not likely constructively dismissed. Instead, it ruled that a full hearing was necessary to decide the issue.

Thus if a former employee who has resigned has a plausible claim for constructive dismissal, it may difficult to obtain a pretrial injunction.

### 2. Something Must Be Given in Exchange For a Non-Compete

Employment agreements, like other contracts, must contain an element of exchange (known as "consideration") to be enforceable. In general, this means that written employment agreements must be signed before an employee starts working for the organization. Alternatively, they may be signed as a condition for receiving a promotion or an increase in compensation, after the person is already an employee.

In *Allstate Insurance*, Laroque signed the non-compete when he became a full-time sales agent, after his training period. Ordinarily, this could suggest that he received consideration – a better position and a chance to make more money. However, the court found there was insufficient evidence to determine the issue without a full hearing.

### 3. Salespeople Usually Not Fiduciaries

"Fiduciaries" have obligations toward their former employers after they leave their jobs. This includes the obligation not to compete "unfairly" by, for example, soliciting customers or employees, or seizing business opportunities they are aware of. These obligations usually extend between 6 and 12 months after employment ends.

The court in *Allstate Insurance* held that Laroque was not a fiduciary, because he had no real control over the business. Fiduciary relationships exist by virtue of an employee's position and authority within the organization, not simply by virtue of proximity to customers or access to confidential information.

Salespeople and other employees who report directly to others in the organization and have no real control over the business, prices or marketing, are therefore unlikely to be regarded as fiduciaries.

#### 4. No Evidence of “Irreparable Harm”

Without evidence that an employee is soliciting customers and competing, or that he is using confidential information or property, the courts will not ordinarily grant an injunction.

But evidence of competition is not enough – the employer must also show evidence of “irreparable harm” that justifies a restraint on the former employee’s freedom. “Irreparable harm” means substantial harm to an employer’s business interests that cannot easily be remedied by the payment of damages.

Allstate admitted it had no evidence that Laroque was actually soliciting Allstate’s customers or that Allstate had lost any business as a result of Laroque’s “competition”. In any case, Laroque’s portfolio of clients accounted for less than 1% of Allstate’s business. As a result, Allstate failed to demonstrate evidence of irreparable harm.

#### CONCLUSION

This case reiterates the fact that injunctions to enforce non-compete obligations are the exception, not the rule -- they are especially difficult to obtain when sought before trial. Despite the fact that salespeople have direct access to customers and confidential information, it is still very difficult to restrain them from engaging in post-employment competition.

Employers bear the onus of demonstrating not only that a non-compete clause is enforceable, but also that there are good reasons to do so before a trial. Even if an employee resigns, a plausible constructive dismissal case may scuttle chances of success.

Employers who wish to protect themselves from competition from former salespeople should not rely simply on getting an injunction.

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