IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacLean v. CrossOff Inc., 2005 NSSC 185

Date: 20050630
Docket: SH 192369
Registry: Halifax

Between:

David MacLean

Plaintiff and Defendant by Counterclaim

v.

CrossOff Incorporated, a body corporate, incorporated under the laws of the Province of Nova Scotia

Defendant and Plaintiff by Counterclaim

Judge:	The Honourable Justice M. Heather Robertson
Heard:	January 20, 21, April 18 and 19, 2005, in Halifax, Nova Scotia
Written Decision:	June 30, 2005
Counsel:	Peter McLellan and Julia Clark, Articled Clerk, for the Plaintiff and Defendant by Counterclaim David Farrar and Lisa Gallivan, for the Defendant and Plaintiff by Counterclaim

By the Court:

[1] The plaintiff David MacLean ("MacLean") says he was constructively dismissed from his position of Vice President and General Manager of the Keltic Property Management Division of the defendant company, CrossOff Incorporated ("CrossOff") and was therefore deprived of salary, bonuses and benefits which form the basis of this claim for loss and damage.

[2] The defendant CrossOff says that a change in the plaintiff's employment responsibilities did not amount to a constructive dismissal. In the alternative, the defendant says the plaintiff acquiesced to the change in employment duties and chose to resign rather than accept his new position. Further, the defendant counterclaims for damages they say result from the plaintiff's breach of his fiduciary duties as an employee, including his use of confidential information and solicitation of CrossOff's clients and contract employees, while in pursuit of a new position with a competitor.

[3] CrossOff also maintains that MacLean failed to mitigate any damages that he may have suffered by failing to accept the position of Vice President - Commercial Sales of Altera Property Management Services ("Altera") and/or failing to seek alternate employment in a timely manner.

FACTS - CHRONOLOGY - AN OVERVIEW

[4] On or about November 1, 1992, MacLean entered into an employment contract with Keltic Incorporated and commenced employment as Manager of Keltic Properties and Services Division. MacLean was employed by Keltic Incorporated for nearly 10 years, and his exclusive duties and responsibilities consisted of management and development of its property management division which specialized in the management and administration of distressed and foreclosed properties (predominantly residential properties) primarily for financial institutions in Atlantic Canada.

[5] Throughout his period of employment with both Keltic Incorporated (now CrossOff) he worked from Halifax and had responsibilities throughout the Atlantic Region. The majority of his duties were operational in managing the distressed and foreclosed properties. As well, Mr. MacLean had significant responsibilities in

maintaining the relationship with the key customers, namely, the major financial institutions.

[6] At the time of alleged termination of his employment, MacLean held the position to Vice President and General Manager of the Keltic Property Management Division of CrossOff, and MacLean earned a base salary of $75,000 per annum plus bonuses and benefits.

[7] Bonus was calculated at 5% of the profits of the Property Management Division of CrossOff and was a significant component of Mr. MacLean's income. Profits earned in the last full three years of his employment with CrossOff was as follows:

(a) 1999 - $22,716.00;
(b) 2000 - $24,088.00; and
(c) 2001 - $26,801.00

As is evident, the bonus represented approximately 25% of his total annual income.

[8] The defendant CrossOff, is a corporation incorporated under the laws of Nova Scotia with a registered office in Halifax, Nova Scotia. CrossOff merged with Keltic Incorporated on or about August 8, 2000. The name Keltic Incorporated was changed to CrossOff Incorporated effective August 8, 2000.

[9] In early 2002, CrossOff acquired Remcorp Inc., a company operating a business managing distressed properties predominately in Ontario and Western Canada. After the acquisition of Remcorp, CrossOff created a new division, Altera Property Management Services, by merging the operations of Remcorp Inc. with Keltic Property Management division.

[10] On or about May 16, 2002 MacLean was informed during a meeting with Chris Mace, the then President of Altera Property Management Services that CrossOff was removing him from the position of Vice President and General Manager of the Keltic Property Management Division and transferring him to the position of Vice President - Commercial Sales of Altera Property Management Services. No position description nor outline of responsibilities was provided to MacLean by CrossOff. The effect of this purported change was to take away from

MacLean any responsibility for residential properties in Atlantic Canada and purport to give to MacLean responsibility only for sales, that would be predominantly commercial sales in a division he was to single handedly spearhead and create as a national undertaking.

[11] MacLean was informed that all responsibility for operations that he had managed would be given to others and managed out of Ontario. A new operations manager was hired to carry on with his former responsibilities.

[12] A series of emails between the plaintiff and officers of the defendant corporation which I shall subsequently refer to in greater deal, dealt with the possible parameters of this new position. His employment with the defendant terminated on July 9, 2002, although he continued to be paid by CrossOff until August 15, 2002.

[13] On August 1, 2002, he commenced employment with AGC Incorporated as Vice President of its property division, performing much the same duties of residential distress management as he had when heading up the Keltic Property Management Division for the defendant.

[14] At AGC the plaintiff was paid a base salary of $65,000 per annum from August 2002 to January 31, 2003; $70,000 per annum from February 1, 2003 to July 31, 2003 and $75,000 thereafter. According to the terms of his employment offer, he was also to receive a bonus based on AGC's net profits, stock options and employment benefits at least equivalent to those that he received during his employment with CrossOff. These benefits are at issue with respect to any calculation of damages. On October 1, 2004, the plaintiff left AGC when they closed their local office. He then joined Home Alone, a company for which he still works.

Issues:

1. Was MacLean constructively dismissed from his employment with CrossOff?
2. In the event that MacLean was constructively dismissed, what damages is he entitled to? What period of notice is appropriate and are special or aggravated damages warranted?

3. Did MacLean fail to mitigate any damages he may have suffered by not accepting the position as Vice President - Commercial Sales for Altera or by actually accepting a position at AGC for a lesser salary?
4. Was MacLean a fiduciary of CrossOff and if so, did he violate his fiduciary obligations to CrossOff?

Issue #1 - Was the plaintiff David MacLean constructively dismissed from his employment with CrossOff?

[15] It is clear from the evidence that significant rationalization was taking place in the distress and foreclosed property management business. When CrossOff purchased Keltic its property management business in Atlantic Canada was a going concern. The plaintiff had built this business along with the assistance of the principles of Keltic William Ritchie and Roland Martin from 1992 onward. Their principal clients grew to include Canadian Imperial Bank of Commerce, Royal Bank, the Bank of Nova Scotia, Home Alone and Central Mortgage and Housing Corporation ("CMHC").

[16] In October 2001 the Royal Bank terminated its contract with Keltic for work done principally in the Atlantic provinces preferring a national property management company based in Quebec.

[17] When CrossOff purchased Keltic in 2000 it did so principally to acquire Keltic's listing on the Toronto Stock Exchange. Don Snow, the CEO of CrossOff had no first hand experience in the foreclosure and distress residential property market and acquired the Keltic property management division with the purchase of Keltic Incorporated. He comes from an information technology background having been the operational vice president of MacKenzie College, a computer skills training business and a senior vice president of the now defunct Knowledge House IT Company. CrossOff today has more than 20 offices. These are located in all major Canadian cities. They have two divisions; one, dealing with DNA authentication of valuable collectables such as sporting paraphernalia and a division that provides corporate IT training in IBM and MICROSOFT products.

[18] From his evidence I gleaned that Mr. Snow is a real entrepreneur specializing in acquisitions.

[19] He looks at any business opportunity that is viable and shows growth potential. With the plaintiff David MacLean's experience in the field CrossOff wanted to explore acquiring a national distress property management business. His evidence was that he saw the trend toward national centralization. He achieved this with the purchase of Remcorp, who operated out of Toronto. Mr. Snow's evidence was that he saw the Keltic property management business being vulnerable and feared that other clients might move their business to Toronto so he therefore wanted to expand their property management division to include commercial properties and centralize its operation out of Toronto.

[20] In early 2002 the plaintiff David MacLean had prepared a list of potential distress property management companies that CrossOff might approach. He was not involved in the negotiations however as Don Snow and his Chief Operations Officer Jamie Thomson were the acquisition team. I accept that they relied on the plaintiff's experience in the business to target potential companies.

[21] Once the marriage with Remcorp became a reality in May 2002 MacLean was surprised that he would no longer be in charge of his division and that Chris Mace of Remcorp would be, despite the assurances he had earlier been given that his responsibilities would not change.

[22] Don Snow had achieved his objective of creating a national division and he and Mr. Thomson made the determination that Mr. Mace not Mr. MacLean should run it. When asked why Chris Mace had been chosen over David MacLean, Mr. Snow testified that "we needed him in Toronto where the customers were." Therefore they had to find a position for Mr. MacLean and created one, that of Vice President - Commercial Sales for Altera.

[23] The integration of Remcorp and the Keltic division under the name of Altera began in May 2002 and was an ultimate failure. Remcorp was three times as large as the Keltic property division. Mr. Snow's evidence was that he discovered Remcorp was not a profitable company and relied on Keltic's cash flow. As well, a change in fee collection policy from the banks also cost Altera additional carrying charges until each distressed or foreclosed property was ultimately sold. Mr. Snow also attributed the failure of the new entity to a loss of business in Atlantic Canada with the departure of the Royal Bank as well as a loss of business occasioned by MacLean's departure to AGC. The entire property management

division of CrossOff was sold in December 2003 at fire sale price according to Mr. Snow's evidence.

[24] Without Mr. MacLean at the helm the Keltic division appears to have run into trouble almost immediately in the second and third quarter of 2002. His responsibilities were divided between three other employees; Ray Scarlett, Operations Manager, Natalie Ianni, Sales and Wendy McNiven, the National Inspection Manager. Operations were then turned over to a newly hired employee Bob Trowell who had no prior experience in the business according to Mr. MacLean's evidence.

[25] MacLean's original team of five employees who assisted him in the division no longer reported to him. One of them, Nancy Hoskins was terminated in June 2002. Another, Cathy Shannon also soon left the company.

[26] It is clear from the evidence that the restructuring following the acquisition of Remcorp, resulted in the constructive dismissal of the plaintiff.

[27] The leading Canadian authority on constructive dismissal is *Farber v. Royal Trust Co.*, [1996] S.C.J. No. 188 wherein Justice Gonthier cited with approval, the comments of Justice N.W. Sherstobitoff of the Saskatchewan Court of Appeal in an article entitled "Constructive Dismissal" in Brian D. Bruce, ed., Work, Unemployment and Justice. Montréal: Thémis, 1994, 127. Justice Sherstobitoff's definition of constructive dismissal was given at para. 34 follows:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[28] This decision has been cited with approval in several Nova Scotia cases such as *Lane v. Carsen Group Inc.,* [2002] N.S.J. No. 428 (S.C.).

[29] In *Chambers v. Axia Netmedia Corp.* [2004] N.S.J. No. 26 in the latter case MacAdam J., articulated the test for determining a constructive dismissal. At para. 16 he stated:

> The test for determining whether an employee has been constructively dismissed is an objective one and essentially a question of fact. The court must decide whether, on a reasonable interpretation of the facts, the employee has established he was constructively dismissed, as a result of conduct by the employer, that breaches a fundamental or essential term of the employment contract. The employee's perception of the employer's conduct is not determinative. Rather, the court must ask whether a reasonable person, in a similar position as the employee, would have concluded the employer had substantially changed an essential term of the employment contract.

[30] In *Miller v. Fetterly & Associates Inc.*, [1999] N.S.J. No. 203, the court cautioned, quoting from *Fisher v. Eastern Bakeries Ltd.* 1986 CarswellNS 113, that all facts surrounding the situation must be carefully scrutinized in a claim for constructive dismissal:

> Whether or not an employee has been unjustly dismissed is largely a question of fact. Where a plaintiff has resigned from his employment, as in the present case, and claims that the resignation was merely the final result of a constructive dismissal, the court ought scrutinize all of the facts very carefully and determined whether or not a reasonable interpretation of those facts supports the plaintiff's contention. In a case such as this, the court must be satisfied that the plaintiff has established on the balance of probabilities that the defendant's conduct, vis-à-vis the plaintiff, was such that the duties required of the plaintiff were substantially different from those for which the plaintiff has contracted. If the plaintiff establishes that, then a court may find that the defendant's conduct amounted to constructive dismissal.

[31] In early June 2002, the plaintiff faced a precarious future. He had no job responsibilities, no staff and only opportunity to assume a position as Vice President - Commercial Sales for Altera, a position for which he had little or no experience and a position for which Altera had no infrastructure or business plan. Inevitably, he would also have had to move to central Canada to establish this division. They relied almost entirely on Mr. MacLean to create a new division.

[32] Mr. Snow testified that he had great confidence that Mr. MacLean would be able to establish a new commercial division, due to his past success in establishing

the Keltic distress property management division. Yet he also testified that with the implementation of a new accounting system in early 2002, they were able to track billing with revenue on a per item bases and found that there were mistakes made, resulting in double billing that was pure profit. He provided the example of billings for six drive-by inspections when only four had actually been made. On the one hand he gave high praise to Mr. MacLean and on the other cast a shadow over the accounting practices of the division that Mr. MacLean led. His evidence of Mr. MacLean's bright future heading a new division is suspect in light of these alleged accounting irregularities. His evidence did not ring true.

[33] I accept Mr. MacLean's evidence that he voiced his objection and disappointment that his position was taken away from him and that he expressed real concern that he was not qualified or experienced enough to handle a new position creating a commercial division. I also accept his evidence that his acceptance of this position was made with stated caution and always subject to coming to acceptable contract terms. The position offered was now radically different from the job he earlier held. He testified that he expressed these concerns to Jamie Thomson, Kathy Lynch and William Ritchie. These were all verbal communications throughout the month of June 2002. These three people did not testify. Mr. Snow had no communications with the plaintiff on this subject. He testified that he left these matters to Jamie Thomson and Kathy Lynch.

[34] Mr. MacLean testified that earlier in his career he had been unemployed for nearly two years. He was afraid again for his future. He has a wife, two children and a mortgage. He felt he had to consider the new position that was offered.

[35] The defendant says that Mr. MacLean accepted the new position as Vice President Commercial Sales then sought out other opportunities to work for a competitor in the residential side of the business in Atlantic Canada.

[36] Events are compressed into a five to six week period from May 30, 2002 onward. A series of emails were exchanged.

[37] Following his May 16th meeting Chris Mace asked how he saw his new position with the company unfolding. Mr. MacLean provided a "draft concept" of the position. He asked Chris Mace for the existing job description for the position of Vice President Commercial Sales, "to help me understand the scope of the

position." None was forthcoming. Mr. MacLean outlined 11 areas in his draft concept. They were:

1. Maintain 9 year relationship with B.N.S., continue to be responsible for Atlantic Canada program.

2. Utilize long term relationship with C.I.B.C., Lawrence St. West to expand residential coverage in all regions.

3. Develop relationship with Credit Union - Atlantic Region.

4. Expand scope of business with R.R.L.S.

5. Expand scope of business with Royal Trust - Estate Division.

6. Develop relationship with G.E. Capital.

7. Expand scope of service with CMHC.

8. Develop strategy to provide national coverage for B.D.C.

9. Develop relationship with lst Canadian Title - DRN.

10. Develop internally the parameters for a Commercial Property Division utilizing existing contacts with BNS and C.I.B.C.

11. Develop relationship with Home Trust.

[38] Of these 11 items nine related to residential real estate distress management which in my view reflected that he had little understanding of the scope of the commercial property management, a very specialized field. He did know that nationally the players in commercial real estate were companies such as Olympia and York, Centennial, City Group Property and more locally the Hardman Group.

[39] I accept his evidence that he had little confidence he could enter these leagues and expressed this to Thomson and Mace.

[40] He received a reply from Jamie Thomson on May 30:

David

> Thank you for the brief however, I see that your description basically address what you do presently. In our discussion I though [sic] I was frank about moving towards Commercial development and was looking forward to you putting together a job description in that vain.
>
> For clarification I would like to reiterate that as of June 1st the functions of the inspectors is to move over to Wendy the national manager for inspectors and the staff of Keltic and operational concerns would move over to Ray Scarlett.
>
> In terms of the sales of the existing that this would move mover to Natalie and myself accordingly. To be blunt this changes your function and may give you a clearer understanding of how this is to role out.
>
> As vp of CrossOff I am expecting a rather detailed plan as to 1: how you see yourself fitting in and what the duties and responsibilities are and how you would effect them. As a heads up Ray Scarlett has been forcasting and building a business plan and would suggest you contact him and start along this avenue.
>
> David this as mentioned in your office is a great opportunity to advance within the company and has the capability of better margins ultimately effecting your income stream in an upward motion. I believe you would be a great asset.

[41] Despite the assurance that Mr. MacLean would be a great asset, it must have been apparent to Mr. Thomson that Mr. MacLean was struggling to describe or even understand his new role. By May 30th he clearly understood that his former position had been taken away from him and given to others.

[42] On June 6, 2002 Mr. MacLean replied:

> Chris, hope you are feling [sic] better, please accept my thanks for the courtesies extended. I look forward to assuming the role of Vice-President Commercial sales for Altera and the opportunity to work with Ray to create a successful Division.
>
> I have set up a meeting next week with Mike Hayes and will contact Ray to participate when we clue up the exact time.
>
> When you have the chance as discussed you will outline the new role and package for my review and it is my hope all issues will be clarified and we will set forth to make the new Division the most siccessful [sic] within the CrossOff Group.

> I have started the process of garnering the information discussed at the meeting and hope to develop a good working relationship to ensure success. I will keep you apprised of my schedule and marketing efforts and as noted will forward all Residential leads to Natalie to develop.
>
> I hope you have a successful trip to Montreal and have a nice week-end.

[43] On June 10, 2002 Chris Mace emailed:

> Thank You David
>
> I 'am [sic] pleased that you have chosen to participate in the commercial properties and excited that we can continue our relationship in this regard. As promised I will set up the terms of reference this week and start of with a good foundation.
>
> Cheers
>
> Chris

[44] It is clear from these communications that Mr. MacLean accepted the new position subject to clarification of his role, his terms of employment and remuneration. I also accept that he did so as he felt he could not afford to be unemployed.

[45] I accept his evidence that had he received sufficient guarantees of his salary and bonus that made up one quarter of his income that he might well have stayed with CrossOff and helped them build a new commercial division.

[46] Following some verbal contact between them, Mr. Mace writes on June 20, 2002:

> Dear David,
>
> Although I've received 2 voice mail messages from you regarding your positioning on the commercial development, I am a strong believer in documentation of which I haven't received any. My concern is that you may be going in a direction that is adversely different than Ray Scarlett. I would ask that

> all future correspondence be directed in writing so I can truly and clearly see your thinking in terms of the business plan.

[47] Despite earlier undertakings that Mr. Scarlett would prepare the business plan, now it appears Mr. MacLean is expected to prepare that document as well.

[48] On June 25, 2002, Mr. MacLean replies:

> Good morning, as per our telephone conversation of June 24, 2002, I look forward to receive the information referenced in your e-mail of June 6, 2002.

[49] In evidence he made a correction to the contents of this email saying he was referencing Mr. Mace's June 10th email not June 6th, wherein Mr. Mace had undertaken to send Mr. MacLean the "terms of reference" for his new position.

[50] On the same date, June 25, 2002 Mr. Mace replies:

> Hello David
>
> I 'am [sic] expecting to finalize with Ray the business plan and have yet the opportunity to sit with him. I would ask that you be patient and give me a week to finalize the commercial side. I would feel better in scripting this out at that time (Your Job Description). I realize this may make you somewhat anxious however I do not want to make haste in planning your future plans and desires with the company.
>
> Thanking you in advance
>
> Chris

[51] In the meantime David MacLean with the assistance of Mike Hays who worked in the DNA technologies branch of CrossOff prepared a marketing plan. No budget or infrastructure plan accompanied this document.

[52] In preparing this marketing plan, Mr. MacLean's evidence was that he was going through an exercise, waiting to see if a job description and employment terms would be forthcoming as undertaken in Mr. Mace's email of June 10, 2002.

[53] Mr. MacLean's evidence was that Mr. Mace was well aware that he wanted his old job back, being in charge of distress residential property management. It was his hope that if he tried and failed to succeed in the commercial side he would at least be assured he could return to the residential side of the business he knew so well.

[54] On June 28, 2002 Chris Mace makes a formal offer to Mr. MacLean for his new position.

[55] He writes:

> Dear David:
>
> Further to our discussions during the past month, I am pleased to offer and outline to you the position of Vice President, Commercial Sales for Altera Property Management.
>
> A role description of VP, Commercial Sales for Altera is attached.
>
> Your remuneration will remain the same with a base salary of $75,000 per annum. All other payroll benefits that you now have will stay in place such as your group insurance, Canada Savings Bond and RSP with matching company RSP contribution.
>
> You presently receive a bonus of 5% of the annual net profit of Keltic Property Management. This program will continue for the remainder of fiscal year 2002. However, beginning January 1st, 2003 we will introduce a bonus program that will coincide with your duties and responsibilities as the Vice President, Commercial Sales for Altera.

[56] On receipt of this letter which contained a job description as an appendix, Mr. MacLean wrote to Kathy Lynch on July 2:

> Kathy, thank-you for forwarding the job description for Commercial Sales, on Friday, June 28, 2002, with the holiday week-end it was not possible to meet with my Solicitor to discuss my concerns, a meeting will take place on Tues. PM. I look forward to the resolution of this matter.

[57] Mr. MacLean's evidence was that he was upset that his bonus of 5% of revenues was not being honoured after December 30, 2002. This sum amounted to

25% of his gross income. With no guarantee of a bonus, not only had his job responsibilities radically changed but his salary would be substantially reduced, until some time in the future when revenues from a new commercial division might justify a bonus plan.

[58] Mr. MacLean exchanged voice mail messages with Kathy Lynch.

[59] On July 3, 2002, he emailed Ms. Lynch:

> At 8:00 a.m. this morning, I was advised by my Solicitors assistant, Peter MacLellan, Q.C. was called out of Province to attend a funeral and will return on the week-end, due to this circumstance my meeting is now rescheduled for July 8, 2002.
>
> It is my wish to have a successful resolution of my continued employment with CrossOff Inc. And trust all can appreciate the recent constuctive [sic] dismissal by Remco, from the residential business which I successfully developed for the last 10 years, has made the past months very difficult.

[60] She replied that same day:

> Thanks, David. I appreciate your email. Does this mean you will not be in the office until after the 8th of July?

[61] He further replied on July 3, 2002:

> I will be in and out of the office the balance of the week, am available at all times and will be in the office on Monday after my rearly [sic] morning meeting. I f [sic] this is not satisfactory, please advise.

[62] To which Ms. Lynch replied:

> David, we can understand that you would like legal advice on this and we encourage you to do this. But we expect you to attend work each day and pay you as we have in the past and to assist us with the transition of the residential properties as well as help us develop and start the creation of the commercial division.
>
> You keep referring to constructive dismissal which we strongly disagree with. As far as we are concerned we are paying you and expect if you are out of the office

> you must be attending outside commercial meetings? Will you be attending work or are you resigning?
>
> We are glad you are seeking advice on your role change but the employee/employer relationship is still in existence, so we are confused why you not working with us.

[63] Mr. MacLean replied on July 5, 2002:

> Hello, I am in the office, as noted in my voice mail yesterday, I was out of the office for tests, however am back today. I have no intention to resign from CrossOff Inc., and wish to have the new role description reviewed, which will take place on Monday morning. I am more than willing to help with the transition of the residential properties, however no one from Remco has requested any assistance in that regard.

[64] Mr. MacLean's evidence was that by saying he had "no intention of resigning" he meant that it was not over until there was a final resolution of his lost position with CrossOff. With respect to the new position he had not even to that date received final documentation (no budget was ever prepared) or had an opportunity to review the position offered. I accept the general tenor of Mr. MacLean's evidence with respect to his understanding of these contract negotiations for his new position.

[65] The fact that he remained with the company to July 9, 2002 has been raised by the defendant as acquiescence and acceptance of the new position, which then precludes the plaintiff from claiming that he had been constructively dismissed. However, the plaintiff may reject this alternate position of employment if it is reasonable to do so. It is the defendant's position that if as he testified Mr. MacLean considered himself dismissed effective May 30 then he ought to have left the company immediately and sought legal recourse.

[66] The defendant relies on *Mate v. Laidlaw Environment Services Inc.* 1996 CarswellBC 216 (BCSC). In that case the plaintiff worked for the defendant for approximately ten years when his position was changed. The business was sold; a restructuring occurred and the employee's duties changed considerably. His salary remained unchanged. The employee expressed dissatisfaction with his new position at a sales meeting. The sales director provided him with a draft job description and invited his comment on the new position. The employee sought

legal advice and claimed he had been constructively dismissed. The employer encouraged the employee to reconsider. The employee chose to maintain his position that his employment had been terminated. The court found that the employee had been premature in his decision to leave his employment.

> It is my further opinion that the plaintiff was premature in leaving the defendant's employment, without providing his input into the job description and negotiating its terms and before the reconstruction was complete and he and the defendant had an opportunity to observe the position in action as it were. It seems to me that had the plaintiff done so he would have seen the errors in his perception, and would have continued on in the employ of the defendant, assuming that he had no personal motive for leaving the defendant, and there was no other motivating factor attributable to the defendant. And in this regard, I give no weight to the suggestion that he would not have been able to work along with and under the supervision of Mr. Waters.

[67] As well the defendant cites *Cruickshank v. Jordan Petroleum Ltd.* 1999 CarswellAlta 639. The Alberta Court of Queen's Bench considered the impact of an employee's refusal to discuss changes to his position of his claim of constructive dismissal. The court held in that case that the changes to the employee's position were not so fundamentally different as to constitute a constructive dismissal and that the employee was premature in leaving the company without discussion or negotiation.

[68] These cases can be distinguished on the facts and indeed *Mate v. Laidlaw Environmental Services, Inc., supra*, is an authority that is supportive of Mr. MacLean's position. He did not jump ship on May 30 but worked throughout June hoping to have clarification of the role he might next play with CrossOff. To have acted prematurely until he fully understood the implications of this restructuring could have adversely effected any claim he might have against his employer. It is true that he secured alternate employment in early July but had consulted legal counsel concerning the changes to his contract and effectively rejected the position offered.

[69] I find that Mr. MacLean was constructively dismissed from the position that he held for almost ten years. His job was taken away from him. I do not accept the argument that the new position was "similar in many respects" to the position formerly held and at the same rate of compensation.

[70] I find that he was offered a position vastly different from the old one and at compensation that would likely be far less than his earlier salary since the bonus provisions were a critical component and represented one quarter of his annual income.

[71] Mr. MacLean on any reasonable interpretation of the facts was constructively dismissed.

Issue #2 - Notice Period

[72] Plaintiff's counsel have referred to an array of cases showing a range of notice periods: *Walsh v. Alberta and Southern Gas Co.* (1991), 41 C.C.E.L. 145 (Alta. Q.B.); *Baker v. B.C. Insurance Co.* (1992), 41 C.C.E.L. 107 (B.C.S.C.); *Trimmer v. Ridge Meadows Hospital Assn.*, [1994] B.C.J. No. 715 (1994), T.L.W. 1405-024 (B.C.S.C.); *Deildal v. Tod Mountain Development Ltd.* (1995), 10 C.C.E.L. (2d) 202 (B.C.S.C.); *Lerch v. Cableshare Inc.* (1996), 32 O.R. (3d) 233 (Ont. Gen. Div.); and *Galbraith v. Acres International Inc.* (2001), 8 C.C.E.L. (3d) 66 (Ont. S.C.J.).

[73] Based on Mr. MacLean's age, experience and the role he played in developing a successful property management division for Keltic, he falls within the category of mid to senior executives. I have concluded that he is entitled to 15 months notice upon the termination of his employment. I will deal with the calculation of damages later in this decision.

Issue #3 - Mitigation

[74] It is the defendant's position that if the court finds that a constructive dismissal had occurred, then the plaintiff is not entitled to damages for his failure to mitigate any employment loss. The burden is on the defendant to show that Mr. MacLean could have avoided a position of loss and that his conduct amounted to a failure to mitigate.

[75] On July 9, 2002, Mr. MacLean accepted a position with AGC. He had been approached by Mr. Garibaldi, the CEO of that company some time between mid and late June. They sought him out and asked that he run their residential distress management business in Atlantic Canada out of Bedford, Nova Scotia.

[76] He was to be paid initially $65,000 per year and received commissions of 2.5% of gross profits. His duties would almost mirror his former position with Keltic division of CrossOff. He remained in residential distress management, the business he knew so well.

[77] Mr. Garibaldi gave evidence on behalf of the defendant in this case. He testified that he had been approached by his own solicitors, Bennet, Jones of Toronto on the previous Friday, who told him he could be of assistance to Mr. Farrar in defending this case.

[78] Mr. Gariboldi agreed that it was he who approached Mr. MacLean to offer him a position with AGC. He thought the date was about mid June. However, he testified that Mr. MacLean supplied plenty of information about CrossOff's business including that the company was not doing very well, who was unhappy within the company and which inspectors were not being paid. He also testified that Mr. MacLean had said he could deliver the Bank of Nova Scotia work to AGC.

[79] With respect to compensation he testified that Mr. MacLean "could write his own ticket" and could in fact have asked for a higher salary and he would have paid it. He said there were no negotiation about salary, just his acceptance of Mr. MacLean's proposal.

[80] I found Mr. Garibaldi to be a convenient witness and not particularly credible or helpful in his evidence. He was confused about reimbursement received by Mr. MacLean from AGC for car, club fees and other expenses and clearly did not understand the origin of at least two cheques made payable to Mr. MacLean. He clearly intended to discredit Mr. MacLean by now a former employee who sought unpaid commissions from AGC in a Small Claims Court proceeding.

[81] I generally accept Mr. MacLean's evidence over that of Mr. Garibaldi and particularly I accept Mr. MacLean's testimony that Mr. Garibaldi did negotiate the salary, bonus and benefits he was to receive. Mr. Garibaldi did not strike me as the kind of man who would allow any employee to "write his own ticket."

[82] I also accept Mr. MacLean's evidence that he joined his current employer Home Alone when AGC decided to close its office in this province. Mr. Garibaldi

suggested the opposite, that AGC had to close its office after Mr. MacLean's departure.

[83] In the result I find that Mr. MacLean did mitigate the damage resulting from his constructive dismissal, to the best of his ability. However, he secured a job that paid $10,000 less in base salary and provided a reduced commission. He did this in a timely fashion, after being approached by AGC mid to late June and after he came to the conclusion that there was not real future for him at CrossOff.

Issue #4 - Was Mr. MacLean fiduciary of Cross and if so did he violate his fiduciary obligations?

[84] It is quite obvious that Mr. MacLean, an executive with the Keltic Division of CrossOff was a fiduciary of that company, during his employment with them. He held a senior position and by all accounts carried out his duties well over the years, always receiving pay increases and bonus throughout the years that he built the division.

[85] The difficulty arises upon his departure when the plaintiff freely admits that he contacted Keltic's old customers at the charter banks and CMHC, to ask if he might be considered for contracts for management of properties under distress or foreclosure on behalf of AGC his new employer. He was not subject to a non-competition clause or non-solicitation clause as a term of his contract with Keltic.

[86] Does he nevertheless owe a common law duty not to solicit contacts?

[87] The Keltic division's customers were few: the three major banks, CMHC and Home Alone. Over a 10 year period David MacLean had developed close business friendships with about a dozen representatives of these institutions. Some he considered to be personal friends with whom he golfed or socialized. In the spring of 2002, he made them aware or they became aware of the restructuring at CrossOff. After leaving CrossOff he told them he had joined AGC. He asked to be considered future business.

[88] In the case of the Bank of Nova Scotia, AGC had to apply to the Bank and qualify to do business. This took eight months. CHMC only tendered their business every two years and he asked on behalf of AGC if they might tender

future contracts. The Royal Bank was no longer a factor and AGC had already done business with the CIBC in central Canada.

[89] This is a very small community of individuals involved in distressed or foreclosed properties. If Mr. MacLean were precluded from approaching these institutions he would quite simply not have been able to work. There is nothing exclusive or proprietary about this "list" of customers. Lending institutions foreclose on properties. Anyone in the business would obviously contact them if wishing to manage their distressed properties. This is not a case where Mr. MacLean took with him a confidential or proprietary list of CrossOff's customers or took with him proprietary technology or trade secrets.

[90] I accept Mr. MacLean's evidence that he took nothing with him on his departure, no client lists, no inspector lists, no contract information, no equipment or auto.

[91] With respect to his contacting inspectors who had done residential inspection work for the Keltic division, each of these was an independent contractor with no exclusive relationship to Keltic or CrossOff.

[92] While CrossOff might have a proprietary interest in the goodwill acquired over the years with these institutions, it has no proprietary interest in the customer *per se.* It has no proprietary interest in Mr. MacLean's experience in this field. It would be unduly harsh to preclude him from earning a living upon his departure from CrossOff. Had they wished to slow Mr. MacLean down in the event of his departure from the Company they ought to have secured a contractual term of non-solicitation for a specified period from the outset.

[93] Having effectively discharged Mr. MacLean from the position he held for almost 10 years, CrossOff, in my view, could not have had a reasonable expectation that he would not solicit these lending institutions, once he accepted a position with a competitor. *Hodginson v. Simms* [1994] 3 S.C.R. 377; *Atlantic Business Interior Ltd. v. Hipson* [2005] N.S.J. No. 33 2005 N.S.C.A. 16, addressed the validity of non-competition clause and non-solicitation obligations. Each case adjudicated is of course heavily dependant on its facts. In the circumstances of this case, I do not find that Mr. MacLean was under any obligation of non-solicitation, particularly in light of their lack of real commitment to him in proposing a new position.

[94] In any event AGC did not begin doing contract work for any of these institutions before October 2002. Mr. MacLean had not been in charge of the Keltic division from mid May and left the company on July 9, 2002. Losses occasioned in the second and third quarter of 2002 calendar year cannot be attributed to his taking any customers away from CrossOff but more likely arise because he was no longer in charge and others who were less experienced and less able were running this division.

[95] With respect to Mr. Garibaldi's evidence that Mr. MacLean told him that CrossOff was not doing well and not paying its accounts, I accept that such a conversation may have occurred in a very general way and would reflect Mr. MacLean's unhappiness with his situation. I do not accept that these comments amounted to a breach of Mr. MacLean's fiduciary obligations to CrossOff. This was not evidence of Mr. MacLean revealing confidential information. I consider these comments to be more of a trifle. In any event I did not place much reliance on Mr. Garibaldi's evidence.

Damages arising from the constructive dismissal:

[96] With respect to the issue of damages, the statements for the Keltic division as generated by Crossoff's new accounting system, were tendered by the defendant to show that there were no profits upon which to pay a bonus to Mr. MacLean for 2002.

[97] Bonuses were paid annually in January relation to the previous year's performance.

[98] Mr. MacLean tendered his calculation of bonus owing to be an average of the bonuses he received in the years 2000 and 2001. These two years totalled $50,027.85 paid or an average of $25,013.93 per year.

[99] I agree that bonuses are an integral part of the compensation plan.

[100] The plaintiff suggests that in the absence of hard evidence to explain the reasons for reduced profits in 2002 - 2003, as claimed by the defendant, the fairest and best calculation of bonuses owed to Mr. MacLean is to look to these previous two years performance when Mr. MacLean was in charge of the division. They

rely on: *Gillies v. Goldman Sachs Canada Inc.* [2000] B.C.J. No. 410, 2000 B.C.S.C. paras. 78-82; *Morrell v. Grafton-Fraser Inc.* [1981] N.S.J. No. 306; *Kennedy v. Gescan Ltd.* [1991] B.C.J. No. 3612, 41 C.C.E.L. 134.

[101] I agree that where losses may have occurred because of the restructuring either because of Remcorp's demands on cashflow of the company or because of severance paid out to employees or even accounting anomalies, these calculations are not quantifiable in a meaningful way.

[102] What is clear from the evidence is the first quarter of 2002 that earings for the division was managed by Mr. MacLean, were on target to provide him with at least a $5000 quarterly bonus.

[103] I accept that with the departure of the Royal Bank as a client there was some reduction in revenue which would have impacted on Mr. MacLean's capacity to earn bonuses in 2002. Therefore, I find that a bonus at $20,000 is more realistic for calculation purposes for 2002, rather than the $25,013.93 as averaged and proposed by the plaintiff. The first quarter's performance thus reflects the loss of the Royal Bank as a client. Had Mr. MacLean remained in charge of the Keltic division I accept that this level of performance would have been achieved. Also clear from the evidence is the fact that CrossOff placed on their books for June 30, 2002 the sum of $35,000 in severance for Mr. MacLean, a severance never paid to him.

[104] The plaintiff has provided the court with a summary of the plaintiff's financial claim, which reflects the 15 month notice period and takes into consideration increases in Mr. MacLean's salary while at AGC.

[105] Those figures are as follows:

1.	Aug 1 - Jan 31, 2003 (Six months)	A.	Salary Loss ($75,000 - $65,000 x 6 mos)	$ 5,000.00
		B.	**Less** Salary earned at AGC and salary paid By CrossOff Aug 1-15	($ 3,125.00)
			Amount Owing	$ 1,875.00

		C.	**Plus** profit sharing/ bonus ($25,013.93 / 2)	$12,506.96
		D.	**Total**	**$14,381.96**
2.	Feb 1, 2003 - Jul 31, 2003 (Six months)	A.	Salary Loss ($75,000 - $70,000 X 6 mos)	$ 2,500.00
		B.	**Plus** Profit Sharing ($25,013.93 / 12)	$ 12,506.96
		C.	**Total**	**$ 15,006.96**
3.	August, 2003	A.	No Salary Loss	
		B.	Profit Sharing/Bonus ($25,013.93 / 12)	$ 2,084.49
		C.	**Total**	**$ 2,084.49**
4.	September, 2003	A.	No Salary Loss	
		B.	Profit Sharing ($25,013.93 / 12)	$ 2,084.49
			Less AGC Profit Sharing ($5,000.00 / 12)	$ 416.67
		C.	**Total**	**$ 1,667.82**
5.	October, 2003	A.	No Salary Loss	
		B.	Profit Sharing ($25,013.93 / 12)	$ 2,084.49
			Less AGC Profit Sharing	

			$$5,000.00 / 12)	$ 416.67
		C.	**Total**	**$ 1,667.82**
6.	**TOTAL (1-5)**			**$ 34,809.05**

[106] I have found that the loss of the Royal Bank business in 2001 would have hurt the plaintiff's 2002 bonus opportunity and that a figure of $20,000 should be applied.

[107] Therefore the adjustment to this figure results in the following calculation:

1.	Aug 1 - Jan 31, 2003 (Six months)	A.	Salary Loss	$ 1,875.00
		B.	Profit Sharing/Bonus ($20,000 / 12)	$ 10,000.00
		C.	**Total**	**$ 11,875.00**
2.	Feb 1, 2003 - Jul 31, 2003 (Six months)	A.	Salary Loss	$ 2,500.00
		B.	Profit Sharing/Bonus ($20,000 / 12)	$ 10,000.00
		C.	**Total**	**$ 12,500.00**
3.	August, 2003	A.	No Salary Loss	
		B.	Profit Sharing/Bonus ($20,000 / 12)	$ 1,666.66
		C.	**Total**	**$ 1,666.66**
4.	September, 2003	A.	No Salary Loss	

	B.	Profit Sharing/Bonus ($20,000 / 12)	$ 1,666.66
		Less AGC Profit Sharing ($5,000.00 / 12)	$ 416.67
	C.	**Total**	**$ 1,249.99**
5. October, 2003	A.	No Salary Loss	
	B.	Profit Sharing/Bonus ($20,000 / 12)	$ 1,666.66
		Less AGC Profit Sharing $$5,000.00 / 12)	$ 416.67
	C.	**Total**	**$ 1,249.99**
6. **TOTAL (1-5)**			**$ 28,541.64**

[108] The total salary loss and lost bonus for the 15 month period deemed notice period is therefore $28,541.64.

[109] In addition, Mr. MacLean did not receive any profit sharing/bonus for the 1st six months of 2002. This sum is best calculated from the actual figures relating to profits in 2001 which I accept to be 5% of $514,900 as shown on Exhibit 6. Therefore, one-half of $25,745 is $12,872.50. This figure is actually slightly lower than a possible calculation using the Chief Financial Officer's calculation of profits at over $532,000 for the period.

[110] The plaintiff has also asked for a recalculation of the car allowance figure appearing on his T-4 slip for 2002, which appears to allocate $8409.87 for car expense, when in earlier years this allocation was $2389.89. However, it is speculation that the higher allocation relates to a lease payout charge, upon his turning in his vehicle to CrossOff in July 2005. Absent any real evidence concerning this allocation I decline to make any further adjustment in favour of the

plaintiff for this cost. No other special damages or aggravated damages are appropriate in the circumstances of this case.

[111] Therefore the plaintiff shall have judgment for sum of $41,414.14 with pre-trial interest thereon and recovery of their costs in this action. The defendant's counterclaim is dismissed, as it is without merit.

[112] In the absence of the parties agreeing on the matter of costs and pre-trial interest, I am prepared to hear from counsel.

Justice M. Heather Robertson