IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Atlantic Business Interiors Ltd. v. Hipson, 2004 NSSC 32

Date: 20040311
Docket: S.H. No. 153027
Registry: Halifax

Between:

Atlantic Business Interiors Limited

Plaintiff

-and-

Scott Hipson and **MMP Office Interiors Incorporated**

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: January 12-16 and 19, 20, 22, 2004 at Halifax, Nova Scotia

Written Decision: March 11, 2004

Counsel: Counsel for the Plaintiff - Peter Bryson, Q.C. and Cheryl Hodder

Counsel for the Defendants - Jonathan Stobie, Q.C. and Lisa Gallivan

INTRODUCTION

[1] This is an action by Atlantic Business Interiors Limited ("ABI") against former employee Scott Hipson and his new employer, MMP Office Interiors Inc. ("Office Interiors"), for damages arising from the concurrent loss by ABI to Office Interiors of one of its valued customers, Information Technology Institute ("ITI"), in early 1998.

[2] ABI and Office Interiors are both major players in the office furnishings business in Nova Scotia. They are keen competitors in the industry, dating back to 1992 when Office Interiors was formed. ABI is the territorial dealer for the Steelcase product line, while Office Interiors is the territorial dealer for the Haworth product line. Steelcase and Haworth are the leading manufacturers of office furnishings in Canada and are keenly competitive themselves.

[3] Mr. Hipson is presently 37 years of age and has spent virtually his whole working life as a sales representative in the office furnishings industry. He essentially began in a sales capacity with Thompson Office Interiors in 1987 before moving to ABI in 1994 and then to Office Interiors in early 1998. One of the major accounts he serviced as sales representative while at ABI was ITI, a then fast growing company whose business concept was the training and placement of university students in the information technology sector. In that pursuit, ITI opened up several schools across Canada and soon became the largest information technology school of its kind in the country. This activity generated a very high demand for office and classroom furnishings, both in terms of volume and timeliness of delivery and installation for the opening or upgrading of schools.

[4] Mr. Hipson was first assigned to the ITI account by ABI management some time in 1996. He thereafter became the exclusive sales representative at ABI for that account until his resignation given to ABI on February 27, 1998. On March 30, 1998 he commenced his new employment at Office Interiors in the newly created position of Director of Business Development - IT Sector, reporting to the Vice President-Sales. Beginning in the following month, ITI moved most of its business to Office Interiors where it ultimately resumed its customer relationship with Mr. Hipson as sales representative. This lawsuit is over the loss of that business by ABI.

[5] Coupled with that is a counterclaim by Mr. Hipson against ABI alleging constructive dismissal by reason of the unilateral change made by ABI in its compensation plan for sales representatives on one month's notice, effective May 1, 1997. The counterclaim further alleges breach of contract by ABI for the withholding of his final commissions cheque and the unauthorized withdrawal of his final pay deposit from his personal bank account. These two sums were actually paid to him shortly before trial, but a punitive damages claim continues to be pursued, in addition to the damages claimed for constructive dismissal. The measure of those damages is the amount of the reduced commissions under the new formula spanning the ten month period from May 1, 1997 until Mr. Hipson's resignation on February 27, 1998.

FACTS CHRONOLOGY - AN OVERVIEW

[6] I begin with an overview of the chronology of events giving rise to this litigation, the accuracy of which was agreed to by both counsel in their closing submissions.

[7] The pertinent history dates back to 1994 when Mr. Hipson moved his employment as a sales representative from Thompsons to ABI. During the hiring process at ABI, he was presented with (and later signed on his start date of June 20, 1994) an employment agreement which contains the following two pertinent clauses:

> L. You acknowledge, by accepting this offer, that as a sales representative with Atlantic Business Interiors Limited you will gain a knowledge of, and a close working relationship with Atlantic Business Interiors' customers, which would injure Atlantic Business Interiors if made available to a competitor or if used for competitive purposes. You therefore agree that, for a period of twelve (12) months from the termination of your employment with Atlantic Business Interiors Limited for any reason or cause, you will not, within the geographical area of mainland Nova Scotia, engage in, directly or indirectly, or be employed by another employer engaged in, a business which is in competition with Atlantic Business Interiors Limited in a position in which the duties are the same of similar to those duties that you will perform during your employment with Atlantic Business Interiors Limited, nor shall you solicit or assist others in soliciting the customers, sales agents and/or clientele of Atlantic Business Interiors for a period of twelve (12) months following the termination of your employment for any reason whatsoever.
>
> **REMUNERATION** ...Atlantic Business Interiors Limited reserves the right to unilaterally introduce new salary and/or commission arrangements designed to fairly remunerate you for your efforts. If you choose not to accept the proposed salary and/or commission arrangement, you shall be deemed to have given your notice of resignation from Atlantic Business Interiors Limited.

[8] From the time that ABI first acquired the ITI account some time in 1996 until Mr. Hipson’s resignation on February 27, 1998, ABI was the principal supplier of office furnishings to ITI. Sales in excess of $900,000 were generated during that period. The customer relationship was not an exclusive one, however, since ITI bought some of its furniture requirements from other suppliers, including purchases through the Haworth dealer network. Included among those other suppliers was Office Interiors, albeit in a modest way.

[9] More specifically, in 1996 ITI purchased Haworth furniture products at a cost of approximately $250,000 for installation in its Halifax and Moncton schools. These transactions originated, however, with Haworth’s Ottawa dealer. Office Interiors’ role was relegated to that of the local installing dealer. That transaction was followed in December of 1996 with a further ITI order in the approximate amount of $47,000, but again the original quotation came from an Ottawa area dealer which was later transposed to Office Interiors in a somewhat unusual network arrangement. In the calendar year 1997, ITI’s purchase orders to Office Interiors amounted to less than $500, subsequent to which no purchase orders were placed with Office Interiors until April of 1998.

[10] When Mr. Hipson was first assigned the ITI account some time in 1996, he dealt with Mr. Jerry Baillie at ITI whose responsibilities included the role of a facilitator or troubleshooter to make sure the school projects were completed on time. This included, of course, the timely delivery and installation of office and classroom furnishings. With Mr. Baillie easing into semi-retirement, however, ITI hired Mr. Gary Mannette in the fall of 1997 to perform that role. He was first

engaged on a contract basis in September of 1997 and then hired as a full time employee in the position of Facilities Manager as of November 1, 1997. In effect, Mr. Mannette was Mr. Baillie's successor in handling ITI's furniture requirements and thereby became the person through whom Mr. Hipson maintained the customer relationship between ABI and ITI until his resignation some four months later on February 27, 1998.

[11] The next events of significance in this chronology are the meetings held between Mr. Hipson and Mr. John Patterson (Vice President-Sales of Office Interiors) which spanned the first three months of 1998 and led to Mr. Hipson's change of employment. It was also in early January of 1998 that Mr. Patterson met with Mr. Mannette at ITI at the latter's request to discuss the possibility of doing business together, following a service incident with ABI installers of a Halifax classroom project over the Christmas break.

[12] On February 27, 1998 Mr. Hipson handed his letter of resignation to ABI. Earlier that day, he met privately with Mr. Mannette to inform him of his imminent resignation. He similarly met with his contacts at Maritime Tel&Tel, his other major account, for the same purpose the day before. On the day after his resignation, ABI's three year term Purchase Contract with Maritime Tel&Tel expired.

[13] On March 27, 1998, following his meetings with Mr. Mannette, Mr. Patterson sent to Haworth what is known in the industry as a Special Pricing Agreement request in trying to win Office Interiors' business for the supply and

installation of classroom furniture at two Halifax locations (City Centre and Park Lane). On the following Monday, March 30^{th}, Mr. Hipson started work at Office Interiors under an employment agreement dated March 27^{th} and executed on March 30^{th}. On the following day, March 31^{st} , Mr. Mannette's name was added to Office Interiors' internal customer contact list.

[14] Soon thereafter, on April 4, 1998, Office Interiors supplied ITI with some loaner furniture in a further effort to cultivate its business. Then, on April 17, 1998, ITI placed its first sales order with Office Interiors pursuant to the Special Pricing Agreement earlier referred to for ITI's furniture requirements for the City Centre and Park Lane classrooms. On the same date, as many as four telephone calls were made by Mr. Hipson to Mr. Mannette. Four days prior to that, on April 13^{th}, Mr. Patterson sent a fax to Mr. Mannette attaching the product listings for the two new Halifax classrooms and inviting him to direct any questions to either Mr. Hipson or himself.

[15] Further evidence where the parties are in some discord will be reviewed later in this decision to fill a number of gaps in this chronology overview, including that until June of 1998 when Mr. Hipson acknowledged that the ITI account was assigned to him at Office Interiors. It was in that same month that Mr. Patterson listed ITI as a "project win" for Office Interiors at a company sales retreat.

[16] It was in August of 1998 when Office Interiors' invoices began to flow to ITI for the purchase orders earlier placed in April. The business relationship between Office Interiors and ITI then continued on a regular basis, culminating in Office Interiors winning a National Sales Agreement with ITI over a competitive bid by ABI in the Spring of 1999. That business relationship was maintained through Mr. Hipson on behalf of Office Interiors and Mr. Mannette on behalf of ITI until Mr. Mannette's employment was terminated by ITI in February of 1999.

ISSUES

[17] Within this overview of the chronology of events, a number of legal issues emerge which require a closer scrutiny of the surrounding evidence. These issues can be stated as follows:

(A) At the time of Mr. Hipson's hiring, did ABI misrepresent to him that the restrictive covenant in his employment agreement would not be enforceable against him so as to estop it from now attempting to rely on that covenant?

(B) If not so estopped from relying on the restrictive covenant, is the covenant nonetheless unenforceable because of a failure to meet the common law tests of reasonableness between the parties and with reference to the public interest?

(C) If the restrictive covenant is unenforceable because it fails to meet these common law tests, was Mr. Hipson nonetheless under a common law fiduciary duty as a departing employee not to solicit ABI's customers (and, in particular, ITI) after moving to Office Interiors?

(D) If Mr. Hipson was under such a fiduciary duty, or if the restrictive covenant remains enforceable against him, did he breach his common law fiduciary duty or the restrictive covenant respectively and thereby cause the damages sustained by ABI through its loss of ITI's business?

(E) If such breach and causation of damages is established by ABI, what quantum of damages should be awarded to it?

(F) With respect to the counterclaim, has Mr. Hipson established that he was constructively dismissed from his employment with ABI by reason of the unilateral change in his compensation plan effective May 1, 1997?

(G) Is Mr. Hipson entitled to an award of punitive damages by reason of ABI's withholding of his final commission cheque and its orchestrated withdrawal of his final pay deposit from his personal bank account, which sums were not restored to him until shortly before trial?

LEGAL ANALYSIS AND FINDINGS

[18] (A) ESTOPPEL ISSUE

The modern law of estoppel is summed up by Fridman in *The Law of Contract* (4th Ed., 1999) at page 581-2 as follows:

> There would seem now, in modern law, to be a firm foundation for the proposition that even without a technically correct variation of a contract, there may be the alteration (possibly even the extinction) of contractual rights and obligations as a consequence of some words or conduct leading the other party into a certain belief as to the contractual position between the parties, as long as this has led to some reliance by the party to whom the words were spoken or the conduct performed. Once he has changed

> his position in consequence the other party cannot return to the original legal situation which obtained between them. He is estopped.

[19] Mr. Hipson was hired by ABI on June 20, 1994 after being recruited by Michael Forward, who was then the company's Vice President and Chief Operating Officer. During the hiring process, Mr. Hipson was given a proposed employment agreement to review which contained the two clauses earlier recited in paragraph 7 of this decision. Mr. Hipson did not voice any objection to the clause pertaining to changes in his compensation plan but he testified that he did voice his concern over the inclusion of the restrictive covenant. He said he had not seen one before and felt uncomfortable with it because he was not sure what else he could do for an occupation if he left ABI. Mr. Forward's response, according to Mr. Hipson's testimony on direct examination, was to the effect that he shouldn't be worried about the covenant, it being something that the owner of the company, Tom Rose, inserted in the company's standard form employment agreement as a scare tactic so that departing employees wouldn't go to the competition. He says he signed the contract, without seeking legal advice, with the understanding that the restrictive covenant would be nothing to worry about.

[20] In his cross examination, Mr. Hipson acknowledged his belief that Mr. Rose as owner of the company might try to enforce the restrictive covenant to protect ABI's business. When his earlier discovery evidence was put to him that he believed the clause wasn't "inevitably enforceable", he said what he was getting at was that he might well have to go through a lawsuit but that he didn't think the clause would be enforceable in any circumstances. He thought of it as an intimidation factor by ABI to discourage departing employees from going to the

competition.

[21] Mr. Forward testified that he had no specific recollection of ever discussing the restrictive covenant with Mr. Hipson at the time he was hired. He said that his practice, if the subject was raised, was to explain to the prospective employee that the restrictive covenant was inserted for the protection of the organization and to safeguard confidential information. He said his practice was to use a parable of planting seeds in an orchard and wanting to prevent others from harvesting the fruit after the planter did all the work. He adamantly denied having made any representation to Mr. Hipson that ABI could not, or would not, enforce the covenant.

[22] Mr. Hipson resigned from ABI on February 27, 1998 on two weeks' notice. When he was called in for a meeting the following Monday with Mr. Forward and Mr. David Fennell (then Vice President-Sales of ABI), and confirmed he was not about to change his mind, he was presented with a letter setting out the ground rules of his two week notice period and, in no uncertain terms, informing him that ABI intended to enforce the restrictive covenant, and would resort to legal action if necessary.

[23] Mr. Hipson acknowledged that he did not, either at this meeting, or upon receipt of a subsequent letter to the same effect from Mr. Bryson, protest to anyone that the restrictive covenant was not part of the agreement he made. He said on cross-examination that he simply didn't see any point in doing so. He also acknowledged that prior to leaving ABI, he asked other unnamed persons about

the enforcement of restrictive covenants generally. He also took the precaution of showing the restrictive covenant to Office Interiors in his initial discussions with Mr. John Patterson prior to his being hired there.

[24] In support of Mr. Hipson's version of the evidence, defence counsel also called as a witness Sandra Batten, who joined ABI in a sales support capacity in 1991. In 1995, when she was promoted to a design technician/sales force support position, she was asked by Mr. Forward to sign a new employment agreement containing the same restrictive covenant. She testified that Mr. Forward told her words to the effect that "we both know its not worth the paper its written on". She felt she had little choice but to sign the agreement to keep the new position but she knew that the clause remained as part of the contract and that ABI might try to enforce the covenant if necessary.

[25] From all of the foregoing evidence, I am satisfied that Mr. Hipson did voice his concern over the restrictive covenant to Mr. Forward during the hiring process. I am also satisfied, however, that even if Mr. Forward did voice an opinion about the enforceability of the clause, that in itself was not a representation that Mr. Hipson could have safely relied upon in the face of other knowledge he had. Put at its highest, Mr. Hipson says that he was given to understand that Mr. Forward considered the restrictive covenant to be unenforceable but that it was inserted in the employment agreement at the insistence of Mr. Rose as a scare tactic to prevent departing employees from going to the competition. This is something less than a promise or assurance that ABI as a corporate entity intended to relinquish the covenant and would not ever attempt to enforce it. Indeed, Mr.

Hipson knew from Mr. Forward that there was a risk that Mr. Rose as the owner and directing mind of ABI might well attempt to do so to protect his business. It follows that Mr. Hipson must have known that the covenant was not being relinquished by ABI or removed from the employment agreement, as further borne out by the fact that he did not protest otherwise to Messrs. Forward and Fennell when they presented him with ABI's letter on the Monday following his resignation, or at any other time until this litigation began.

[26] In the face of such knowledge, Mr. Hipson cannot successfully maintain that he reasonably relied on what Mr. Forward told him to negate the operation of the restrictive covenant. I therefore find that ABI is not estopped from suing on the restrictive covenant.

[27] (B) VALIDITY OF RESTRICTIVE COVENANT UNDER COMMON LAW TESTS
The leading Canadian case on non-competition clauses in an employment context is *Elsley v. J.G. Collins Insurance Agencies Ltd.* [1978] 2 S.C.R. 916. In that case, the defendant sold his general insurance agency business to the plaintiff and shortly thereafter, entered into an employment agreement to serve as its manager. This agreement contained a non-competition clause precluding the employee from engaging in the business of a general insurance agent within a defined area for a period of five years after any termination of his employment. The employee then managed the plaintiff's business for 17 years and dealt with the customers of the insurance agency almost to the exclusion of the plaintiff. He thereby gained knowledge of the insurable assets, financial credit, likes and dislikes and idiosyncrasies of each customer, in a recurring and confidential relationship. After

leaving this employment, the employee established his own general insurance agency and actively solicited clients of the plaintiff which led to a large number of clients transferring their business to him. The plaintiff sued for breach of the non-competition clause.

[28] A concise summary of the *Elsley* case is found in the judgment of MacPherson, J.A. of the Ontario Court of Appeal in *Lyons v. Multari* (2000) 50 O.R. (3rd) 526. Beginning at page 531, Justice MacPherson writes:

> In *Elsley*, Dickson J. began his analysis by recognizing that such clauses presented a collision between two long-standing common law principles - discouraging restraints on trade and respecting freedom of contract. Dickson J. explained, at p. 923:
>
> > The principles to be applied in considering restrictive covenants of employment are well-established . . . A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power.
>
> In *Elsley*, Dickson J. said that a proper reconciliation of these conflicting principles was anchored in the notion of reasonableness, which could only be determined "upon an overall assessment of the clause, the agreement within which it is found, and all of the surrounding circumstances" (at p. 924).
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> Importantly, Dickson J. then set out the factors that require special attention when considering a restrictive covenant in an employment contract. In his view, there are three such factors: first, whether the employer has a proprietary interest entitled to protection; second, whether the temporal or spatial features of the clause are too broad; and third, whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employee (at p. 925).

[29] In his analysis of the third of these factors, Justice MacPherson went on to consider the relationship between non-solicitation and non-competition clauses in a professional employment context (which I consider to be apt to Mr. Hipson's employment as well). His analysis reads (beginning at page 533):

> It is quite common for employers to insist that their employees sign a contract containing a non-solicitation clause. This type of provision prohibits a departing employee from soliciting the customers of his or her previous employer.
>
> The non-competition clause is a more drastic weapon in an employer's arsenal. Its focus is much broader than an attempt to protect the employer's client or customer base; it extends to an attempt to keep the former employee out of the business. Usually, non-competition clauses are limited in terms of space and time ...
>
> An important question in the case law relates to the relationship between non-solicitation and non-competition clauses. Generally speaking, the courts will not enforce a non-competition clause if a non-solicitation clause would adequately protect an employer's interests. In *Elsley*, Dickson J. framed the inquiry in this fashion, at p. 925:
>
>> The next and crucial question is whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employer.
>
> Dickson J. continued, at p. 926:
>
> Whether a [non-competition] restriction is reasonably required for the protection of the covenantee can only be decided by considering the nature of the covenantee's business and the nature and character of the employment. Admittedly, an employer could not have a proprietary interest in people who were not actual or potential customers. Nevertheless, *in exceptional cases*, of which I think this is one, the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.

[30] Justice MacPherson then went on to address the question of whether or not the case before him was one of those "exceptional cases" where a simple non-solicitation clause would not suffice. He concluded in the final analysis that the plaintiff's legitimate interest in protecting his own referring dentists and patients could have been protected by a non-solicitation clause and that this was not "an exceptional case" where a non-competition clause could be justified for enforcement.

[31] A different result was reached in *Elsley*. Justice Dickson recognized that although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information and trade connections of the employer. He went on to say that the test of reasonableness can only be applied in the peculiar circumstances of a particular case and while other cases may help in enunciating broad general principles, they are otherwise of little assistance.

[32] After examining the facts in *Elsley*, the court concluded that that was an exceptional case where the nature of the employment justified a covenant prohibiting the employee not only from soliciting customers (which by itself would have been meaningless), but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers. It was therefore held that the non-competition clause was no wider than reasonably required in order to afford adequate protection to the employer.

[33] In both the *Elsley* and *Lyons* cases, the court was dealing with a non-competition clause defining certain temporal and spatial limits. In the present case, the restrictive covenant contains both a non-competition clause and a non-solicitation clause within the temporal and spatial limits specified. It is to be remembered, however, that courts decide on the validity of restrictive covenants as they are written by the parties and cannot "write down" a restrictive covenant into narrower terms which the court considers to be more reasonable in scope in the employment context at hand.

[34] Bearing the foregoing principles in mind, I now turn to a closer examination of the nature of ABI's business and the nature and character of Mr. Hipson' employment there, particularly as it relates to ITI. ABI is a major player in the office furnishings business in this area (as is Office Interiors). Its business volume grew significantly during the 1990's as did its number of employees (to about 50). One of those new employees was Mr. Hipson who was hired in 1994 as a sales representative. ABI's main territory at that time under its dealership agreement with the Steelcase manufacturer was mainland Nova Scotia.

[35] As an ABI sales representative, Mr. Hipson was responsible to assess and respond to a customer's needs including its product requirements and colour selection, to determine the discount pricing available to get the business in, and to generally maintain the customer relationship. A typical transaction with its customer ITI was usually generated by the opening of a new school. ITI retained an Ottawa architect, Richard Chmiel, to provide the necessary drawings and specifications for its office and classroom furnishings and layout. This work

usually specified the installation of Steelcase products (using Steelcase symbols), especially where systems furniture was being purchased. Given Mr. Chmiel's involvement, Mr. Hipson played a more limited role in the selection of the office furnishing products required, although the evidence disclosed that Mr. Chmiel's role began to be diminished by ITI in late 1997 or early 1998.

[36] Once the furniture requirements were finalized, Mr. Hipson would work up a price quotation for ITI which involved substantially discounted prices from the manufacturer's published price list. This involved a process of negotiation between ABI management and Steelcase to try and land the contract. Mr. Hipson was generally required to obtain the approval of ABI management for a proposed discount level unless it was one within his authorized minimum gross profit level.

[37] Once so approved, Mr. Hipson presented the quotation to ITI. If accepted, he would then finalize the order and place it with Steelcase along with the scheduling dates for delivery and installation. These dates were invariable critical to ITI which was under tight deadlines to open a new school on time or upgrade an existing school during a break in the academic programs. In acknowledging an order, Steelcase would confirm whether or not the requested scheduling dates could be met.

[38] Once delivered, the furniture product would then be installed by ABI unless the job site was outside its territory. In that event, the installation of the furnishings would be installed by another Steelcase dealer servicing that outside area. ABI's invoicing then followed on completion of the job which in turn

triggered the commission earned by the sales representative.

[39] During the time period between the assignment of the ITI account to him by Mr. Forward in 1996, and his resignation on February 27, 1998, Mr. Hipson achieved a sales volume on that account in excess of $900,000. As was contemplated by the wording of his restrictive covenant, Mr. Hipson thereby gained a knowledge of, and a close working relationship with ITI. Indeed, ABI allowed Mr. Hipson to be solely responsible for maintaining the ITI customer relationship. When first assigned the ITI account, Mr. Hipson's contact was Jerry Baillie who essentially acted as project manager and played a lead role in getting new school locations operational on time, including the purchase and installation of its furniture requirements. That job responsibility was later taken on by Gary Mannette who was hired by ITI as Facilities Manager effective November 1, 1997.

[40] As a result of this employment activity, Mr. Hipson became keenly familiar not only with the Steelcase product lines and its discounting strategies designed to win the ITI business, but also with the unique customer demands of ITI in its time of rapid growth. The logistics of opening several new schools, and upgrading existing schools, created very high customer demands in terms of product requirements and the scheduling for delivery and installation. Although Mr. Mannette served as Facilities Manager for ITI for only four months before Mr. Hipson's resignation, a close working relationship developed between them. Indeed, I conclude from the evidence that Mr. Mannette was very much dependent on Mr. Hipson and his experience to achieve the deadlines that he himself was under (of which more will be said later in this decision). At the time of his

resignation, the interface between the two companies was one almost exclusively between Mr. Hipson in a sales function and Mr. Mannette as the purchasing authority for ITI . Mr. Hipson thereby acquired a close working knowledge of ITI's product needs, scheduling requirements, and pricing expectations.

[41] To put all this in perspective, there must also be considered the extent to which this special knowledge of ITI's business was already known or available to Office Interiors when Mr. Hipson joined its employ. The evidence of Jim Mills, President of Office Interiors, (none of which was challenged on cross-examination) was that his company knows its competitors' product lines and general discount strategies. The product lines are, of course, publicly advertised both by catalogues and web sites and can be seen at trade shows. In addition, the manufacturer Haworth maintains, and shares with its dealers, its library on competitors' products.

[42] With respect to the discount pricing strategies of its competitors, including ABI, Office Interiors has two main sources. First, it develops its own knowledge from market experience which is primarily gained by the disclosure of competing bids after a contract is awarded, especially with public sector contracts. By having access to a competitor's published list price, and its bid on a specific contract, Office Interiors can pretty well deduct the discount pricing strategy that was used. Mr. Mills testified that there are very few secrets in the discounting strategies used in the office furnishings industry and that competing bids are usually extremely close.

[43] Moreover, Office Interiors has another valuable source in learning discount strategies through Haworth. Through its own market intelligence gathering, Haworth provides such analyses to its dealers based on current market conditions. That is not to say that Office Interiors can deduct the discount pricing strategies of ABI with precision, but the evidence is that it can develop a pretty good idea of where the competition will bid on a given contract. Similar evidence was given by Ms. Batten about information available to ABI from Steelcase concerning its competitors' discount practices.

[44] This evidence stands to reason. Moreover, there is no evidence whatsoever before the court that Mr. Hipson at any time imparted trade secrets or confidential information to Office Interiors pertaining to the ITI account. In the result, I am satisfied that the primary interest that ABI had in protecting, through the use of a restrictive covenant, was its trade connection with ITI, the responsibility for which was entrusted to Mr. Hipson to maintain in his capacity as sales representative. The question then becomes whether or not this is one of those exceptional cases where the impugned restrictive covenant was reasonably necessary to protect ABI's trade connection with ITI or whether by comparison, a non-solicitation clause would have been adequate to protect that interest.

[45] In assessing the reasonableness of the clause, the first question to be addressed, under the *Elsley* analysis, is whether ABI had a proprietary interest entitled to protection. What makes this case unique from most others is that the litigation is concerned only with ABI's loss of one customer, namely, ITI, rather than a broad segment of its customer base. While the reasonableness of the clause

must be considered in an overall context when the agreement was signed, the focus in this litigation is entirely on ABI's customer relationship with ITI.

[46] ITI was first brought into the ABI fold in 1996 primarily through the sales efforts of Mr. Forward. Through a number of meetings with ITI personnel, the introduction of a competitive lease program, and working closely with Steelcase to develop pricing and servicing support, Mr. Forward was slowly able to build the relationship between the two companies. At some point in 1996, Mr. Forward assigned the ITI account to Mr. Hipson who essentially took on full responsibility for maintaining that customer relationship on behalf of ABI. It was not an exclusive relationship but until Mr. Hipson's resignation on February 27, 1998, ABI secured the vast majority of ITI's business. It became a highly valued trade connection, one that was personified by the close business relationship developed and maintained between Mr. Hipson and Mr. Mannette. Such trade attachments with customers are a form of goodwill and thereby a substantial business asset which can be vulnerable to competition, particularly from ex-employees.

[47] I hasten to add that ABI did not have any proprietary interest in the professional skills and experience developed by Mr. Hipson, even to the extent they were acquired during his time working there. Neither does an employer have any proprietary right *per se* to its customers. However, the case authorities have consistently held that employers can have a legitimate proprietary interest in their trade connections and their goodwill (see, for example, *Winnipeg Livestock Sales Ltd. v. Plewman* (2000) MBCA 60 at para. 27 and the authorities cited therein). I conclude that this is one of those cases where ABI can properly be said to have

developed a legitimate proprietary interest in the nature of goodwill with respect to its trade connection with ITI as it grew into one of ABI's major customers.

[48] With that finding, it becomes necessary to move to the second and third inquiries mandated by *Elsley*, namely, the temporal and spatial limits of the covenant, and whether the covenant goes too far by restricting competition generally.

[49] The limits proscribed by the restrictive covenant in question were, geographically, mainland Nova Scotia and, temporally, 12 months following the termination of Mr. Hipson's employment. The geographical limit so specified was tied into the dealer territory then assigned to ABI by Steelcase as manufacturer. Mr. Hipson was not assigned any particular part of that territory and although the large majority of his business was transacted in Halifax Regional Municipality, he did service customers outside the Municipality as well. Considering both those factors, I do not consider the geographical restriction of mainland Nova Scotia to be an unreasonable limit. Neither do I consider the temporal limit of 12 months following the termination of Mr. Hipson's employment to be excessive and unreasonable, given the time and effort that might reasonably be entailed in rebuilding the customer relationship with entirely new sales personnel. Accordingly, the restrictive covenant survives this second part of the inquiry.

[50] The validity of the restrictive covenant therefore hinges on the third inquiry of whether the covenant goes too far by restricting competition generally. In reality, what ABI primarily sought to protect by the use of this clause was its trade

connections with its customers and any confidential information related thereto. It did not, in my view, need a sweeping non-competition clause to accomplish that. A simple non-solicitation clause would have afforded adequate protection, one that restricted Mr. Hipson, if he became a competitor, from soliciting any ABI customers with whom he had formally dealt during his employment there. Indeed, in an excerpt from his discovery evidence entered as an exhibit at trial, Mr. Rose acknowledged that the primary purpose of the covenant was that it be directed towards those accounts with which the salesperson had had direct contact. He went on to say at trial that if Mr. Hipson had moved his employment to Office Interiors without the corresponding loss of the ITI business by ABI, there would have been no litigation. It is obviously the loss of ITI's business entrusted to Mr. Hipson, and not keeping Mr. Hipson out of the industry altogether, that is driving this litigation.

[51] All things considered, I conclude that this is not an exceptional case where the more drastic weapon of a non-competition clause was reasonably necessary to protect the interest of ABI in its trade connections. As earlier noted, courts will not write down excessively broad restrictive covenants to narrower terms more reasonable in their scope (which here would have been a simple non-solicitation clause as described in the preceding paragraph). I therefore find that the restrictive covenant inserted in Mr. Hipson's employment agreement as clause L is unenforceable, in failing to meet the common law tests for validity above described.

[52] (C) THE COMMON LAW FIDUCIARY DUTY OF A DEPARTING EMPLOYEE As submitted by ABI's counsel in closing arguments, another avenue by which the plaintiff can seek to establish liability apart from the enforcement of a restrictive covenant is through the common law fiduciary duty of a departing employee not to solicit former customers.

[53] In the legal text written by Mark Ellis on *Fiduciary Duties in Canada* (looseleaf ed.) the author engages in an extensive review of the case law where fiduciary duties have been fastened upon departing employees. In his introductory comments on the subject at p.16-1, Ellis writes that:

> Despite the conventional absence of a fiduciary responsibility on the part of an employee in a master-servant relationship, a fiduciary relationship has been found to exist with respect to both active and departing employees, where the requisite deposing of "trust and confidence" is extant. Generally, the law has developed a test for the imposing of a fiduciary quality into an employment relationship based primarily upon the employee's degree of responsibility in the enterprise. Thus, a "mere" employee will rarely be subjected to the duty of utmost good faith; an upper-level executive will rarely escape it.

[54] Ellis goes on to comment (at p. 16-14.1) on the apparent confusion that has developed in this area of the law over the years, resulting from the formulation by the courts of various tests for determining fiduciary status in trying to achieve a just result in the fact situation at hand. Among the tests noted are "top management", "senior management", "key personnel", and "vulnerability of the enterprise". The difficulty most often arises when the departing employee, like Mr. Hipson, is somewhere along the continuum between an upper level executive and a lower level employee. The courts have stressed that it is the nature of the job function and responsibility being performed, and not the job title, which will

be determinative.

[55] Overall, the case law demonstrates that varying degrees of trust and confidence, reliance and dependency can suffice to establish a fiduciary duty in an employment relationship, depending upon the fact situation. Corresponding with that is the degree of vulnerability of the employer should the departing employee move to the competition. It is always a question to be decided on the individual facts of each case whether the degree of responsibility, dependancy and vulnerability is strong enough to support a finding of fiduciary status.

[56] On the facts of this case, Mr. Hipson was assigned the ITI account sometime in 1996 after Mr. Forward had succeeded in earning its business for ABI. As noted earlier, ITI soon thereafter launched into a stage of very rapid growth, generating sales by ABI in excess of $900,000 the following year. This represented a special business opportunity for ABI, one that was entrusted to Mr. Hipson to develop and maintain. Mr. Hipson was, by all accounts, very good at his job and ABI permitted him to become solely responsible for the ITI customer relationship. In fulfilling that role, Mr. Hipson became keenly familiar with the unique customer demands of ITI (as earlier described) and what it took to keep the business.

[57] As a result, Mr. Hipson took on the key role in ABI's trade connection with ITI. He was thereby placed in a position of trust and confidence by ABI to nurture and maintain that trade connection on its behalf, a trade connection in which I have already found that ABI developed a legitimate proprietary interest in the

nature of goodwill. ABI was dependent on Mr. Hipson to preserve that trade connection and correspondingly, became more vulnerable to its loss if Mr. Hipson were to move to a strong competitor. This vulnerability was accentuated because, as I earlier found, Mr. Mannette was also very much dependent on Mr. Hipson and his experience to achieve the tight deadlines that he himself was under.

[58] I recognize that ordinary sales employees are not easily fixed with a fiduciary duty to their former employer, as long as they do not utilize trade secrets, customer lists or other confidential information acquired during their employment. However, because of the special circumstances of this case which I have just reviewed, and in particular the direct responsibility that was entrusted to Mr. Hipson to nurture and maintain the ITI customer relationship, I conclude that a finding should be made that Mr. Hipson owed a fiduciary duty to ABI not to solicit the ITI account after moving to a competitor.

[59] (D) BREACH AND CAUSATION OF DAMAGES

For convenience, I will deal with the pivotal issues of breach and causation of damages together in this decision and I begin with a review of the background events that led to Mr. Hipson's change of employment.

[60] Mr. Hipson's discontent with his employment at ABI began with his employer's implementation of a change in his compensation plan on one month's notice, effective May 1, 1997. Subsequent to that, he felt that there was a deterioration in the level of service that ABI was supplying to its customers, mostly in respect of the installation side of the work. He says that he began to

look around at other job opportunities in the office furnishings industry, perhaps in a different role from that of a sales representative, including the possibility of joining his brother's agency business.

[61] None of those inquiries ever amounted to anything, however, until he decided to call John Patterson, Senior Vice President-Sales at Office Interiors, sometime in January of 1998. Mr. Hipson testified that he had reservations about moving to another dealer in the industry but was interested in talking to Mr. Patterson about job opportunities generally. Mr. Patterson knew Mr. Hipson by reputation and thought he would be a good addition to Office Interiors in its current growth mode. He was therefore excited at the prospect of acquiring Mr. Hipson's services and was encouraging that they should meet. They soon arranged to do so at an unobtrusive location.

[62] Although Mr. Hipson was more guarded in describing the conversation at that first meeting, Mr. Patterson testified that it was clear to him that Mr. Hipson intended to leave ABI. Mr. Patterson testified that he then talked to Mr. Hipson mainly about how Office Interiors conducts its business and how it pays its sales representatives. Both attested that Mr. Hipson informed Mr. Patterson from the outset that Office Interiors could not expect that Mr. Hipson would bring any of his existing customers with him if he were to move his employment there. Mr. Patterson testified that his reply was that he was not interested in Mr. Hipson's customers but rather that he was interested in having Mr. Hipson join Office Interiors to help with their growing business. Mr. Hipson said he would think about it.

[63] At Mr. Hipson's initiative, a second meeting was held in late January or early February. Mr. Hipson testified that Mr. Patterson had piqued his interest and that he was interested in more about what he had to say. The discussions between the two then became a bit more detailed as they talked about the information technology boom and the business opportunities that were developing in that market. Office Interiors was interested in getting into that market and felt that they needed someone to lead that charge. That someone, in Mr. Patterson's estimation, was Mr. Hipson and they decided that they should meet again.

[64] Although Mr. Hipson did not recall a third meeting prior to his resignation from ABI, I am satisfied from the evidence of Mr. Patterson that a third meeting did take place in the latter half of February. Mr. Patterson testified that it was at this meeting that he gave Mr. Hipson a compensation plan and that they talked of his pending departure date from ABI. Either at this meeting or the previous meeting, Mr. Hipson alerted Mr. Patterson to the restrictive covenant in his employment agreement with ABI (which Office Interiors then referred to legal counsel for an opinion). Both witnesses maintained that they did not discuss the ITI business at any of these meetings although Mr. Hipson conceded in cross-examination that ITI's name may have come up in their discussions about the information technology sector generally. He denied, however, that that was a focus of conversation or that ITI was ever mentioned as a specific target customer.

[65] When Mr. Hipson resigned from ABI soon after on February 27, 1998, he did not have a specific job offer from Office Interiors. However, he well knew by this time that Office Interiors wanted to hire him to develop business in the

information technology sector and he had a good idea of what his compensation and other terms of employment would be. He was therefore able to give his resignation with a good deal of confidence that he would soon be taking up new employment with Office Interiors.

[66] Messrs. Hipson and Patterson met yet again in March to further their discussions and by March 27th, a written employment offer had been prepared for Mr. Hipson's consideration. He was offered the new position of Director of Business Development-ITI sector with responsibility to both develop new accounts and to service existing accounts. Mr. Hipson accepted the offer and commenced work with Office Interiors the following Monday, March 30, 1998. Mr. Hipson was given a sales budget for the balance of the calendar year of $750,000 and was also given a minimum income guarantee of $80,000 for his first year of employment.

[67] At this juncture, I turn to the evidence surrounding parallel discussions going on between Mr. Patterson and Mr. Mannette of ITI during those first three months of 1998. As recited earlier, Mr. Mannette became the full time Facilities Manager of ITI effective November 1, 1997 (after having worked on a contract basis for ITI for a couple of months prior to that). Although Mr. Mannette testified that he got along well with Mr. Hipson , he said that he was dissatisfied with ABI because of service issues (in particular, a service incident at the Halifax classroom project during the Christmas break), and because of a credit hold incident where ABI had delayed the placement of a furniture order with the manufacturer because ITI had surpassed its credit limit. He testified that this led

him to approach Mr. Patterson to inquire about the possibility of doing business with Office Interiors.

[68] Mr. Patterson jumped at the opportunity and a meeting was soon arranged to discuss ITI's furniture requirements for the City Centre and Parklane classrooms in Halifax that were then a work in progress. This first meeting apparently took place sometime in January of 1998. After familiarizing himself with ITI's requirements for the project through Mr. Mannette, Mr. Patterson made what is known in the industry as a Special Pricing Agreement request to Haworth, seeking approval for special discounts to win the business. In his notes attached to this pricing request, Mr. Patterson informed Haworth that Office Interiors was being given this long awaited opportunity, with all of ITI's future business hinging on it. He advocated to Haworth that "this is our time to perform". He also noted that he had been shown Steelcase prices by Mr. Mannette relating to the subject product and that Haworth should match the Steelcase discounts. He urged upon Haworth that the ITI account was one that he had been working on for two (+) years and that ITI was ready to make a move after experiencing poor service from ABI in recent months.

[69] There was much controversy in the evidence over the timing of the preparation of the Special Pricing Agreement request. The computer generated document itself bears the date of March 27, 1998. However, Mr. Patterson went through an exercise on his computer while on the witness stand in trying to show that the actual creation date of the document was February 25, 1998 at which time, of course, Mr. Hipson was still employed at ABI. I am left with some skepticism

by that explanation as to whether this document was actually created on February 25, 1998 but it is not a point crucial to this decision. In any event, Mr. Patterson was successful in securing the ITI contract for the City Centre and Park Lane classrooms, with the purchase order having been placed on April 17, 1998.

[70] Meanwhile, having started in his new position at Office Interiors on March 30, 1998, Mr. Hipson embarked upon a two to three month training program which essentially consisted of on the job training with Mr. Patterson to whom he reported. This included familiarization with the Haworth product lines, its discount pricing strategies, and the internal office procedures and practices at Office Interiors. It also included making sales calls with Mr. Patterson on customers, including ITI.

[71] The first documented contact between Mr. Hipson and ITI after his employment at Office Interiors began was April 7, 1998 in connection with a loaner transaction of chairs. Shortly thereafter, on April 13, 1998, Mr. Patterson sent a fax to Mr. Mannette in connection with the City Centre and Park Lane classrooms attaching the product listings and inviting Mr. Mannette to contact either Mr. Hipson or himself if there were any questions. As noted above, the sales order for that project soon followed on April 17. It was authored by Mr. Patterson but showed Mr. Hipson as the sales rep on the contract. Telephone records entered in evidence also established that there were as many as four telephone calls made by Mr. Hipson to Mr. Mannette on the date of April 17th.

[72] The next transaction with ITI was evidenced by a sales order created May 28, 1998 which showed Mr. Hipson as both the author of the computer entry and the sales representative. Similarly, Mr. Hipson was named as the sales representative in the next sales order which followed on April 27, 1998 and again in May. The next development was in June when Mr. Hipson was formally assigned the ITI account by Mr. Patterson. The direct relationship between Mr. Hipson and Mr. Mannette was thereby restored and in the result, the lion's share of Mr. Hipson's commission income earned thereafter was attributable to a large volume of sales to ITI. ABI's sales to ITI, on the other hand, virtually dried up as soon as Mr. Hipson left its employ.

[73] The explanation given by both Messrs. Patterson and Hipson for the almost immediate appearance of Mr. Hipson's name on the paper trail of transactions between Office Interiors and ITI is that Mr. Hipson was job shadowing Mr. Patterson over the first two to three months and in that role, placed orders for transactions made by Mr. Patterson as part of his training on his new employer's software. Mr. Patterson further explained that Office Interiors took the decision to credit Mr. Hipson with the commission income on those early transactions to offset his guaranteed minimum income in his first year of $80,000. He said that in effect, the company was subsidizing Mr. Hipson's commission income by making these credits in order to cover his guaranteed income. Mr. Patterson also maintained that during his training period, Mr. Hipson did not contact any Office Interior customers on his own. He said that Mr. Hipson's calls to Mr. Mannette in April were made on his express instruction.

[74] Indeed, Mr. Patterson maintained throughout his testimony that it was he who secured the ITI account on behalf of Office Interiors, beginning with the Halifax classrooms project that he transacted with Mr. Mannette. He said that Mr. Hipson really had nothing to do with generating that sale because it had already been made by the time Mr. Hipson became involved on behalf of Office Interiors. Mr. Patterson regarded the success of that transaction as instrumental in winning over ITI's business. Once the account was brought in as a result of his own longstanding efforts, Mr. Patterson said that Mr. Hipson was "transitioned" to handle the ITI account in June after his training was completed in trying to put the right resource with the right opportunity. Mr. Patterson was resolute in his denial that Mr. Hipson himself ever solicited ITI as a customer since joining the employ of Office Interiors.

[75] I return now to the evidence of Mr. Mannette. It was his testimony that because of the service issues and the credit hold incident, ITI started looking at other furniture suppliers around February or March of 1998. He acknowledged that it was at his initiative that ITI management made a decision to move its business to Office Interiors. He refused to acknowledge, however, that Mr. Hipson's move to Office Interiors had anything to do with that decision. He also denied that Mr. Hipson solicited ITI's business after moving his employment to Office Interiors.

[76] Contrasted with that is the evidence of Gary Blandford who was called as a rebuttal witness for ABI. Mr. Blandford was President and CEO of ITI and confirmed that the lead person responsible for office furnishings purchases for ITI

in the 1998 time frame was Mr. Mannette. Mr. Blandford underscored ITI's needs for delivery and installation of office furnishing products on time to facilitate the opening or upgrading of new schools. He described Mr. Hipson as a key person in that endeavour, referring to him as "our furnishings rep" at ABI.

[77] Mr. Blandford went on to say unequivocally that ITI moved its business to Office Interiors in early 1998 because Mr. Hipson had moved his employment there. He stated that Mr. Hipson knew the intricacies of ITI's business; that they liked him and wanted to stay with him. He further testified that Mr. Mannette had indicated that he wanted to move ITI's business to Office Interiors because Mr. Hipson had decided to move his employment there. He acknowledged that Mr. Mannette was in a very demanding job position in meeting ITI's many critical time lines and that he relied on Mr. Hipson to get the job done effectively. Mr. Blandford was aware of the credit hold incident in early 1998 but did not regard it as very significant because it was resolved so quickly and never became an operational issue. Neither did he speak of service issues as a significant factor behind the change. He said that if they had a problem, they would call Mr. Hipson, that he was good at his job and "that's why we stuck with him".

[78] I have recited the pertinent trial evidence at some length, perhaps at the risk of repetition from one issue to another, where the court is being asked by ABI to draw the inference that Mr. Hipson engaged in the solicitation of ITI's business after joining Office Interiors and thereby breached his fiduciary duty to his former employer. Messrs. Hipson, Patterson and Mannette all flatly deny that any such solicitation took place and there is no direct evidence otherwise to prove that it

did. Counsel for ABI nonetheless argues that the strength of the surrounding circumstantial evidence is compelling enough that such an inference should be drawn.

[79] In this a civil case, the inference to be drawn by the court from circumstantial evidence need not be the sole necessary conclusion. Rather, an inference may be properly drawn by the court where it is a reasonable one in the circumstances (see Cudmore on *Civil Evidence Handbook* (looseleaf ed.) at p. 2-30 ff.).

[80] There are case authorities illustrating the court's willingness to draw an inference of solicitation based on circumstantial evidence and, conversely, the court's refusal to draw such an inference (see, for example, *Reed Stenhouse Companies Ltd. v. Learning* (1991) 271 A.P.R. 271 and *Services Investors Ltee. v. Fainer* [2000] Q.J. No. 3294 respectively). However, each case must be decided on its own individual facts and it is of little assistance to look at others in this regard.

[81] Although downplayed in their evidence, I have little doubt but that Mr. Patterson and Mr. Hipson, in the course of their discussions leading to Mr. Hipson's change of employment, had it in the back of their minds that ITI (and perhaps MT&T) might follow Mr. Hipson to Office Interiors. After all, Mr. Patterson was then engaged in parallel discussions with Mr. Mannette trying to capitalize on getting ITI's business. He wanted to see Office Interiors expand its business into the information technology sector which is where Mr. Hipson had

both experience and connections. Once hired, he strategically placed Mr. Hipson in a job shadowing role as part of his training which would allow Mr. Hipson to assist in finalizing the details and the placing of a sales order for ITI's requirements for its Halifax classroom projects. That kept up Mr. Hipson's visibility and astutely placed "the right resource with the right opportunity". The evolution of that, of course, was Mr. Patterson's assignment of the ITI account to Mr. Hipson sometime in June.

[82] Mr. Hipson, on the other hand, took the calculated step of meeting with Mr. Mannette privately earlier on the day that he submitted his resignation to ABI. He testified that he did this as a courtesy and to explain to Mr. Mannette why he couldn't follow up on a certain business item. I conclude, however, that he also wanted to let Mr. Mannette know that moving to Office Interiors might be one of his options. Indeed, on cross examination he acknowledged his earlier discovery evidence that he thought he indicated to Mr. Mannette that a move to Office Interiors was a possibility that he was considering.

[83] It was, of course, only a month later that Mr. Hipson actually commenced his new employment with Office Interiors and from that point on, ITI moved virtually all of its business from ABI to Office Interiors.

[84] Notwithstanding these optics, on the whole of the evidence I am not prepared to draw the inference that Mr. Hipson solicited ITI's business away from ABI. That is a conclusion I reach upon a careful consideration of the evidence. First of all, I do not for a moment accept Mr. Mannette's assertion that he initiated

ITI's change in supplier of office furnishings simply because of the service issues and credit hold incident he experienced with ABI. The seriousness of these ostensible reasons for change were very much overplayed, in my opinion, which I take to be attributable to Mr. Mannette's obvious favoritism in this litigation to Office Interiors' position. This favoritism was manifested both by Mr. Mannette's one sided cooperation with Office Interiors' legal counsel before trial and by his evasiveness and demeanor when being cross examined by ABI's counsel. I prefer the evidence of Mr. Blandford, a neutral witness in this litigation, who testified that Mr. Mannette indicated to him that he wanted to move ITI's business to Office Interiors because Mr. Hipson had taken up new employment there.

[85] Consistent with that is the evidence of Mr. Bailey and Mr. Welsman. Mr. Bailey, who I found to be a credible witness, testified that Mr. Mannette was not strong on scheduling skills. Mr. Welsman later testified that the reason for Mr. Mannette's termination by ITI in February of 1999 was that he didn't have the skills set needed for the opening of the various school projects. Added to this is Mr. Mannette's own testimony that he was not satisfied with Mr. Hipson's immediate successor at ABI whose name was Jim Darnboro. In Mr. Mannette's estimation, Mr. Darnboro was lacking in knowledge of ITI's business and its unique requirements which he found frustrating at times. He also acknowledged that having changed suppliers to Office Interiors, he was happy that Mr. Hipson had moved there because of his familiarity with ITI's program and requirements and there was no longer a learning curve to contend with.

[86] I recognize that seeds of discontent with ABI were sown over service issues before Mr. Hipson's departure, prompting Mr. Mannette to contact Mr. Patterson who was only too eager to show what Office Interiors as a supplier of business furnishings could do. Although these were contributing factors that may well have set the stage, in my view the main impetus which was pivotal to Mr. Mannette's initiative to move ITI's business to Office Interiors was his dependency on Mr. Hipson to get the job done. That is to say, I find that Mr. Mannette was primarily motivated in the final wash to move ITI's business to Office Interiors because of his reliance and dependency on Mr. Hipson to meet his own tight deadlines and job demands at ITI, rather than as a result of any improper solicitation initiated by Mr. Hipson.

[87] In short, I decline to draw the inference from the evidence as a whole that Mr. Hipson improperly engaged in soliciting ITI's business after moving his employment to Office Interiors. Even if there was any solicitation on his part indirectly, through the orchestrated efforts of Mr. Patterson, I am not persuaded that that in itself was the instrumental cause of ABI's loss of the ITI account. ABI's action against Mr. Hipson and Office Interiors must therefore stand dismissed.

[88] (E) <u>DAMAGES</u>

Where I have found no liability on the part of Mr. Hipson or Office Interiors, the issue of damages need only be briefly dealt with in a provisional way.

[89] To substantiate its damages claim, ABI called as a witness Grant Thompson, C.A. Mr. Thompson was qualified as an expert in chartered accountancy, able to give opinion evidence on the financial loss sustained by ABI resulting from the loss of the ITI business, and the benefit thereby obtained by Office Interiors. The calculations made pertain to the period of March 3, 1998 until August 11, 1999. The theory behind this extended date (an additional four months beyond the restrictive covenant period) was that Office Interiors put in place a system where it accepted ITI sales orders as early as April of 1998 but did not generate invoices for those orders until August, 1998.

[90] Mr. Thompson, based on the business records provided to him, calculated that the transactions between ITI and Office Interiors during the above referenced time period resulted in a net gross profit loss to ABI of $298,420. He also calculated that the benefit thereby derived from Office Interiors and Mr. Hipson was $388,830 and $43,203 respectively (for a total of $432,033). Counsel for Office Interiors and Mr. Hipson took no objection to the calculations *per se*. However, it was argued that Mr. Thompson's calculations failed to properly take into account additional expenses that ABI would have incurred had it done the business. It was further argued that in any event, the calculation of the net gross profit loss should not extend beyond the date in the spring of 1999 when Office Interiors won a national sales agreement with ITI after a competitive bidding process with ABI.

[91] Had liability been established, the amount of damages to be awarded should be measured, in my opinion, by the net gross profit loss sustained by ABI based on orders placed by ITI between March 3, 1998 and March 2, 1999 (whether yet invoiced or not). That, of course, reflects a non-solicitation period of 12 months which, as earlier noted in this decision, would have been a reasonable span of time in the circumstances. I would add that I accept Mr. Thompson's explanation that there are no other additional expenses which should have been taken into account in the performance of his calculations. As he put it, once the sales volume needed to meet standard overhead expenses is achieved, thereafter sales revenue goes straight to the bottom line except for the specific costs associated with the selling of the product. Assuming the recorded "sales activities" of Mr. Hipson between March 3, 1998 and March 2, 1999 incorporate the approach I've outlined above, it would appear from Mr. Thompson's expert report that ABI's net gross profit loss during that one year period was $280,691.

[92] (F) HIPSON COUNTERCLAIM FOR CONSTRUCTIVE DISMISSAL

On March 31, 1997 Mr. Hipson received a letter from David Fennell, Vice President-Sales for ABI, advising of the implementation of changes in his compensation plan effective May 1, 1997. In essence, these changes increased Mr. Hipson's base salary and reduced the commission side of the compensation equation. The commission calculation was no longer to be open ended as it was under the former plan, but rather the new commission rate became tied into the level of gross profit achieved so as to create an incentive for the sales representative to achieve the maximum gross profit level.

[93] When Mr. Hipson first joined ABI, his initial responsibilities were to develop new business. As he grew into the job, however, he began taking on major accounts and became one of three employees in ABI's major account sales group. This group was to be paid differently from other members of ABI's sales force who were responsible for new business development.

[94] Mr. Forward's evidence was that the new compensation plan was initiated by Mr. Fennell (who was not called as a witness) but that he himself was involved in the decision. Mr. Forward testified that there were two reasons underlying the changes, namely, (a) Mr. Fennell was looking for a way to create a fair remuneration structure that would apply to all three in that sales group, and (b) he was also looking to increase ABI's profit margins. Mr. Forward also acknowledged on cross examination that ABI's sales expenses were then running high, which was also a consideration.

[95] In Mr. Hipson's first full year of employment (1995) at ABI, he earned an income of approximately $55,000. As he moved into the major accounts sales group, however, his income spiraled the next year (1996) to over $90,000. Had he remained under the old commission formula throughout 1997, his income would have further jumped well into six figures. As it was, even with the compensation plan changes made effective May 1, 1997, Mr. Hipson's employment income for the 1997 calendar year exceeded $91,000. Had he remained with ABI throughout 1998 (with ITI as a customer), Mr. Hipson still would have earned income well into six figures considering that his sales volume to ITI with Office Interiors from March 3, 1998 to March 2, 1999 was approximately $1.274 million dollars.

[96] I recite these figures because I infer that one of ABI's objectives in implementing this compensation plan was to strike a balance between ABI's profit margins and the commission income earned by sales representatives, including Mr. Hipson, where major accounts had been assigned to them by management. Indeed, Mr. Stewart (ABI's controller) in his testimony said that the new compensation plan was to focus on major accounts where ABI management had played a significant role in winning those customers in the first place. Because of that, the new commission plan arrangement was designed to reduce the commission side of the compensation equation and, at the same time, provide an inducement to the sales representatives to achieve a higher gross profit margin.

[97] In implementing the new arrangement, ABI relied upon the remuneration clause recited earlier in paragraph 7 of this decision. Mr. Hipson nonetheless objected to the implementation of the new plan, considering that it was unfair. He voiced his objections first to Mr. Fennell who refused to change it, suggesting that Mr. Hipson ride it out for awhile and that he would help Mr. Hipson to try and increase his sales to offset the reduced commission rate.

[98] Mr. Hipson testified that he also expressed his unhappiness over the change in the compensation plan to both Mr. Forward and Mr. Rose in the following weeks, to no avail. When asked why he did not simply resign at the time, Mr. Hipson testified that he then hoped that improvements would be made if he voiced his concerns strongly enough. Mr. Hipson testified that he reiterated his displeasure to Mr. Fennell sometime in the fall of 1997 and again at other times but no further changes were forthcoming.

[99] Counsel for both parties agreed that the comparative shortfall in Mr. Hipson's income between his former compensation plan and the new one, for the period between May 1, 1997 and February 27, 1998, amounted to $48,717.

[100] Both ABI management witnesses and Mr. Patterson of Office Interiors gave evidence that implementing changes in compensation plans for sales representatives in the office furnishings industry is not uncommon. Companies need some flexibility in running their operations as market conditions and volumes change; hence, the insertion of the remuneration change clause in ABI's standard form employment agreement for its sales representatives.

[101] I am satisfied that ABI had the right under its contract with Mr. Hipson to introduce the new compensation plan as it did. I am not persuaded that the balance which ABI sought to strike between its gross profit margins and selling expenses (including commissions) was unfair, especially considering that Mr. Hipson would have continued to enjoy a steadily increasing income under the new compensation plan from the major accounts which had been assigned to him. Although the clause might be criticized for not specifying an appropriate notice period to be given, I am satisfied that the one month's notice that was actually given in this instance was not unreasonable, especially where the parties had agreed elsewhere in the employment agreement on a notice period of 30 days for termination of employment for an employee with less than three years' service. I therefore find that Mr. Hipson was not constructively dismissed from his employment.

[102] Having made that finding, it is unnecessary for the court to address the alternative submission of ABI's counsel that Mr. Hipson must be taken to have condoned the changes made to his compensation plan where he remained in ABI's employ for 11 months after notice of the change in remuneration was given.

[103] (G) HIPSON COUNTERCLAIM FOR PUNITIVE DAMAGES

As recited earlier in this decision, Mr. Hipson gave his notice of resignation to ABI on February 27, 1998 on two weeks' notice. His final pay deposit and commissions cheque was therefore due to him on March 13, 1998.

[104] Mr. Hipson went to his bank on the due date looking for his money which wasn't there. He then had the bank print a statement of his personal account and was shocked to learn that his final pay deposit of $1349.52 had been deposited and withdrawn all on that day. He promptly called Mr. Fennell who indicated that the matter would be straightened out in a few days. That didn't happen and Mr. Hipson later resorted to filing a complaint with the Nova Scotia Labour Standards Board (which was eventually overtaken by this lawsuit).

[105] How this came about was revealed in the evidence of Garry Stewart who then served as Controller for ABI. He testified that he found out on the date of March 13th (through Mr. Fennell), that Mr. Hipson was planning to join Office Interiors. His immediate reaction was to call ABI's payroll agent to put a stop payment on Mr. Hipson's final pay deposit, only to found out that it was too late for that. He therefore called Mr. Hipson's bank directly and instructed an officer of the bank that a mistake in the payroll had been made as a result of which an

employee, Mr. Hipson, had been paid in error. The officer of the bank took Mr. Stewart at his word and returned the deposit of that money to the depositor, a payroll agent, who in turn sent it back to ABI.

[106] When asked in cross examination what right he had to have done this, Mr. Stewart replied that he thought it was a mistake to pay someone who had breached his contract (i.e., his non-competition clause). In fact, the mistake was Mr. Stewart's. Whatever he may have thought about the non-competition clause, his decision to orchestrate the withdrawal of the final payroll deposit made to Mr. Hipson's personal bank account was ill-conceived and wrong. Indeed, Mr. Rose acknowledged at trial that it was a mistake for that to have been done. It was not until the month before trial, however, that ABI finally restored these monies to Mr. Hipson, along with payment of his final commissions cheque in amount of $5,846 (plus interest). Although those sums have now been paid, Mr. Hipson continues to seek an award of punitive damages that would serve as a condemnation of ABI's conduct.

[107] The test for an award of punitive damages is found in the leading decision of the Supreme Court of Canada in *Vorvis v. I.C.B.C.* (1989) 1 S.C.R. 1085 where the court stated (at p. 1107):

> Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.

[108] I note that this test was recently reviewed and applied by the Nova Scotia Court of Appeal in *Woods v. Hubley* (1996) 146 N.S.R. (2d) 97.

[109] Although ABI is to be roundly criticized in its conduct both for manipulating the withdrawal of Mr. Hipson's final pay deposit from his personal bank account and for the long delay in rectifying that mistake, I do not consider its conduct to be so egregious or extreme to warrant an award of punitive damages. It was noted by the court in *Vorvis*, which was also a wrongful dismissal case, that while punitive damages may be awarded in breach of contract cases, it is very unusual for a court to do so and in the overall circumstances of this case, I decline to make such an award.

CONCLUSION

[110] In the overall result, the main action by ABI against Mr. Hipson and Office Interiors is dismissed with costs to those defendants and Mr. Hipson's counter claim is likewise dismissed with costs to ABI. I will leave it to counsel to deal with the costs ramifications as between themselves in the first instance and will hear further submissions from them in the event that they are unable to reach agreement.

J.