S.K. No. 9806

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Lane v. Carson Group Inc., 2002NSSC218]

BETWEEN:

PATRICK ERIC LANE

PLAINTIFF

- and -

CARSON GROUP INC.

DEFENDANT

D E C I S I O N

HEARD: At Kentville, Nova Scotia, on June 26, & 27 and July 19, 2002.

BEFORE: The Honourable Justice Donald M. Hall.

DECISION: September 25, 2002

COUNSEL: Patrick Saulnier and John Shanks, on behalf of the plaintiff.

Randall Balcome and Paula Kinley-Howatt on behalf of the defendant.

Hall, J.,

[1] This is an action for damages for alleged wrongful dismissal.

[2] The issues to be decided are the following: (a) was the plaintiff constructively dismissed and, if so, what is the appropriate period of notice and quantum of damages; (b) if a dismissal, at what point in time did it occur and the notice period be deemed to have commenced; and (c) has the plaintiff failed to mitigate?

[3] In April, 1975, the plaintiff began his employment as a sales representative with the defendant which operates a business as a distributor of medical supplies, equipment and services, principally to hospitals. At the time of the commencement of the plaintiff's employment with the defendant a contract in writing was entered into containing the following terms:

1. TERRITORY: Carsen agrees to employ Lane as a salesman in the following territory: Provinces of New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland.

2. DUTIES: It is understood that during the term of this employment with Carsen, Lane will not engage in any other occupation whatsoever, but will work exclusively for Carsen and direct all his sales efforts towards further promoting the sales of goods and equipment as handled by Carsen in the above specified Sales Territory.

3. DURATION: this agreement will be effective April 21, 1975. The contract shall be in force for one year, i.e. until April 20, 1976. It will renew itself automatically thereafter for one year, and so forth,

4. TERMINATION: This contract may be terminated by either party at any time, in writing by Registered Mail, to the last known address of the other party. And, in that case, this contract shall be terminated as of fourteen (14) days after such notice has been mailed and postmarked. Lane shall not be entitled to any commission for sales or deliveries made after his employment is terminated.

5. REMUNERATION: Carsen will pay Lane $16,500 per annum. 1% commission will be paid on sales over $180,000 in the territory as described above. This will be pro-rated as of January 1, 1975. Beginning January 1, 1976 the sales target will be reviewed and adjusted accordingly.

6. EXPENSES:

> (a) Automobile: Lane is to receive a car allowance of $125.00 monthly. all automobile expenses to be paid by Lane. Carsen agrees to pay 80% of gasoline only, receipts to be submitted by Lane on his expense account.
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> (b) General: Carsen is to pay normal travelling expenses incurred by Lane in connection with his duties. lane will submit expense accounts every two weeks, on the traveller's expense report form provided.

The written contract was amended the following year and the year following that as well. These amendments provided for minor changes to the terms of employment.

[5] In subsequent years there were many variances to the terms of the plaintiff's employment without any reference to the written contract. The variances included changes in the territory which the plaintiff was to serve and the basis of remuneration.

[6] In the beginning the plaintiff had responsibility for sales in the four Atlantic provinces and was responsible for the sale of all product lines of the defendant including medical, surgical and microscopes. Following that there were a number of changes in his territory but apparently the changes were made by the defendant after consultation with the plaintiff and his concurrence. During this time Mr. William Vella was the defendant's sales manager. He was later to become the Vice President in charge of sales and at the present time is the President of the company.

[7] At the time of termination of his employment the plaintiff's territory consisted of the four Atlantic provinces where he was responsible for medical sales and service. In 1998 he had reassumed responsibility for sales in Newfoundland under a special arrangement where, in addition to an increased commission if he met his quota, he would receive reimbursement for travel expenses. The matter of the expenses became a source of

disagreement as the plaintiff was of the view that the arrangement was to continue indefinitely, while the defendant sales manager at the time, Ronald Ehrlund, maintained that it was to be only for one year and then they would "revisit it". Mr. Ehrlund had become sales manager in 1995 and was the plaintiff's immediate superior. In 1999 Mr. Ehrlund became the defendant's Vice President of sales and William Collins replaced him as sales manager.

[8] In April, 2000, Mr. Collins advised the plaintiff of a major change in his territory and product responsibility. The Province of Newfoundland and the Cape Briton Island part of the territory and the service sales were to be taken from the plaintiff and to be given to a new sales person. The plaintiff vigorously opposed the changes as it, according to his calculations, represented 25 to 30% of his income and one-third of his territory. The plaintiff made efforts to have the decision reversed or modified but without success. He continued in his employment, however, until October, 2000, when he submitted his resignation after learning that a new salesman, William Fenton, had been hired for the revised territory. As a result of this hiring the plaintiff considered himself to have been "constructively dismissed". The defendant offered to pay a one time payment of upwards of $15,000.00 to induce the plaintiff to stay, which he rejected.

[9] Apparently the new arrangement has not worked well for the defendant. The new salesman, Mr. Fenton, did not remain with the Company long although in addition to salary and commission he received travel expenses for the Newfoundland part of the territory. The replacement for the plaintiff was given the three Maritime Provinces including Cape

Breton Island. As well, things did not go well for the plaintiff. Although he has submitted a number of applications for sales positions he has not been able to obtain employment. In addition, he set up a company of his own as a sales representative or distributor but to date this venture has not been successful and his company has operated at a loss. The plaintiff, however, continues to have hopes that it will eventually succeed and will provide him with a satisfactory income.

[10] The plaintiff was 32 years old when he began employment with the defendant. He was 57 when his employment ended after 25 years service.

[11] The plaintiff seems to have had a very successful sales career with the defendant. In his first year with the defendant he had total sales of $13,500.00. Over the years his sales increased dramatically with his best year being 1999 when he had sales of over three million dollars. His sales record for his last five years of employment with the defendant is as follows:

1995/1996	$ 1,658,250.00
1996/1997	$ 2,413,140.00
1997/1998	$ 2,293,277.00
1998/1999	$ 3,236,645.00
1999/2000	$ 2,691,943.00

[12] As a subsidiary issue the plaintiff claims that he is owed the sum of $1.500.00 as the balance of an unpaid commission. The defendant disputes this claim.

[13] The plaintiff contends that the changes in his territory and the taking away of the responsibility for service sales amounted to a unilateral change in the fundamental terms of the contract of employment resulting in a substantial loss of income. Thus, he maintains that he was constructively dismissed by the employer, the defendant, and entitled to damages. He further submits that the offer of $15,000.00 compensation was an acknowledgement by the defendant that he would suffer a loss of income. The plaintiff's position is that a reasonable period of notice would be 24 months considering his lengthy period of employment of 25 years. Based on an average income over the last three years of his employment, his monthly income was $14,000.00 per month. He maintains that he did everything he could to mitigate his loss by seeking other employment and establishing his own business but with very limited success. As well, he says that the term of notice in the written contract does not apply since the contract had been ignored since 1977 and ceased to be of any effect.

[14] The defendant, on the other hand, maintains that the plaintiff would not have lost a third of his income as a result of the change but would have made up for it by being able to concentrate on sale of the new products that were coming on stream. Thus there would have been no substantial loss of income. Further, it was necessary for the defendant to make changes from time to time in order to increase profitability. In any event, the defendant says that the plaintiff had indicated that he was not willing to continue servicing Newfoundland without payment of his travel expenses and the agreement was that he would be reimbursed for his travel expenses for only one year. The defendant takes the position that if it is found that there was a constructive dismissal the notice period in the

written contract applies, that is, two weeks. Alternatively, the defendant says that any notice period should be treated as beginning in April of 2000 when the changes were made and for a period of fourteen to eighteen months. The defendant submits, as well, that the plaintiff has failed to mitigate.

[15] Counsel agree that the applicable principles of law are as stated by Gontier, J., in the Supreme Court of Canada in **Farber v. Royal Trust Company** [1997] 1 S.C.R. 846, 145 D.L.R.(4th) 1. At paragraphs 33 - 36 Gontier, J., wrote:

> 33 In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. . . . Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment -- a change that violates the contract's terms -- the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice . . . .
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> 34 In an article entitled "Constructive Dismissal" in B.D. Bruce, ed., **Work, Unemployment and Justice** (1994), 127, Justice N.W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:
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> > 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.
>
> 35 . . . each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed.
>
> 36 In a number of decisions in both Quebec and the common law provinces, it has been held that a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed. In some decisions, it has been held that a unilateral change to the method of calculating an employee's remuneration justifies the same finding. Other decisions have found that a significant reduction in an employee's income by an employer amounts to constructive dismissal. . . .

[16] It appears, as well, that counsel are agreed that the test to be applied is an objective one. This view of the law is supported by a decision of the New Brunswick Court of Appeal in **Dick v. Canadian Pacific Limited** (2000), 230 N.B.R.(2d) 39. At paragraphs 35 and 36 Drapeau, J.A., in delivering the Court's unanimous judgment said:

> 35 It is commonplace that whether an employee has been constructively dismissed is essentially a question of fact. The court must determine whether on a reasonable interpretation of the facts, the employee has established that he was constructively dismissed as a result of conduct by the employer that breaches a fundamental or essential term of the employment contract. See **Smith v. Viking Helicopter Ltd.** (1989), 24 C.C.E.L. 113 (Ont. C.A.), per Finlayson J.A., for the Court, at pp. 116-17 and **Saint John Shipbuilding Ltd. v. Snyders** (1989), 100 N.B.R.(2d) 14 (N.B. C.A.), at p. 22. The employee's perception of the employer's conduct is not determinative. Rather, the court must ask whether a reasonable person in the same situation as the employee would have concluded that an essential term of the employment contract had been substantially changed by the employer. See **Saint John Shipbuilding Ltd. v. Snyders** and **Brennan v. Henley Publishing Ltd.** (1997), 188 N.B.R.(2d) 338 (N.B. C.A.), at p. 341.
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> 36 A wide array of unilateral modifications to the employment relationship brought about by the employer may, if sufficiently significant, be treated by the employee as wrongfully terminating the employment contract. Most commonly, the event giving rise to an allegation of constructive dismissal is a substantial modification to an employee's remuneration package or a demotion. . . .

[17] The difficulty for the court is to determine whether on the facts of the case before it the unilateral changes to the contract of employment made by the employer amount to a fundamental or substantial change to the employee's contract of employment, resulting in a termination of the contract, as stated by Gontier, J., in **Farber** (supra).

[18] In the present case the defendant contends that the plaintiff, at least in part, agreed to the change in his territority because he had stated that he would not continue servicing Newfoundland unless he received travel expenses and that there was no agreement that he would be paid expenses beyond the one year period. The plaintiff disputes this saying that although at one point he had said that he would not be willing to cover Newfoundland

without expenses, in the end, in an email dated October 3, 1999, he advised Mr. Ehrlund that if there was no other solution available he would pay the Newfoundland expenses.

[]9] There were, however, no direct discussions between the parties as to exactly what the plaintiff's final position on the issue would be, although he did continue to press the defendant to pay his Newfoundland travel expenses. In any event, in my view of the facts this had absolutely nothing to do with the decision to make changes to the plaintiff's territory. In my opinion, the decision to make the changes was made unilaterally by Mr. Collins and Mr. Ehrlund without any consideration of the plaintiff's position. Indeed Mr. Ehrlund acknowledged in his testimony that the decision to do so was his, Mr. Collins' and Mr. Vella's. It is clear that the plaintiff had never given any indication that he wanted to give up Cape Breton Island or the service portion of his sales responsibilities. The evidence indicates that the plaintiff had no input in this decision as there had been no previous discussions in which he participated. The first indication to him that the defendant was considering any change came in an email of October 1, 1999, from Mr. Ehrlund where he stated, "You now have me thinking that perhaps its time for some type of territory change as I alluded to and we should discuss at your convenience In my mind Nfld alone would not be enough to justify on it's own and it would involve some additional geography." The latter statement is inconsistent with Mr. Ehrlund's denial, in response to a question by the court, that Cape Breton and Service were added to the new territory to make a satisfactory package for the new sales representative. It seems to me, however, that it was probably a major factor in the decision to include them. In any event, there were no discussions with the plaintiff in this respect.

[20] The plaintiff argued that the changes resulted in him losing a third of his territory and twenty-five percent of his potential annual income. He supported this with his sales and income figures for the preceding three years. His gross employment income for those years was:

1997	$ 147,101.44
1998	$ 152,492.95
1999	$ 200,263.68

[21] The defendant countered that the plaintiff would have made up for the bulk of the lost income through concentration on sales of the new products that were to be introduced. The defendant did not, however, produce any calculations or pertinent evidence to support that contention. Upon reviewing the figures submitted by the plaintiff I am satisfied that he would have experienced a loss of income in the range that he suggested. Due to the lack of evidence I am unable to accept the contention of the defendant as to the loss being compensated for by the introduction of the new products. I acknowledge, however, that the fact that the plaintiff would be able to devote more time to his remaining territory along with the new products to sell may have resulted in an increase of his income with respect to the remaining territory. Lacking any factual calculations, however, I am unable to put a figure on it and will accept the figures put forth by the plaintiff as to the extent of his potential loss.

[22] With respect to the agreement to pay the Newfoundland travel expenses there appears to be no documentation to support the respective contentions of the parties. The plaintiff maintains that when he agreed to take on the Newfoundland territory again Mr. Ehrlund agreed that the defendant would pay his travel expenses and that there was no

time limitation in that respect as to the payment of expenses. Mr. Ehrlund, on the other hand, is adamant that the agreement was that the defendant would pay expenses for one year only and then revisit the issue. The limited correspondence or documentation exchanged concerning these expenses began with a memo from the plaintiff to Mr. Ehrlund dated December 14, 1997. It states:

> As per your telephone call on Friday, I understand that I will be taking over the Medical portion of the Nfld. Territory. This will require more travelling on my part.
>
> I am requesting assistance covering the expenses involved, which I estimate to be in the range of 1,500.00 per trip. This would cover the cost of Air Tickets, Hotels, and Car Rentals. I assume that I would travel there once per quarter and also on an urgent basis if necessary.

[23] The next mention of Newfoundland expenses is in a memo from Mr. Ehrlund to the plaintiff dated March 16, 1999, nearly fifteen months after the agreement came into effect. It is as follows:

> I am concerned about our expenses incurred while travelling to Nfld. We might have to revisit how we are going to handle next year. Are you getting the best possible rates and going through Diane each time? Understand that you are planning another trip to St. John's next month again? Pls send me the next proposed visits for the remainder of the year. Regards,

[24] Then in a memo from Mr. Ehrlund to the plaintiff dated August 17, 1999, the following appears:

> . . . Speaking about the "bottom line," travel expenses are a major component that can adversely effect our performance. Last year we had a discussion whereby I said we would pick up your travel costs to Newfoundland for the year and review this arrangement the following year. One of the reasons was because of the general state of affairs that Blair left the territory in. The Newfoundland territory did approximately $1M in sales last year. The company is no longer in a position where we can pay for your travel expenses and have not budgeted to do so this year. The compensation plan stays the same and is one of the most competitive in the industry. I trust you understand the companies position in this matter.

[25] The plaintiff responded in a memo dated August 18, 1999, expressing his objection to the change and restating his position that, "We had agreed that if I was to do this area that I would get expenses."

[26] In a memo from Mr. Ehrlund to the plaintiff dated September 14, 1999, Mr. Ehrlund replied:

> As per our discussion last week, I agreed to cover the travel costs for your next trip to Newfoundland as a concession to your argument. After this you will be responsible for your own expenses. I trust you understand the companies position on this matter as we debated it at length.

[27] From the foregoing it appears that the plaintiff's position has been consistent throughout - he was to receive his travel expenses in Newfoundland with no time limitation specified. On the other hand, it is to be noted that the issue was not "revisited" after a year as Mr. Ehrlund alleged that it was to be and in his memo of March 16, 1999, he simply suggested that they "*might* have to revisit" how they were going to handle expenses the next year. Nothing further was said on the subject apparently until Mr. Ehrlund's August 17, 1999, memo. Although the defendant contends that it was against Company policy to pay travel expenses of sales representatives, it is noted that the defendant paid the travel expenses of the plaintiff's successor in Newfoundland.

[28] I conclude from all this that the decision to discontinue paying the plaintiff's Newfoundland travel expenses was a budgetary decision of the company, made at the time of preparing its new budget in August of that year without any reference to any agreement with the plaintiff. In these circumstances, I find the plaintiff's recollection of the terms of the agreement to be far more accurate and reliable than that of Mr. Ehrlund. I am satisfied,

therefore, that the defendant through Mr. Ehrlund did agree to pay the expenses in question as the plaintiff claimed and that the decision to discontinue payment was a unilateral decision of the defendant.

[29] The defendant contended that it was necessary to make changes and try new things in order to increase profitability. As Mr. Collins said, when he became sales manager his mandate was to "grow our sales and to restructure our sales process". At that time it appears that the Atlantic territory was performing very well although there seemed to be a problem in Newfoundland. The plaintiff recognized this and proposed remedial action which would involve him spending more time there. He wanted reimbursement for his travel expenses, however. In response Mr. Vella e-mailed him that "perhaps it's time to restructure the Maritimes and add another flexible rep." The next word the plaintiff received was Mr. Collins April 11, 2000 memo informing him of the "re-alignment" which was made without further discussion with the plaintiff, despite the fact that he had just completed an extremely successful year.

[30] In the circumstances, I am of the opinion that the plaintiff was entitled to have participated in the decision, rather than the defendant acting unilaterally.

[31] The question is, were these changes fundamental or substantial to the contract of employment. In my opinion they were. The loss of a quarter of one's income amounting to $35,000.00 - $40,000.00 per year, plus travel expenses of $10,000.00 or more per year would, in these circumstances, be substantial and fundamental to the contract of

employment. Since I have already indicated that, in my opinion, the changes were made unilaterally by the defendant, the employer, I find that the changes constituted a breach of the contract of employment entitling the plaintiff to consider himself constructively dismissed amounting to a wrongful dismissal.

[32] As to the period of notice the plaintiff would be entitled to in these circumstances, on behalf of the defendant, Mr. Balcome submitted that it should be the two week period set out in the 1975 written contract of employment. Mr. Saulnier, on behalf of the plaintiff, maintained that the termination provision in the written contract was harsh and for that reason ought not to be enforced. As well, it has been overtaken by events and is no longer enforceable.

[33] I do not intend to spend much time on this issue. Not only is the term harsh in these circumstances but ludicrous in the context of a highly productive 25 year employee. In saying that, I do not intend any criticism of Mr. Balcome for putting it forward, as I appreciate that, in his client's interest, he was obliged to do so. In reaching this conclusion I have relied on the decision in **Nardoccho v. Canadian Imperial Bank of Commerce** (1979) 41 N.S.R.(2d) 26. As well, the evidence clearly establishes that no reference whatever was made to the document except during the first few years of the plaintiff's employment. Thereafter there were many changes to the terms of employment without any reference to it. In fact, the parties appear to have forgotten about its existence until the commencement of this action. I conclude, therefore, that the contract has been overtaken by events and is no longer applicable.

[34] Mr. Saulnier submitted that the appropriate notice period would be 24 months, while Mr. Balcome, in his alternative position, proposed a period of fourteen to eighteen months. In this respect, counsel referred the court to a number of cases including:

> **Barakett v. Levesque Beaubien Geoffrion Inc.** (2001), N.S.R.(2d) 114, aff'd. (2001), N.S.R.(2d) 135 - 4 years employment - 17 months.
>
> **Balckburn v. Victory Credit Union Limited** (1997), 160 N.S.R.(2d) 167, aff'd, as to quantum (1998), 165 N.S.R.(2d) 1 - 32 years employment - 24 months.
>
> **Schwann v. Husky Oil Operations Limited** (1989), 76 Sask. R. 97 - 5 years, 4 months employment - 10 months.
>
> **Nardocchio v. Canadian Imperial Bank of Commerce** (supra) - 12 years employment - 12 months.
>
> **Roberts v. Versatile Farm Equipment** (1987), 53 Sask. R. 219 - 18 years employment - 15 months.
>
> **Schumacher v. Toronto Dominion Bank** (1997), 29 C.C.E.L. 96, aff'd. (1999), 120 O.A.C. 303 - 9 years employment - 13 months.
>
> **Lavergne v. Meloche Windows Limited** 2001 Carswell Ont. 790 - 8 years employment - 10 months.

[35] The authorities indicate that the range of notice is from two or three months to 24 months. There are a number of factors that influence courts in determining what is reasonable notice, including the length of the period of employment, the unique or special nature of the employment, the age of the employee when the employment is terminated, the availability of suitable alternative employment, the conduct of the employer with respect to the dismissal, and so forth. It is well established, however, that each case must be determined on its own facts and circumstances.

[36] In the present case the plaintiff was employed in a highly specialized sales field and earning a very high income. There are few such positions available in the Atlantic Region. He was 57 years of age at the time of termination and approaching normal or usual retirement age. Despite his best efforts, he has been unable to find equivalent or suitable employment although almost two years have expired since termination and prospects appear to be very bleak. Indeed, at his present age of 59, it seems most unlikely that the plaintiff will obtain equivalent employment in the future. Having regard to all these factors I have concluded that a reasonable period of notice in the circumstances of this case would be 24 months, which I recognize is at the top of the range.

[37] Mr. Balcome argued that any notice period should commence as of the date that the plaintiff received notice of the changes to his territory, April, 2000, which is when the event complained of occurred. I do not accept this position. Although it appears to be established that an employee must resign within a reasonable period of time following the matters complained of, here the plaintiff continued to press for and hoped that Mr. Ehrlund and Mr. Collins would modify their positions and come around to an acceptable compromise. It was not until the new sales person was hired that he realized and accepted that there was no hope of that. It was then that he submitted his resignation. I am satisfied that that is the time from which the period of notice should commence.

[38] I am also satisfied that the plaintiff has made reasonable efforts to obtain alternative employment. He has made application to a number of companies for similar positions without success. He has also established his own company in an effort to break into his

former sales field. Unfortunately, to date it has not been successful and prospects for the future do not look too bright. In addition, he has sought a lower level sales position to provide him with a basic income so that he could continue to promote his new enterprise, but again without success. On the other hand, the employer has the onus of establishing on a balance of probabilities that the employee has failed to mitigate, which burden the defendant has not met.

[39] I have also concluded that there should be no adjustment for the "investment" aspect in respect to the time spent in developing his new business enterprise as was done in **Battell v. Canem Systems Ltd**. (1981), Carswell B.C. 278, 31 B.C.L.R. 345. As indicated above, to date the business has not been a success and prospects for the future appear to be anything but good.

[40] As to the actual quantum of damages, I accept Mr. Saulnier's suggestion that it should be based on the plaintiff's average monthly income during the last three full years of his employment with the defendant, which amounts to a total of $499,856.00 or $13,884.00 per month for a total of $333,000.00. I suspect that there may be some adjustments that ought to be taken into account and I am prepared to hear counsel further in that regard.

[41] With regard to the plaintiff's claim for unpaid commission of approximately $1,700.00, counsel did not address this issue in their submissions. I will hear them further in this regard if they are unable to agree on the appropriate disposition.

[42] The plaintiff will have his costs in accordance with tariff A, scale 3, based on an amount involved of $333,000.00.

Donald M. Hall, J.