

Farber v. Royal Trust Co., [1997] 1 S.C.R. 846

**David Farber**

*Appellant*

v.

**Royal Trust Company**

*Respondent*

**Indexed as: Farber v. Royal Trust Co.**

File No.: 24885.

Hearing and judgment: November 28, 1996.

Reasons delivered: March 27, 1997.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ.

on appeal from the court of appeal for quebec

*Labour law -- Constructive dismissal -- Changes by employer to terms of employee's contract of employment as part of company restructuring -- Employer offering regional manager the position of manager of single branch, with no guaranteed base salary -- Whether unilateral changes made by employer to employment contract amounted to constructive dismissal -- Admissibility of evidence of events subsequent to employer's offer.*

In June 1984, as part of a major restructuring, the respondent company decided to eliminate its regional manager positions. As regional manager for Western Quebec, the appellant had supervised 400 real estate agents and administered 21 offices whose sales had amounted to more than \$16,000,000 in 1983. With commissions, benefits and his base salary of \$48,800, his income that year had been \$150,000. To replace his eliminated position, the respondent offered him the manager's position at the Dollard branch, a position he had held eight years earlier, but did not offer any guaranteed base salary. That branch, one of the least profitable in the province, had about 20 real estate agents whose sales had amounted to only \$616,000 in 1983. The respondent also offered him financial compensation, including a \$40,000 reorientation allowance and a branch manager's commission at a rate higher than the usual one for the remainder of 1984 and 1985. The offer also provided that the appellant would receive \$48,000 for the commissions he had earned as regional manager in the first six months of 1984. The appellant estimated that his income would be cut in half if he accepted the offer, and he initiated discussions with the respondent seeking either to be appointed manager of a more profitable branch or to obtain a guaranteed base salary for the following three years. The respondent refused to change its offer and the appellant sued the respondent for damages on the ground that he had been constructively dismissed. The Superior Court dismissed his action. Based on a comparative analysis of the appellant's former position and the one offered to him, including the actual sales figures of the Dollard branch and the Western Quebec region after June 1984, the trial judge concluded that the respondent's offer was reasonable and adequate in terms of both remuneration and the prestige associated with the position offered. The majority of the Court of Appeal affirmed the Superior Court's judgment.

*Held:* The appeal should be allowed.

According to art. 1670 *C.C.L.C.*, general contractual principles are applicable to employment contracts. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been constructively dismissed. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and the employee can treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages. To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have. For the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. These principles derive from the civil law of Quebec, the only law applicable here. However, since the common law rule is similar to that applicable in Quebec civil law when it comes to the concept of constructive dismissal, common law decisions may provide illustrations that are helpful in applying the civil law rule.

In this case, the respondent's offer amounted to constructive dismissal, since it is clear that it substantially altered the essential terms of the employment contract. At

the time the offer was made, any reasonable person in the same situation as the appellant would have come to that conclusion. The manager's position at the Dollard branch, which was experiencing problems, was a significant demotion for the appellant. His responsibilities were being drastically cut, resulting in a considerable loss of status and prestige. As well, the offer considerably altered his salary terms, since as manager of that branch his income would have been limited to commissions. He would have received no guaranteed base salary. The unilateral change was extremely detrimental to the appellant's financial security. Neither the \$40,000 reorientation allowance nor the \$48,000 for commissions the appellant had already earned as regional manager could take the place of a guaranteed salary.

The trial judge erred in admitting in evidence the Dollard branch's sales figures after June 1984. Subsequent event evidence is admissible only if relevant to the case. The sales figures subsequent to the offer could not reasonably have been foreseen at the time the offer was made. The Dollard branch was in a precarious financial position at that time and the respondent itself did not anticipate that the branch's sales would increase in 1984. The appellant therefore did not make a mistake by not foreseeing a substantial increase in sales at the branch. The subsequent event evidence distorted the trial judge's analysis. Although he in fact acknowledged all the differences between the regional manager position and the respondent's offer, he said nothing about or disregarded such significant changes as the loss of a guaranteed base salary and the demotion, which are in themselves sufficient to support a finding of constructive dismissal.

Remuneration in lieu of notice, the purpose of which is primarily compensatory, must be fair and reasonable in light of all the circumstances, while being based on the value of the former employee's previous remuneration. Here, the trial

judge stated that if he had found that the appellant had been constructively dismissed, he would have awarded the equivalent of one year's remuneration in lieu of notice, and the term of that award was accepted by the dissenting judge in the Court of Appeal. The only real, representative figure available to determine the value of the remuneration in lieu of notice is the appellant's 1983 income. Since the method used to calculate his salary was changed that year, previous years cannot be used. The appellant is therefore entitled to \$150,000 as one year's remuneration in lieu of notice.

### Cases Cited

**Referred to:** *Asbestos Corporation Ltd. v. Cook*, [1933] S.C.R. 86; *Columbia Builders Supplies Co. v. Bartlett*, [1967] Que. Q.B. 111; *Soupes Campbell Ltée v. Cantin*, D.T.E. 91T-741; *Standard Broadcasting Corporation Ltd. v. Stewart*, [1994] R.J.Q. 1751; Cass. soc., February 4, 1988, *Bull. civ.* V, No. 96, p. 65; Cass. soc., January 21, 1988, *Bull. civ.* V, No. 58, p. 39; Cass. soc., February 25, 1988, *Bull. civ.* V, No. 140, p. 93; Cass. soc., November 15, 1988, *Bull. civ.* V, No. 594, p. 382; *Lavigne v. Sidbec-Dosco Inc.*, [1985] C.S. 26, aff'd C.A. Mtl., No. 500-09-001556-844, May 4, 1988; *Montreal Public Service Co. v. Champagne* (1916), 33 D.L.R. 49; *Rubis v. Gray Rocks Inn Ltd.*, [1982] 1 S.C.R. 452; *Driver v. Coca-Cola Ltd.*, [1961] S.C.R. 201; *Hallé v. Canadian Indemnity Co.*, [1937] S.C.R. 368; *Desrosiers v. The King* (1920), 60 S.C.R. 105; *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250; *Pauze v. Gauvin*, [1954] S.C.R. 15; *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Stewart v. MacMillan Bloedel Ltd.* (1992), 42 C.C.E.L. 225, aff'g (1991), 37 C.C.E.L. 292; *Cox v. Royal Trust Corp. of Canada* (1989), 26 C.C.E.L. 203, leave to appeal refused, [1989] 2 S.C.R. x; *Mifsud v. MacMillan Bathurst Inc.* (1987), 60 O.R. (2d) 58; *Schwann v. Husky Oil Operations Ltd.* (1989), 27 C.C.E.L. 103; *Saint John Shipbuilding Ltd v. Snyders* (1989), 29 C.C.E.L. 26; *Farquhar v. Butler Bros. Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89;

*Baker v. Burns Foods Ltd.* (1977), 74 D.L.R. (3d) 762; *Cayen v. Woodward's Stores Ltd.* (1993), 45 C.C.E.L. 264; *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349; *Orth v. MacDonald Dettwiler & Assoc. Ltd.* (1986), 8 B.C.L.R. (2d) 1; *Reber v. Lloyds Bank International Canada* (1985), 61 B.C.L.R. 361; *Chouinard v. Groupe Commerce, compagnie d'assurances* (1995), 67 Q.A.C. 83; *Daigneault v. Coopexcel, coopérative agricole* (1991), 42 C.C.E.L. 128; *Roy v. Caisse populaire de Thetford Mines*, [1991] R.J.Q. 2693; *Nyveen v. Russell Food Equipment Ltd.* (1987), 19 C.C.E.L. 227; *Vigeant v. Canadian Thermos Products Ltd.*, D.T.E. 88T-295; *Désormeaux v. Banque de Montréal*, D.T.E. 87T-210; *Reilly v. Hotels of Distinction (Canada) Inc.*, [1987] R.J.Q. 1606; *Rémi Carrier Inc. v. Nolan*, D.T.E. 86T-370; *Lynch v. Mac Carter Ltd.* (1995), 17 C.C.E.L. (2d) 292; *Pulak v. Algoma Publishers Ltd.* (1995), 10 C.C.E.L. (2d) 111; *McNeil v. Presstran Industries* (1992), 45 C.C.E.L. 78; *Johnson v. Moncton Chrysler Dodge (1980) Ltd.* (1991), 34 C.C.E.L. 164; *Sherrard v. Moncton Chrysler Dodge (1980) Ltd.* (1990), 33 C.C.E.L. 72; *Cook v. Royal Trust* (1990), 31 C.C.E.L. 6; *Rebitt v. Pacific Motor Sales & Service Ltd.* (1988), 20 C.C.E.L. 239; *Jobber v. Addressograph Multigraph of Canada Ltd.* (1980), 1 C.C.E.L. 87; *Cie minière Québec Cartier v. Québec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095; *Bertucci v. Banque Toronto-Dominion* (1994), 65 Q.A.C. 17; *Desgagné v. Fabrique de St-Philippe d'Arvida*, [1984] 1 S.C.R. 19.

### **Statutes and Regulations Cited**

*Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57, s. 2.

*Civil Code of Lower Canada*, arts. 1022, 1668, 1670.

*Civil Code of Québec*, S.Q. 1991, c. 64.

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APPEAL from a judgment of the Quebec Court of Appeal, [1995] Q.J. No. 466, J.E. 95-1307, D.T.E. 95T-737, 55 A.C.W.S. (3d) 1190, affirming a judgment of the Superior Court rendered on August 11, 1989 dismissing the appellant’s action in damages. Appeal allowed.

*Brahm L. Campbell and Leonard E. Seidman*, for the appellant.

*Guy Dion and Benoit Mailloux*, for the respondent.

English version of the judgment of the Court delivered by

1. GONTHIER J. -- Following the hearing of this case, the appeal was allowed from the bench with reasons to follow. These are those reasons. This appeal concerns constructive dismissal and the consequent damages. More specifically, the issue is

whether the unilateral changes made by the respondent to the appellant's employment contract amounted to constructive dismissal. A collateral issue is whether subsequent events were relevant and admissible in evidence.

I - Facts

2. The appellant began working for the respondent Royal Trust Company in November 1966 as a real estate agent. Because of his excellent work for the respondent, he was promoted a number of times over the years: real estate sales manager at the Chomedey branch (1972); transfer to the branch in Dollard-des-Ormeaux (hereinafter referred to as "Dollard" formerly called the Roxboro branch) (1973); residential sales manager for the Montreal region, then assistant regional sales manager (1976); regional sales manager for Metro-Montreal West (1979); and regional manager for Western Quebec (1982). The appellant was an excellent employee who was respected and appreciated by both his employer and the business community in which he worked.
  
3. As regional manager for Western Quebec, the appellant supervised and administered 21 offices employing some 400 real estate agents and 35 secretaries. In 1983, the appellant's region generated a gross income of more than \$16,000,000. The appellant's remuneration as regional manager was made up of a guaranteed base salary, commissions and benefits. In 1983, the appellant received \$48,802.20 as his base salary and \$88,405 in commissions, for a total of \$137,207.20. With benefits, the appellant earned \$150,000 that year.
  
4. On June 4, 1984, the appellant was informed by his immediate supervisor that as part of a major restructuring, the company had decided to eliminate 11 of the 12 regional manager positions across the country, including the appellant's. To replace his

eliminated position, the respondent offered the appellant financial compensation and the manager's position at the Dollard branch.

5. The financial compensation being offered included the following: first, \$40,000 as a reorientation allowance payable within two years; and second, an 8.75 percent override commission on the net commissions of the real estate agents at the Dollard branch -- by comparison, the respondent's branch managers usually received an override commission of 5.75 percent. However, that rate was to apply only for the remainder of 1984 and 1985. Starting in 1986, the appellant's override commission was to decrease to the usual rate of 5.75 percent. The offer also provided that starting in 1985, the commissions of real estate agents who were below the minimum standard set by the respondent would not be included in the calculation. The appellant was not offered any guaranteed base salary as manager of the Dollard branch; his income was to be made up only of commissions. Finally, the offer provided that the appellant would receive a lump sum of \$48,000, which represented the commissions he had earned as regional manager for Western Quebec in the first six months of 1984, the exact value of which was not yet known at the time.

6. The Dollard branch was one of the most problematic and least profitable in the province. It was not meeting the sales targets set by the respondent and there was even some question of closing it. In 1983, the branch had 22 real estate agents, whose sales amounted to only \$616,532. Moreover, four of those agents were new recruits, which suggested that they were unlikely to reach the minimum sales standard set by the respondent for another three years. The appellant was aware of this, since the branch was part of the Western Quebec region he was managing at the time.

7. The appellant considered the respondent's offer unacceptable. To begin with, the position was one he had held eight years earlier and from which he had been promoted. As well, he was insulted by the fact that he was being asked to manage a branch experiencing problems. Finally, he estimated that his income would be cut in half if he accepted the respondent's offer. He therefore initiated discussions with the respondent seeking either to be appointed manager of a more profitable branch or to obtain a guaranteed base salary for the following three years. The respondent refused to change its offer in any way. It told the appellant that he had to assume his new duties on July 6, 1984 or it would consider that he had resigned. The appellant did not go to the Dollard branch on the date in question.

8. The appellant sued the respondent for damages on the ground that he had been constructively dismissed. On August 11, 1989, the Superior Court dismissed his action. The appellant appealed the decision and, on May 29, 1995, the majority of the Court of Appeal dismissed the appeal: [1995] Q.J. No. 466 (QL), J.E. 95-1307, D.T.E. 95T-737, 55 A.C.W.S. (3d) 1190. Fish J.A., in dissent, would have allowed the appeal.

## II - Judgments Below

*Superior Court* (District of Montreal, No. 500-05-004698-856, August 11, 1989)

9. Based on a comparative analysis of the appellant's former position and the one offered to him, Flynn J. concluded that the respondent's offer was reasonable and adequate in terms of both remuneration and the prestige associated with the position offered.

10. Flynn J. compared the income the appellant would have earned if he had remained regional manager with the income he would have earned if he had accepted the offer. For this purpose, he decided to admit in evidence the actual sales figures of the Dollard branch and the Western Quebec region after June 1984. The purpose of that evidence was to show what the appellant would actually have earned had he accepted the position in Dollard and what he would actually have earned had he remained regional manager. Of course, the figures that the respondent adduced in evidence were not known at the time of the offer. Flynn J. dismissed the appellant's objection to the admissibility of the evidence on the ground that it was relevant in assessing the reasonableness of the offer. He added that it was for the appellant to prove that [TRANSLATION] "any projections made by the employer when preparing its offer were based on unrealistic or even unreasonable assumptions that could have been confirmed only by circumstances that could not reasonably be anticipated in the market" (p. 13). After comparing the figures, he concluded that the appellant's income would not have fallen as a result of his change of position, and he stated the following at pp. 14-15:

[TRANSLATION] The plaintiff has not adduced any evidence that would suggest to the Court that exceptional circumstances he could not reasonably have foreseen accounted for the concrete results reported by his employer. Nor has he been able to convince the Court that his employer was far too optimistic when it prepared the new financial terms for the manager's position in Dollard-des-Ormeaux and that it has been proved right only by chance.

11. As regards the prestige associated with the position offered, Flynn J. acknowledged that the Dollard branch was one of the respondent's most problematic. However, he noted that the appellant was offered the position first because it was the only branch without a manager and second because the respondent felt that the appellant had the skills needed to get the branch back on its feet. He added that it could not be

concluded from the evidence that the respondent had deliberately made the appellant an unacceptable offer to induce him to resign. Flynn J. noted the following at p. 19:

[TRANSLATION] The Court believes that a more objective consideration of what was being proposed to him, given the fairly long period he had for doing so, ought to have led [the appellant] to realize that his employer still wanted him and that the offer being made to him was reasonable.

For these reasons, he dismissed the appellant's action.

*Court of Appeal, D.T.E. 95T-737*

Mailhot J.A.

12. Mailhot J.A. felt that the trial judge had not erred in admitting the post-June 1984 and 1985 sales figures in evidence. In her view, it was the best way to show that the respondent was acting in good faith and that its offer was reasonable. She added that this was not unfair to the appellant because he had been given an opportunity to challenge the validity of the respondent's figures.
13. She concluded that the appellant had not shown that, in finding that the appellant had not been constructively dismissed, the trial judge had made a palpable error in his assessment of the facts, the testimony or the evidence. She noted that it would be contrary to the rulings of the Supreme Court to review and reconsider the evidence adduced at trial. Her view was therefore that the appeal should be dismissed.

Chamberland J.A.

14. Chamberland J.A. agreed with what Fish J.A. had to say about the state of Quebec law on constructive dismissal. However, he concurred with Mailhot J.A. on the outcome of the appeal. He concluded that the trial judge had not made a palpable error in deciding the offer was reasonable and that, in the absence of such an error, the Court of Appeal could not intervene.

15. On the question of whether the sales figures after June 1984 were admissible in evidence, he found that the trial judge had correctly admitted them.

Fish J.A. (dissenting)

16. Fish J.A. first noted that if the Court of Appeal disagreed with the conclusions drawn by the trial judge from the evidence, it had a duty to intervene in order to substitute its own view for that of the trial judge.

17. Fish J.A. felt that the trial judge had erred in admitting *ex post facto* evidence, that is, the sales figures after June 1984, because that evidence was not relevant.

18. He then stated that the doctrine of constructive dismissal, a creature of the common law, has become part of the civil law. After reviewing the relevant cases, he concluded that constructive dismissal can take one of two forms, which he described as follows at pp. 6-7 of the full text:

The first relates to a reassignment offered in bad faith by the employer in the hope or expectation that the employee will feel bound to refuse. The second occurs where the employer, even without malice or oblique motive, reassigns the employee to new duties “involving such a disparity in status, advantages, duties and modalities as to constitute substantially new conditions of employment”. [Citation omitted.]

19. Fish J.A. noted that the trial judge had analysed the offer of employment made to the appellant in light of the *ex post facto* evidence, which he considered an error. In his view, the trial judge should have asked whether, based on the information available at the time of the offer, the appellant was entitled to consider that his employment contract had been unilaterally resiliated by the respondent, not whether the offer would have turned out to be reasonable for the appellant because of what subsequently occurred.

20. On the basis of the facts accepted in evidence by the trial judge, Fish J.A. concluded that the appellant had been constructively dismissed under the second branch of that doctrine. He would therefore have allowed the appeal, set aside the judgment of the Superior Court and ordered the respondent to pay the equivalent of one year’s remuneration in lieu of notice, the whole with interest and additional indemnities. Fish J.A. set the value of the remuneration in lieu of notice at \$109,144 (*sic*): \$50,088 for the 1984 guaranteed base salary of a regional manager, \$46,059 for commissions (based on the average of the appellant’s commissions in 1982 and 1983) and \$13,000 for benefits.

### III - Issue

21. The issue is whether the appellant was constructively dismissed and, if so, what damages he should be awarded.

#### IV - Analysis

##### A. *Constructive Dismissal*

22. I will begin by recalling a few principles. In Quebec, employment contracts are governed by the civil law, including the provisions of the *Civil Code*. Since all the facts of this case occurred before the new *Civil Code of Québec*, S.Q. 1991, c. 64, came into force, the situation is governed by the *Civil Code of Lower Canada* (“C.C.L.C.”). (Section 2 of the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57.) However, the *Civil Code of Québec* does not seem to have changed the law applicable to this matter.

##### (i) Concept of Constructive Dismissal in the Civil Law

23. According to art. 1670 *C.C.L.C.*, general contractual principles are applicable to employment contracts. Under art. 1022 *C.C.L.C.*, contracts are binding on the parties thereto: they must fulfil their commitments. The parties cannot unilaterally change the obligations they have incurred under the contract. This was noted by Justice J.-L. Baudouin in *Les Obligations* (4th ed. 1993), at p. 243:

[TRANSLATION] Nor can the parties, absent an agreement to this effect, change the terms of their contract or the manner in which it is to be performed. The contract’s binding force means that they are bound not only over a period of time, but also with regard to the content of what they have undertaken.

In the context of an indeterminate employment contract, one party can resiliate the contract unilaterally. The resiliation is considered a dismissal if it originates with the employer and a resignation if it originates with the employee. If an employer dismisses

an employee without cause, the employer must give the employee reasonable notice that the contract is about to be terminated or compensation in lieu thereof. (Article 1668 C.C.L.C.; *Asbestos Corporation Ltd. v. Cook*, [1933] S.C.R. 86; *Columbia Builders Supplies Co. v. Bartlett*, [1967] Que. Q.B. 111; *Soupes Campbell Ltée v. Cantin*, D.T.E. 91T-741 (C.A.); *Standard Broadcasting Corporation Ltd. v. Stewart*, [1994] R.J.Q. 1751 (C.A.).)

24. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

25. On the other hand, an employer can make any changes to an employee's position that are allowed by the contract, *inter alia* as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract. R. P. Gagnon made the following comment on this point in *Le droit du travail du Québec: pratiques et théories* (3rd ed. 1996), at p. 66:

[TRANSLATION] Moreover, to what extent can the employer change the nature of the employee's work or the employee's duties and responsibilities? This issue is increasingly important, *inter alia* because it is often an

essential consideration for employees in their employment that they be able to do the job for which they were hired, given both the satisfaction they legitimately wish to derive from it and their concern to maintain and develop their qualifications and skills in their field of work. The answer takes into account the form of and circumstances surrounding the hiring of the employee and thus how much discretion the employer explicitly or implicitly has to exercise managerial authority in this regard. [Citation omitted.]

26. To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

27. Moreover, for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee. In the case at bar, there is no question of bad faith by the respondent, which was acting in good faith in reorganizing its hierarchical structure. Thus, the only damages in issue are those that would be awarded in lieu of notice.

28. French civil law has adopted similar solutions. The Court of Cassation stated the following in Cass. soc., February 4, 1988, *Bull. civ.* V, No. 96, p. 65:

[TRANSLATION] Whereas . . . the employer cannot substantially change an individual contract of employment without the employee's consent, and whereas the employer must either maintain the contractually agreed terms or draw conclusions from the refusal of the person concerned. . . .

In *Droit du travail* (17th ed. 1994), G. Lyon-Caen, J. Pélissier and A. Supiot stated the following at p. 273:

[TRANSLATION] When the employer has made a unilateral decision to substantially change the employment contract, the employee can, rather than continuing to work while voicing his or her refusal to accept the employer's changes, take the initiative by ceasing to work.

If the employee simply stops working under the new terms imposed by the employer, the breakdown of the employment relationship will be considered a dismissal. . . . [T]he judge will apply all the substantive rules applicable to dismissals: the employer will owe severance pay, compensation in lieu of notice and possibly compensation for dismissal without real and serious cause. [Citations omitted.]

At pp. 492 and 664, they also provided a few examples of changes that are substantial enough to amount to dismissal:

[TRANSLATION] According to the general rule, any change in the [salary] calculation method or reduction [in salary] is considered a substantial change to the contract. If the employee refuses to accept such a change, the result is dismissal.

...

Thus, a *demotion* combined with a pay cut is a substantial change to the employment contract that may be considered a dismissal. . . . [Citations omitted; emphasis in original.]

(See: Cass. soc., January 21, 1988, *Bull. civ.* V, No. 58, p. 39; Cass. soc., February 4, 1988, No. 96, *supra*; Cass. soc., February 25, 1988, *Bull. civ.* V, No. 140, p. 93; Cass. soc., November 15, 1988, *Bull. civ.* V, No. 594, p. 382; see also: B. Teyssié,

*Droit du travail*, vol. 1, *Relations individuelles de travail* (2nd ed. 1992), at pp. 592-96;  
J. Rivero and J. Savatier, *Droit du travail* (12th ed. 1991), at pp. 509-10.)

29. Before going on to examine how the courts have applied these principles, I should pause to discuss a point raised by the statement of Fish J.A. of the Court of Appeal, with which Chamberland J.A. concurred, that the doctrine of constructive dismissal, a creature of the common law, has become part of the civil law.

30. In 1984, in *Lavigne v. Sidbec-Dosco Inc.*, [1985] C.S. 26, aff'd C.A. Mtl., No. 500-09-001556-844, May 4, 1988, Hannan J. said at p. 28 that the common law rule concerning constructive dismissal has been adopted by Quebec civil law:

It is a well established principle in the law of contract of personal services under the common law, that actions of the employer in reducing the functions and salary of an employee may be held to be equivalent to a "constructive dismissal", and when the employee resigns in these circumstances he will be entitled to damages. The breach of the contract in these cases is held to have been committed by the employer, and it is this breach which allows a Court to condemn the employer to damages.

...

Caution must be exercised in adopting unreservedly common-law concepts of contract into cases arising under the Civil law, except where there is useful necessity and authoritative precedent. However, in the case of lease and hire of personal services, in Quebec, the doctrine of constructive dismissal has been recognized.

In support of this statement, Hannan J. relied on the decision of the Judicial Committee of the Privy Council in *Montreal Public Service Co. v. Champagne* (1916), 33 D.L.R. 49. In that case, which originated in Quebec, an employee had left his employer after the employer had unilaterally changed his duties. The employee then sued his employer for damages. The Judicial Committee of the Privy Council reached the following conclusion at p. 52:

Their Lordships therefore think that the company, by their action in [altering powers of the respondent and the duties which he had contracted to perform], committed a breach of this contract, entitling the respondent to assert that the contract was at an end, and justifying him in maintaining the suit for damages, in which he has succeeded.

The Judicial Committee was cryptic about the legal basis for this statement. However, it is clear that the statement is fully consistent with the civil law, and it must not be seen as expressing any intention by the Judicial Committee to depart from that law.

31. As this Court has noted on many occasions, the civil law is a complete system in itself; care must be taken not to adopt principles from other legal systems. Thus, for a legal principle to be applicable in the civil law, it must above all be justified within the system itself. (*Rubis v. Gray Rocks Inn Ltd.*, [1982] 1 S.C.R. 452, at p. 469; *Driver v. Coca-Cola Ltd.*, [1961] S.C.R. 201, at p. 208; *Hallé v. Canadian Indemnity Co.*, [1937] S.C.R. 368, at p. 384; *Desrosiers v. The King* (1920), 60 S.C.R. 105, at p. 126.)

32. That being said, it may nevertheless be worthwhile from a comparative point of view to consider how other legal systems have resolved the same issue. That analysis must not, however, lead to the unquestioning adoption of legal rules from other systems. In “L’interprétation du Code civil québécois par la Cour suprême du Canada” (1975), 53 *Can. Bar Rev.* 715, Professor J.-L. Baudouin, now a Quebec Court of Appeal judge, stated the following at p. 726:

[TRANSLATION] Reference to foreign precedents is not wrong in itself. To say that it would be to deny that comparative law has any value. However, it can be dangerous when it is done at the expense of local sources or sources from a similar system and when it has the effect of substituting the earlier *dicta* of a judge or court for an effort by the court hearing the case to understand and make sense of the written law.

In addition, if the rules in the two systems are similar, precedents may be of some relevance. Although they are not binding, the fact that they apply similar or identical principles may be useful for the purpose of explanation and illustration. (See, *inter alia*, *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250, at p. 261; *Pauze v. Gauvin*, [1954] S.C.R. 15, at p. 21.) This is true, *inter alia*, in constructive dismissal cases, in which, as will be seen, the courts have adopted similar solutions based on very similar principles and circumstances. It is therefore worthwhile to consider decisions from both legal systems to find illustrations of how the courts have applied the constructive dismissal concept.

(ii) Situation in the Canadian Common Law Provinces

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. The leading case on this question is an English decision, *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, in which the following was stated at pp. 321-22:

But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant. . . . It has been authoritatively stated that the question to be asked in cases of alleged repudiation is “whether the acts and conduct of the party evince an intention no longer to be bound by the contract”. . . . The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. . . . But . . . a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain. . . .

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. (See, for example, *Stewart v. MacMillan Bloedel Ltd.* (1992), 42 C.C.E.L. 225 (B.C.C.A.), aff'g (1991), 37 C.C.E.L. 292 (B.C.S.C.); *Cox v. Royal Trust Corp. of Canada* (1989), 26 C.C.E.L. 203 (Ont. C.A.), leave to appeal refused, [1989] 2 S.C.R. x; *Mifsud v. MacMillan Bathurst Inc.* (1987), 60 O.R. (2d) 58 (H.C.); *Schwann v. Husky Oil Operations Ltd.* (1989), 27 C.C.E.L. 103 (Sask. C.A.); *Saint John Shipbuilding Ltd. v. Snyders* (1989), 29 C.C.E.L. 26 (N.B.C.A.); *Farquhar v. Butler Bros. Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 (C.A.); *Baker v. Burns Foods Ltd.* (1977), 74 D.L.R. (3d) 762 (Man. C.A.). See also *Cayen v. Woodward's Stores Ltd.* (1993), 45 C.C.E.L. 264 (B.C.C.A.); *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349 (C.A.); *Orth v. MacDonald Dettwiler & Assoc. Ltd.* (1986), 8 B.C.L.R. (2d) 1 (C.A.); *Reber v. Lloyds Bank International Canada* (1985), 61 B.C.L.R. 361 (C.A.); although it was found in these cases that there had been no constructive dismissal.)

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:

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. The common law rule is therefore similar to that applicable in Quebec civil law when it comes to the concept of constructive dismissal. Thus, although decisions from the common law provinces are not authoritative, it may be helpful to refer to them to see what types of changes the courts have considered fundamental changes to an employment contract resulting in the termination of that contract. However, 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. (See, *inter alia*, for Quebec: *Chouinard v. Groupe Commerce, compagnie d'assurances* (1995), 67 Q.A.C. 83; *Daigneault v. Coopexcel, coopérative agricole* (1991), 42 C.C.E.L. 128 (Que. Sup. Ct.); *Roy v. Caisse populaire de Thetford Mines*, [1991] R.J.Q. 2693 (Sup. Ct.); *Nyveen v. Russell Food Equipment Ltd.* (1987), 19 C.C.E.L. 227 (Que. Sup. Ct.); *Vigeant v. Canadian Thermos Products Ltd.*, D.T.E. 88T-295 (Sup. Ct.); *Désormeaux v. Banque de Montréal*, D.T.E. 87T-210 (Sup. Ct.); *Reilly v. Hotels of Distinction (Canada) Inc.*, [1987] R.J.Q. 1606 (Sup. Ct.); *Rémi Carrier Inc. v. Nolan*, D.T.E. 86T-370 (C.A.). For the common law provinces: *Lynch v. Mac Carter Ltd.*

(1995), 17 C.C.E.L. (2d) 292 (N.B.Q.B.); *Pulak v. Algoma Publishers Ltd.* (1995), 10 C.C.E.L. (2d) 111 (Ont. Ct. (Gen. Div.)); *Stewart v. MacMillan Bloedel Ltd.*, *supra*; *McNeil v. Presstran Industries* (1992), 45 C.C.E.L. 78 (Ont. C.A.); *Johnson v. Moncton Chrysler Dodge (1980) Ltd.* (1991), 34 C.C.E.L. 164 (N.B.C.A.); *Sherrard v. Moncton Chrysler Dodge (1980) Ltd.* (1990), 33 C.C.E.L. 72 (N.B.C.A.); *Cook v. Royal Trust* (1990), 31 C.C.E.L. 6 (B.C.S.C.); *Cox v. Royal Trust Corp. of Canada*, *supra*; *Mifsud v. MacMillan Bathurst Inc.*, *supra*; *Rebitt v. Pacific Motor Sales & Service Ltd.* (1988), 20 C.C.E.L. 239 (B.C.C.A.); *Jobber v. Addressograph Multigraph of Canada Ltd.* (1980), 1 C.C.E.L. 87 (Ont. C.A.).)

(iii) Application of the Law to the Facts

37. It is clear that the change the respondent unilaterally imposed on the appellant through its June 1984 offer substantially altered the essential terms of the employment contract. At the time the offer was made, any reasonable person in the same situation as the appellant would have come to that conclusion.

38. To begin with, the change involved a significant, even a serious, demotion for the appellant. He was being offered the manager's position at a single branch in Dollard, which was a position he had held eight years earlier before being promoted four times. As regional manager for Western Quebec, the appellant supervised and administered 21 branches, 17 branch managers, 400 real estate agents and 35 secretaries. The gross income generated by that region was more than \$16,000,000. As just the manager of the Dollard branch, the appellant would have been responsible for supervising only 22 real estate agents and 2 secretaries. Moreover, the sales of that branch amounted to less than \$700,000. The appellant's responsibilities were therefore being drastically cut, resulting in a considerable loss of status and prestige. As well, the

Dollard branch was one of the respondent's least profitable, one of [TRANSLATION] "the weakest links [in the] chain", as the trial judge put it (at p. 18). It was the only branch in the Western Quebec region that was not meeting the targets set by the company and there was even some question of closing it. Asking the appellant to manage that branch undermined his prestige and status all the more.

39. In addition, the appellant's salary terms were considerably altered by the change imposed by the respondent. As regional manager for Western Quebec, the appellant's remuneration was made up of a guaranteed base salary, commissions and benefits. As manager of the Dollard branch, he would have received no guaranteed base salary; his income would have been limited to commissions. While the value of a guaranteed base salary is known and can be relied on, the same is not true of an income limited to commissions. That type of remuneration can fluctuate greatly depending on market conditions and, as already noted, those conditions were to say the least inauspicious for the Dollard branch. The unilateral change was extremely detrimental to the appellant's financial security. The respondent argued that the appellant was being offered \$40,000 over two years and another \$48,000, which it considered a guaranteed base salary for 1984 and 1985. I cannot accept that argument. As the trial judge found, the \$48,000 was for commissions the appellant had already earned as regional manager during the first six months of 1984. It is true that it was a lump sum, since the final sales figures for the region were not yet known when the offer was made. It turned out that the commissions the appellant had actually earned during the first half of 1984 amounted to slightly less than \$48,000. Neither that small extra amount nor the \$40,000 reorientation allowance could take the place of a guaranteed salary.

40. When he was asked to manage the Dollard branch, the appellant estimated that his salary would be cut in half if he accepted the offer. At trial, the respondent tried

to prove that its offer did not result in such a change to the salary terms of the appellant's employment contract by adducing evidence of what had occurred subsequent to the offer, namely the actual sales figures for the Dollard branch and the Western Quebec region after June 1984. Since the Dollard branch's sales were markedly higher than what the appellant had anticipated, the respondent sought to use the figures to show that if the appellant had agreed to manage the branch, he would in fact have earned more than if he had remained regional manager. The appellant objected to the admission of that *ex post facto* evidence.

41. *Ex post facto* evidence is admissible only if relevant to the case. In *Cie minière Québec Cartier v. Québec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095, L'Heureux-Dubé J. applied precisely this principle when reviewing an arbitrator's decision on an employee's dismissal grievance. (By way of example, see also the Quebec Court of Appeal's decision in *Bertucci v. Banque Toronto-Dominion* (1994), 65 Q.A.C. 17.)

42. Relevance is determined on the basis of what must be proved in an action. In the case at bar, the court had to determine whether the respondent's offer substantially changed the essential terms of the appellant's employment contract. However, since the appellant had to decide whether this was the case at the time he received the offer, the court had to revert to that time to determine whether a reasonable person in the same situation as the appellant would have considered that the offer substantially changed the essential terms of the employment contract. Thus, what is relevant is what was known by the appellant at the time of the offer and what ought to have been foreseen by a reasonable person in the same situation. Evidence of events that occurred *ex post facto* is not relevant unless the sales figures achieved subsequent to the offer could reasonably have been foreseen at the time of the offer.

43. In the instant case, it is clear that the subsequent sales figures could not reasonably have been foreseen. It was proved that the Dollard branch was in an extremely precarious financial position at the time the offer was made. There was even some question of closing it because its sales were below the minimum set by the respondent. Moreover, when the appellant received the offer, he calculated his projected earnings using documents prepared by the respondent and told the respondent of his projections. The respondent never disputed or even commented on them. Nor is there any evidence in the record that the respondent foresaw that sales at the Dollard branch would increase significantly over the following months. Rather, the evidence shows that the respondent itself anticipated that sales at the Dollard branch would not increase in 1984. An operating report dated May 1984 shows that the respondent expected sales at that branch to fall in 1984 (Exhibit P-16, Case on Appeal, at p. 360; see also Diane Brunette's testimony explaining Exhibit P-16, at pp. 253-59 of the Case on Appeal). The appellant therefore did not make a mistake by not foreseeing a substantial increase in sales at the Dollard branch. On the contrary, in light of the facts in evidence, he was fully justified in making the projections he made. I agree with Fish J.A.'s conclusion on this point at p. 13:

Royal Trust therefore cannot now rely on an unexpectedly strong performance by the Dollard office to demonstrate that its offer, viewed years later through the prism of hindsight, looks much better than it did in June, 1984 -- in the contemporaneous light of day.

44. Based on the mere fact that the income of the Dollard branch subsequently improved, the trial judge drew the presumption that such an improvement was reasonably foreseeable by the appellant absent any evidence that exceptional circumstances had arisen in the meantime. In my view, this cannot be the case without

other evidence connecting what subsequently happened to the information available at the time of the respondent's offer. The mere fact that an event occurs does not mean that it was foreseeable. The uncertainties of business stand in the way of such a presumption.

45. The trial judge therefore erred in admitting the *ex post facto* evidence when its relevance to the case had not been established. Moreover, its admission prejudiced the appellant since, in my view and with the utmost respect, it distorted the trial judge's analysis. On the basis of the sales figures of the Dollard branch subsequent to the offer, the judge concluded that the respondent's offer did not substantially change the appellant's employment contract from a salary point of view. However, those figures were not known at the time of the offer and would not have been foreseen by a reasonable person.

46. With respect, the trial judge erred in concluding that the appellant had not been constructively dismissed in the case at bar. Although he acknowledged that the appellant had been demoted, he found that it was not a factor because the appellant would have been prepared to manage a branch that was [TRANSLATION] "more profitable, more prestigious" (p. 15). However, the issue of whether there has been a demotion must be determined objectively by comparing the positions in question and their attributes. What an employee threatened with job loss is prepared to accept as a replacement position is not the yardstick of the employee's rights, although it may, depending on the circumstances, provide some indication of those rights. In this case, an objective comparison of the positions clearly shows that the appellant was being demoted, and this is simply confirmed by his refusal; even as a compromise, the appellant would have accepted only a manager's position in a more successful branch or a guaranteed salary for three years in compensation for the demotion. The trial judge in fact acknowledged all the differences between the appellant's regional manager

position and the respondent's offer. However, he said nothing about or disregarded such significant changes as the loss of a guaranteed base salary and the demotion, which are in themselves sufficient to support a finding of constructive dismissal. In reaching the conclusion that the appellant would have been well advised to accept the offer, he relied primarily on the evidence of what had occurred subsequent to the offer. With respect, he thereby strayed from the real issue, which was whether the offer substantially changed the essential terms of the employment contract. Intervention by this Court is therefore warranted.

47. Moreover, I note that I am in no way altering the trial judge's findings of fact in concluding that the respondent's offer amounted to constructive dismissal. On the contrary, I am relying on those findings to arrive at the necessary legal conclusion. As Beetz J. stated in *Desgagné v. Fabrique de St-Philippe d'Arvida*, [1984] 1 S.C.R. 19, at p. 31:

It therefore does not entail substituting my own view of the evidence for that of the trial judge, but drawing conclusions in law based on the facts which she herself considered to have been established.

*B. Remuneration in Lieu of Notice*

48. The purpose of remuneration in lieu of notice is primarily compensatory. It must above all be fair and reasonable in light of all the circumstances, while being based on the value of the former employee's previous remuneration. Baudouin J.A. stated the following in the Court of Appeal's decision in *Standard Broadcasting Corporation Ltd. v. Stewart, supra*, at p. 1758:

[TRANSLATION] The purpose of remuneration in lieu of notice is essentially compensatory; it is designed to enable the employer to resiliate the contract and find another person to fill the position that has become vacant, and to provide the employee with a reasonable period of time to find work without incurring economic loss. In such cases, the courts act as arbiters and must, over and above a strict actuarial or accounting estimate, arrive at a figure that seems fair and reasonable in light of all the circumstances. However, that figure must, of course, be based on economic data, including the value of the former employee's previous remuneration. [Citation omitted.]

49. The trial judge stated at p. 5 that if he had found that the appellant had been constructively dismissed, he would have awarded the equivalent of one year's remuneration in lieu of notice. Although he did not have to act on his opinion, it is not unreasonable in this case, and the term of the award was not disputed in this Court and was accepted by Fish J.A. in the Court of Appeal, whose colleagues said nothing about it since they were not required to do so. There is accordingly no reason for this Court to change it. (See the comments of Baudouin J.A. in *Standard Broadcasting Corporation Ltd. v. Stewart, supra*, at pp. 1758-59.)

50. At pp. 7-8, the trial judge also found that the appellant had earned \$150,000 as regional manager in 1983, which is not disputed. In the case at bar, it is the only real, representative figure available to determine the value of the remuneration in lieu of notice to which the appellant is entitled. Since the method used to calculate the appellant's salary was changed in 1983, previous years cannot be used. Moreover, it would be highly speculative to try to determine what the appellant would have earned as regional manager after 1983, since he was no longer there to control the region's expenditures, which could have had a significant impact on his annual earnings. It was because of this specific situation that this Court decided, in rendering judgment from the bench, that the appellant was entitled to \$150,000 as one year's remuneration in lieu of notice.

51. As for the appellant's duty to mitigate his damages, the trial judge accepted the following evidence, which shows that the appellant fulfilled his duty, at pp. 4-5:

[TRANSLATION] After the manager of one of the branches in which the plaintiff was interested died in September of the same year, [the appellant] took steps to obtain the position. Since he was no longer an employee and in reliance, *inter alia*, on its practice of appointing managers from within its ranks, Royal Trust denied him the requested position. Subsequently, after being unemployed for a time, the plaintiff opened his own business, which had a slow, difficult start. The evidence did not show how it was doing at the time of trial. In any event, that is not relevant. It is sufficient to note that in the year after he left Royal Trust, the plaintiff's income was minimal despite his attempts to find employment that in some way corresponded to his experience and talent.

There is no reason to alter that conclusion.

52. At the hearing, counsel for the respondent argued, without notice, that assuming that the appellant had in fact been constructively dismissed, he should have accepted the June 1984 offer in order to mitigate his damages. According to that argument, his refusal to accept the offer justifies reducing his damages by the amount he would have earned as manager of the Dollard branch. The argument was not made in either the Superior Court or the Court of Appeal and was not even discussed by the respondent in the factum it filed with this Court. The appellant was therefore not able to respond to it adequately. This Court did not have to consider it.

#### V - Disposition

53. For these reasons, judgment was rendered from the bench allowing the appeal, setting aside the Court of Appeal's judgment, allowing the appellant's action and

ordering the respondent to pay the appellant \$150,000 with interest from the date of service, the additional indemnity and costs throughout.

*Appeal allowed with costs.*

*Solicitors for the appellant: Campbell, Cohen, Seidman, Montréal.*

*Solicitors for the respondent: Martineau Walker, Québec.*