

Case Name:

**Jodoin v. Nissan Canada Inc.**

**Between**

**Harry Jodoin, Plaintiff, and  
Nissan Canada Inc., Defendant**

[2013] O.J. No. 3995

2013 ONSC 4683

Court File No. 11-CV-422143

Ontario Superior Court of Justice

**S.E. Greer J.**

Heard: May 27-30 and June 2, 2013.

Judgment: August 30, 2013.

(121 paras.)

*Employment law -- Wrongful dismissal -- Constructive dismissal -- Demotion -- Action by Jodoin for \$200,000 in damages for constructive dismissal allowed in part -- Jodoin worked with the defendant Nissan in a senior manager sales position -- In 2010 he was moved into the new role of Senior Manager of Vehicle Participation Programme -- Jodoin was constructively dismissed -- Only his salary remained the same -- There was no job description, no employees to report to Jodoin and no long-term goals -- Jodoin was moved from a private office to a cubicle -- Jodoin was with Nissan for over 10 years -- He was awarded \$102,198 in damages.*

*Employment law -- Wrongful dismissal damages -- Occupation -- Executive and management -- Sales -- Duration of employment -- Action by Jodoin for \$200,000 in damages for constructive dismissal allowed in part -- Jodoin worked with the defendant Nissan in a senior manager sales position -- In 2010 he was moved into the new role of Senior Manager of Vehicle Participation Programme -- Jodoin was constructively dismissed -- Only his salary remained the same -- There was no job description, no employees to report to Jodoin and no long-term goals -- Jodoin was moved from a private office to a cubicle -- Jodoin was with Nissan for over 10 years -- He was awarded \$102,198 in damages.*

Action by Jodoin for \$200,000 in damages for constructive dismissal. Jodoin began his career with the defendant Nissan in 2000 and was later promoted to the position of Senior Manager Retail Sales and Sponsorships. In December 2010, Jodoin was told he was being moved into the new role of Senior Manager of Vehicle Participation Programme. No such position existed in the Canadian company. There was no job description, no employees to report to Jodoin, no budget and no long-term goals. Jodoin was moved from a private office to a cubicle in a very open area with heavy traffic. Nissan denied that it demoted Jodoin and/or constructively dismissed him. Nissan took the position that Jodoin resigned from the company.

HELD: Action allowed in part. Jodoin was constructively dismissed. The only essential element of his contract that was not changed by Nissan was his salary. His new title was a hollow title as he had no one to manage in his new position.

From what took place when Jodoin left, it was clear that he was being demoted to a lesser position. Jodoin's replacement had no sales experience and the position was effectively shrunk to being nothing more than an answering machine in a call centre. A reasonable person in a similar position would have felt demoted. Jodoin was with Nissan for more than 10 years and was able to obtain employment with another automobile company within a reasonable period of time. Jodoin was awarded \$102,198 in damages.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, R.S.O. 1990, c. C.43,  
Employment Standards Act, 2000, S.O. 2000, c. 41,

**Counsel:**

Jamie VanWiechen, Counsel for the Plaintiff.  
Susan L. Crawford, Counsel for the Defendant.

**JUDGMENT**

**1 S.E. GREER J.:**-- The issue before me is whether the Plaintiff, Harry Jodoin ("Jodoin"), was constructively dismissed by the Defendant, Nissan Canada Inc. ("Nissan" or "the company") on December 22, 2010, without prior notice. On that date, Nissan informed Jodoin that he was being moved to the newly created position of Senior Manager, VPP. Jodoin saw this move as a demotion and on February 15, 2011, Jodoin wrote to Allan Childs, President of Nissan, that he had been told by his Counsel that he had been constructively dismissed. On March 14, 2011, Jodoin issued his Statement of Claim, claiming damages in the amount of \$200,000. Nissan denies that it demoted Jodoin, and/or constructively dismissed him. It says he resigned from the company.

Some background facts

**2** Jodoin began his career with Nissan in Montreal, Quebec in November 2000, where he worked for 4 years as District Sales Manager before being promoted and sent to Toronto as the Marketing Representative Manager. His job was to improve the company's role with dealers and to obtain substantial investment on the part of these dealers. It is Jodoin's evidence that in two years he obtained the highest rate of programme completion for the company in North America.

**3** In 2007, Jodoin was promoted to take up the position of Regional Sales Representative Manager. He was then offered the position of National Fleet Manager. The job title was changed in 2009 to Senior Manager Retail Sales and Sponsorships. In that position, Jodoin managed Nissan's Tier 2 advertising in English Canada and in French in Quebec.

**4** Jodoin also oversaw Nissan's sponsorship programmes for the CFL and for Cirque de Soleil and oversaw their participation in various auto shows. He dealt with Nissan's new dealer co-op programme and organized the company's dealer meetings, incentive trips and dealer recognition programmes. In one and one-half years, he raised the dealer-recognition sales to 11,000 vehicles. In this position, Jodoin supervised two full-time employees and had a multi-million dollar budget to be applied to all these aspects of his job as a Senior Manager. He also says he was entitled to and occupied a private office.

**5** Jodoin says that he made personal sacrifices to make the move to Toronto, and it was always his ultimate goal to return to Quebec.

**6** Nissan, at this time, employed about 290 persons in Canada, forty-six of which were senior persons having private offices. The President of Nissan was Allen Childs ("Childs") from 2010 to 2012. It was during the period that Jodoin says he was constructively dismissed. Childs left the company in 2012 and now lives in the U.S.A.

**7** Jean-Luc Lemire ("Lemire") was Jodoin's immediate supervisor when he was moved to the new position of Senior Manager, VPP. Lemire had previously worked in Quebec and was known to Jodoin. Lemire left Nissan for a period of 2 years and joined the advertising and marketing firm of Young and Rubican. He then returned to Quebec as Director of Sales Operations and was moved in 2010 into the Regional Sales Manager role in Toronto.

**8** Mark McDade ("McDade") was a Director of Nissan in Toronto before Jodoin moved to the VPP role. Jodoin, in his former role, reported to McDade. Jodoin, in his new role, reported to Lemire and to Wendy Durward ("Durward").

The new position of Senior Manager VPP

**9** On December 22, 2010, Jodoin was told he was being moved into the new role of Senior Manager of Vehicle Participation Programme ("VPP"). No such position existed in the Canadian company. The role did exist in the Nissan America company.

**10** In Canada there was no job description which outlined what was to be expected in the position. There were no employees to report to Jodoin. There was no private office for him. There was no budget. There were no long-term goals in place for the position. Jodoin says he was given a cubicle in a very open area of the building, where employee-traffic moved by on a daily basis, leaving him no privacy. To Jodoin, all of these factors showed that he had been demoted, despite the fact that his salary did not change.

**11** Jodoin says that he never was able to get a job description from anyone at Nissan although he inquired. He says there was to be no direct contact with dealers and others, since much of the work turned out to be done simply on-line.

**12** When Jodoin received the word from McDade that Nissan was moving him to this new position, he sent an e-mail on December 22, 2010 to both McDade and Lemire. In this document, Jodoin says in part:

I am looking forward to getting together with you to lay the groundwork and set our objectives. If you want to sit down and talk later this afternoon, or tomorrow morning, I can come by the office, or if your schedules are too full, please feel free to call me on my cell.

Jodoin, ironically signs off saying "Regards and thanks for the vote of confidence." Nothing, of course, took place two days before Christmas. No one bothered to reply to Jodoin.

**13** A meeting with Jodoin was supposed to take place on January 12, 2011, but was postponed to January 13. He e-mailed Lemire, Durward and Judy Wheeler, with a copy to Glen Branning. He says that neither McDade nor Glen Branning can tell him where his office will be situated in the building. Jodoin says to them that he will require privacy and the ability to speak to potential customers without background noise in the way. He then suggests that he work from the Regional office in Brampton until a solution has been found. That office, he says, is about 10-15 minutes away from the main office.

**14** Lemire responded with a cryptic short answer (when there was still no job description in place) as follows:

I think with the help and support from admin that you will need Proximity to Lauri finance distribution and fleet is key to ensure smooth process of all activities.(sic) We will find you a spot Don't worry I too am homeless (sic).

Lemire, at that point, had his office in a Conference Room, which was eventually converted to his office.

**15** On January 19, 2011, there was a flurry of short e-mails among Jodoin, Lemire, Durward, Lauri Britton and Syed Ahmed about detail on the "fleet and vpp activities for Q". Jodoin had been working on some figures to improve the sales figure for dealer participation. He also had some proposed budget items. What is clear, however, is there never had been a concrete plan for this new position in place by Nissan, during the 28 days after Jodoin was told about his transfer.

**16** It is Jodoin's evidence that he may have met with the others 2-3 times between December 22 and February 15, 2011, when he tells Childs, the President, that he considers himself constructively dismissed.

Nissan's position

**17** Nissan says that Jodoin must prove, on a balance of probabilities, that Jodoin's contract was repudiated by Nissan. The contract in question is dated October 31, 2000 and was signed by Jodoin on November 2, 2000. Nissan says the contract must be examined to determine whether there was an express or implied term that an employee could be transferred, sidetracked or demoted within the company.

**18** Nissan says that one has to examine what did take place. If viewed objectively, the question is whether the new position is so dramatically different from the position he had, that it triggered a constructive dismissal of Jodoin. The question is, setting Jodoin's feelings aside, was this move really a demotion? Nissan says, "Would a reasonable person

have made the same decision in these circumstances?" Nissan sees the move as simply a lateral move with the same benefits, same salary and the same Senior Manager status.

**19** Nissan also looks at the move as meaningful to its bottom line to improve the sales and revenue for the company through an increase in dealer participation in auto sales to employees, family members and friends of the company. That, however, did not happen.

**20** When Jodoin was first hired in 2000, his position was one of Area General Manager at a starting salary of \$65,000. There was to be a six-month performance review. A bonus was in place depending on the company's profitability and Jodoin's performance. A benefits package was included, along with a company vehicle.

**21** The contract is in the form of a letter signed by the Regional Sales Operations Manager, Philippe Lavigueur. The second last paragraph reads:

Nissan Canada Inc. is a national company which conducts business at several locations across the country, as such, business travel is required. As part of your long-term career growth, the possibility of transfers to other locations does exist.

Jodoin knew that if he was promoted, he could be sent from Quebec to another location.

**22** Nissan evaluates its employees by way of a "09 Contribution Appraisal Form". The one for Harry Jodoin, has his own rating of himself side-by-side with the "official rating". His 2010 overall rating was good. The comments by Donna Trawinski on that form are:

Harry has a good sense of the competitive environment and skillfully contributes that knowledge to the groups he works with. His experience also makes him a successful negotiator with sponsors to ensure our ROI is optimized. I would like to see Harry focus on initiating a higher level of synergy among all of his working group and across disciplines in marketing.

Jodoin says that he has never received a bad review from the company and on his own assessment of himself, had indicated that he was interested in being promoted, at some point, to that of Director.

Jodoin's evidence about what he says is his constructive dismissal

**23** It is Jodoin's evidence that he had hoped to return to Quebec when Lemire left the company to join Young and Rubican. He was, however, overlooked for that position. His belief, is that Lemire had nixed this move by telling his superior that other employees would leave the Quebec region if Jodoin was transferred back. He says that he was told this by McDade. He also says he questioned Chris Julian, the then Director of Sales Operations, about this information. He believes that Lemire orchestrated this transfer to Senior Manager VPP in Toronto to replace him with Mary Borg McNeal ("McNeal") in his role as Senior Manager of Retail Sales and Sponsorships.

**24** Jodoin was aware that while the Nissan America company was experiencing a loss of sales during the recession, Canada was not as greatly affected as was the American operation. Jodoin says Childs had said there would be some budget cuts in the Canadian operation but Jodoin's area continued with the sponsorships. Jodoin says that in his former position he did a lot of detailed work, met with vendors about staffing and uniforms, helped negotiate a 5-year deal with one of the sponsors, attended dealer meetings, and helped organize a 2-day event in Las Vegas.

**25** With respect to budgets, Jodoin says his was in the range of \$30,000,000. He outlined in his evidence that the CFL sponsorship with teams and the league had a budget of \$2,000,000 to \$3,000,000. The auto show had a similar budget, with the co-op programme of about \$7,000,000, where rebates were about \$100 per vehicle sold. These were all on top of his general budget noted earlier. Jodoin says that his position in his former role, as compared with the VPP role he was transferred to, was totally different from the new role with no budget, no staff, no long-term goals and no private office.

**26** Jodoin's salary in 2010 was \$99,985 plus benefits, plus 90% use of a company car, plus participation in Nissan's Incentive Plan worth \$11,519 in his last year from April 1, 2010 to March 31, 2011. Jodoin remained in his VPP role from December 22, 2010 to March 18, 2011, although he wrote to Childs on Tuesday, February 15, 2011 to say he had been constructively dismissed. In that e-mail, which was copied to 2 others but not to Lemire, he says:

As I advised you during our conversation last Thursday night, my lawyer has confirmed that this is constructive dismissal under Canadian law. Despite our meeting I have heard nothing from either yourself or the HR department. I do not want to have to take legal action against NCI. I would much rather the company do what I have told that you wanted to do in December before deciding to task me with VPP sales instead, and terminate my employment with the appropriate compensation. However, if I do not hear from you by the end of day, tomorrow, I will need to take further action. Thanking you in advance.

**27** Childs did not reply to this e-mail. Neither Kim Kessler nor David Venegas, who received copies of that e-mail, replied. It was not until Kim Davenport ("Davenport"), Director of Human Resources in the United States office, sent Jodoin a letter dated February 16, 2011, that he knew that Childs had sent her a copy of the e-mail. She was asked to reply on behalf of the company. She wrote, in part:

The President was not satisfied with your performance in your previous role and believed that this reassignment would provide you with the opportunity to take advantage of your core strengths which would ultimately benefit you and the organization. Your assignment to this role was not considered permanent. Rather the plan was to insert you into this role so that you could develop the position and the program. Your success or lack of success in establishing the position and the program would in turn help us decide what your future career path and opportunities within the organization would be.

She then went on to say that the company could not guarantee him an office "... but will certainly consider a potential relocation to an office as part of the various reconfiguration plans."

**28** The contents of this letter must have been news to Jodoin, who had never received a bad review, had never been told the VPP was a temporary position with no plans, no budget, no assistants to work with, and only a short-term goal of selling 500-700 cars in the new incentive employee scheme. There had also been someone on stand-by to take over Jodoin's position. That person was McNeal, who was given his former private office.

**29** On p. 2 of her letter, Davenport said:

Your assignment of the new role was not part of a plan to exit you from the company and was not a constructive dismissal. The company is therefore not prepared to provide you with a severance package.

**30** While Jodoin was in his former position, McDade had been the Director he reported to. In the new VPP position, Jodoin was now expected to report to Lemire, who he felt had prevented him from returning to Quebec. His evidence is that he found Lemire to be "often disruptive, last minute and not constructive" in the job setting. He says that Lemire was condescending to both him and McDade. He says that on one occasion, Lemire came into his office while he was with a supplier, and was told in front of the supplier that things had to change. Jodoin found this embarrassing.

**31** Jodoin says that between December 22, 2010 and March 2011, Lemire only spoke once, and that was when Durward was present. Jodoin says that Lemire had been confrontational and impolite when he met with Lemire and Durward. Jodoin believes he was "set up to fail", as there was no vision of what the new position entailed.

**32** When Jodoin was cross-examined about his previous interaction with Lemire, and was asked why he had not spoken to Lemire and ask him, "Why did you sabotage my return to Quebec?", Jodoin replied, "What would be the point in that". He also pointed out that Lemire was no longer with Nissan at that point. When asked whether he had spoken to Childs about Lemire, Jodoin said that he spoke to his Director, McDade. When he was asked whether McDade was on his witness list, Jodoin agreed that he was but he was not present at the Trial because he, too, had been let go by Nissan in the summer of 2011. He said that Julian was not on the witness list because he still worked for Nissan.

**33** Jodoin was replaced by McNeal. She had previously been at Nissan but left it and went to work for Hyundai. As far as Jodoin knows, McNeal went on maternity leave there, and after it was over, she quickly replaced him, at Nissan. He says that he had heard prior to being told he was moving positions that if he was terminated, McNeal would come in and replace him. To Jodoin, his new role with no employees reporting to him and no job description was simply manufactured to get him out of his former role so McNeal could have his position.

**34** Jodoin was asked to vacate his office around January 11, 2012. While Jodoin acknowledged that McNeal would be taking over his space, he says the fact the company was moving him into a cubicle was embarrassing. He says people kept asking him about the move and he felt awkward at now being in a cubicle.

**35** When cross-examined about the cubicle, Jodoin said that while McDade may have been in one at some time in his position, McDade was allowed, instead, to work from his home. Jodoin acknowledges that there was somewhat of a shortage of private offices but nothing was forthcoming about an office for him until he told Childs he thought he had been constructively dismissed. Only a few days after that Venegas wrote to Jodoin on February 22 saying that office space was located, in a place where there previously had been no space. Jodoin says he sees this as hypocritical on behalf of Nissan to have "miraculously" now found office space.

**36** Jodoin kept pressing those in charge as to what his budget would be in the new position. No budget was ever given to him in the 3 months he was in the position. He says he spoke to Neetika Sathe about moving some of her budget to him so he had something to work with. He says she told him she was over-budget already. He was told to draw up a budget so he presented several different budget scenarios. No one agreed that there was any money for his new position. This, he says, was another factor which contributed to his constructive dismissal.

**37** Jodoin also says that no one ever presented him with the long-term goals of this new VPP position. The short-term goal, he was told, was to increase the sales in that area by 500-700 cars but nothing more. He tried to get McDade to clarify things for him, but Jodoin says that did not happen. He says he told McDade "that it looked like there is no future in the new position for him."

**38** Jodoin knew that Finkelmeyer was the General Manager of VPP in the United States. He did not know Finkelmeyer or what he did. He and Lemire and Durward all had a short telephone conference call with Finkelmeyer in mid January, where some strategy was shared but Jodoin says it was not of much help. He said he still did not trust Lemire at this point.

**39** When Jodoin left Nissan near the end of March 2011, he was replaced by Canzio Milito ("Milito"), who had been Senior Manager of Vehicle Operations. However, Milito had no sales experience going into the new position.

**40** Jodoin says that his last 4 transfers were promotions. He says he tried to co-operate with Nissan after his e-mail to Childs. There is an e-mail from Durward to Kessler, Lemire and Venegas about Jodoin and what he would do. He says he was to meet with another employee, Murphy, about this VPP role. Murphy, however, was another casualty at Nissan and he was let go two weeks later so no such meeting took place.

**41** At 4:00 a.m. one morning around mid-February of 2011, Jodoin received an e-mail entitled a "Career Vision Form for Harry Jodoin" which had comparative ratings in it. He says the evaluation is inaccurate and is an insult to him after all the time and effort he put into his job when he was the Senior Manager of Retail Sales and Sponsorships. He says that his Director had not given him ratings before. When asked on cross-examination whether this form was the "straw that broke the camel's back", he emphatically answered "No", it was just one of things the company had done to him to demote and constructively dismiss him.

**42** Jodoin says that in 2010 the American Nissan company was in deep trouble in the U.S.A., with sales having dropped 50-60%, whereas in Canada, sales had only dropped about 5-10%. Some Americans were being sent up to work at jobs in Canada. The Canadian operation had no Human Resources position and it was run from the American office. The company was, therefore, in a state of flux.

#### The Evidence of Richard Stephen Phillips

**43** Richard Phillips ("Phillips") in 2010 worked in an advertising agency, which had an account with Nissan. He worked with Jodoin on advertising matters involves radio, television, digital and newspapers. In this job, Phillips says he talked with Jodoin on almost a daily basis. He says that Jodoin performed his job very well. He says Jodoin was "extremely intelligent" about the automobile business and its retail sales. He describes Jodoin as being honest and yet tenacious always made sure that Phillips' company was "living up to the job."

**44** Phillips says one evening he was at a dinner with his boss, Jodoin and Childs, when Childs questioned him about Jodoin's performance. Phillips said he told Childs that his employer liked Jodoin a lot. He says Childs disagreed with that assessment. This incident took place close to Christmas 2010, and likely before Jodoin was transferred. This was all within the first 6 months Childs was the President of the Canadian company.

45 Phillips saw Jodoin when he was in the new position in January. He says that Jodoin no longer had any employees reporting to him and he no longer had a large budget. Phillips says, "The VPP role looked like a demotion, with no real explanation as to how the job would grow."

#### The Evidence of Jean-Luc Lemire

46 Jean-Luc Lemire ("Lemire") has spent 17 years with Nissan. He is currently the Director of Sales Operation for Nissan. He held a variety of positions with Nissan, including one period in Quebec around 2007. He spent 2 years from 2007-2009 with Young and Rubican. On June 20, 2010, he rejoined Nissan in his current role.

47 Lemire gave evidence on how the structure at Nissan works with Managers, Senior Managers, Directors, Regional Vice-President and President. He says that persons in these positions can be transferred internally and laterally and to different provinces where the structure operates.

48 Within the structure, some areas have larger budgets than others but Lemire says that does not mean the area is more important than other areas. He says in his current role he has no budget but it works "cross-functionally" with other areas. He says the full budget for Canada is broken into different areas of the company and under the aegis of the Senior Manager or Director as required. He says that a transfer does not mean a demotion.

49 Lemire says that the new Senior Manager VPP position was created in "late 2010". He sees the new position as being a "crucial role to fill a very important position." He says that prior to this, the VPP role did not exist but its functions "moved around in Canada." When asked what the goal of this new role was, his obscure answer was "to put ink to paper to become much more serious to leverage the pool---facing a challenge and identifying the gap of the number of cars needed to sell, within that programme." He says the number of cars needed to be sold in that area was 1000 and Nissan wanted it done quickly before the year end in March.

50 The role of Senior Manager VPP existed in the Nissan America operation where it counted for 30,000 sales per year. At the time the role was created in Canada, Finkelmeyer held that position in the United States. Lemire says he met him at a convention in Las Vegas and was told what work he did in Nissan America. Lemire says he saw that as phenomenal opportunity to "define and create general sales to the company and become the lever" for it in Canada. He says the creation of this role in Canada was important.

51 Lemire says he discussed the new role with Childs a few times in the Fall of 2010. He claims that some of the Directors had input into it. He says the skills needed in this new role were identified, such as collaborating with suppliers, selling the programme and a creative-mind. He says that Jodoin, being bilingual would be ideal to communicate with dealers. He acknowledges that much of the work was done through websites and so this would make it more of a "marketing plan." He says there were a number of names put forward to fill the new role but "Jodoin is clearly the lead candidate."

52 Lemire says that ultimately Childs, he and Durward were responsible for making the selection of Jodoin to fill the new position. He concedes that there was never a written job description for the new position. He says he does not recall that Jodoin asked for one. He says there was no discussion of Jodoin being "exited from the company." He says the company "felt good" about him in the new position.

53 Lemire says that McNeal, the person who replaced Jodoin in his position, did not participate in the decision to transfer him. He cannot recall when, in the Fall, the decision was made to re-hire her by the company for that position. Lemire and McNeal had, however, worked together for 4 years after she first joined the company around 1998/9. She left Nissan around 2004/5 and worked elsewhere until 2010, when she re-joined Nissan. Lemire says that he was asked by Childs what he thought of McNeal and he told Childs that he "highly recommended her." He was vague in his evidence about exactly when McNeal was approached or when she approached the company. He says he did not speak to anyone about wanting to hire McNeal.

54 In a directive/announcement, which is undated but was sent by Lemire, it announces that Jodoin was transferring to a "newly created position of Senior Manager, Nissan & Infiniti VPP" reporting directly to him and Durward. It then says that McNeal is rejoining the company "effective January 17" and assuming Jodoin's former role. She, however, took over Jodoin's office on January 11, 2011.

55 Lemire says he first spoke to Jodoin around the 2nd or 3rd of January, 2011 about the new position. Jodoin's evidence does not support this. He identified his e-mail of January 10, 2011 to Jodoin, where he copied Durward. In it he says he looks forward to reviewing Jodoin's "plans" tomorrow. Lemire says, in part that their goal should be to:

- identify the list of potential big impact/pay-off leads and set a priority list to start Produce a list of resources we will require
  - staff
  - Agencies
  - Fleet dept.
- Define a timeline for activation- Jan-Feb-Mar
- Understand our go to market strategy - Nissan and infiniti (sic)
- Confirm whether we need any media or marketing support

**56** When he was questioned about what took place at the meeting the next day, Lemire's answers were full of "we would have" done this or that. He says Jodoin never expressed any concern about his transfer. Durward, in her e-mail sent shortly after the meeting took place speaks of a plan for the next "40 days". Lemire, however, had to concede that there was no job description for the VPP position and no budget in place.

**57** On March 11, 2011, Childs sent an "Organizational Announcement" e-mail. It included a list of 19 names of various employees moving about in or leaving the company, four of which were for newly created roles. The announcement about Jodoin was included in all of this. It reads:

Ken Milito, currently senior Manager, Vehicles Operations will transfer to Senior Manager VPP, replacing Harry Jodoin, who is leaving NCI effective March 18 to pursue others (sic) opportunities. Ken will report to Jean-Luc Lemire.

**58** Lemire later, in evidence, agrees that Jodoin had asked for a budget to work with in this new position but none was forthcoming. He says he did not speak to anyone else about the budget. As for the lack of an office for Jodoin, after Jodoin again asked about it, Lemire says in an e-mail that "We will find you a spot." He claims not to have known that Jodoin was unhappy until he resigned.

**59** Lemire believes "things were taking form" with respect to the VPP position. He emphasizes the need to make "sales in January", although the website was not changed. He denies he spoke to Durward about Jodoin being unhappy in the VPP position. He denies he knew that Jodoin felt he had been demoted. He denies having been rude to Jodoin.

**60** As for Milito, who took over from Jodoin, Lemire says it was a promotion for him. He was in the position from April 1, 2011 to March 31, 2012, although most of that was on sick leave. Milito only worked for 6 months and that was half-time. He continued doing some of the other work he had previously done. Lemire says Milito remains in the position at the date of the Trial, yet he had to admit that Milito is actually not at work and is ill. Therefore, no one is occupying the role of Senior Manager VPP.

**61** Lemire denies being involved with the company not hiring of Jodoin to fill the Quebec position. He admits Julian had asked him for some input about the Quebec position that Jodoin wanted, but denies he said other employees would not work with Jodoin. He also denies that McDade spoke to him about the way he was treating Jodoin.

**62** On cross-examination, Lemire contradicted his earlier testimony and said he did not speak to Julian about the Quebec position Jodoin wanted. He could not explain, however, how workers in Quebec could have known that Jodoin had applied for the position, if applications were kept confidential by the Human Resources Department. He admits that Jodoin had succeeded in obtaining the former position of National Manager of Fleet, which Lemire wanted but did not get. He concedes that Jodoin did well in that job but would not admit that Jodoin sold more cars than he did when he took over that position later.

**63** Lemire concedes there is no written policy at Nissan regarding Senior Manager positions and mobility within the company. When examined about his relationship with Jodoin, he was evasive in his answer. He says that he was in management and was not privy to information about Jodoin's performance. He could not explain how there had been no bad performance ratings about Jodoin until it was decided to move him to the VPP position.

**64** Lemire agrees that he was involved with the move of Jodoin to the new position. He did not answer whether Childs brought up Jodoin's performance at a meeting. When he was shown a copy of Kim Davenport's letter of February 16, 2011 to Jodoin, after Jodoin had on the 15th said that his lawyer had confirmed that he was constructively dis-

missed, Lemire denies having seen the letter. When asked why he had said that Childs, the President, was not happy with Jodoin's performance, Lemire denies that Childs said that.

**65** When asked about how the decision to create this new position came about, Lemire says that Childs, over time, gave directions. He confirms Durward and McDade were involved in discussions. He confirms that there was no job description for the VPP position and that it would have been Human Resources job to draft one, if asked to do so.

**66** Lemire admits that he was consulted by Childs about the appointment of McNeal to replace Jodoin. He says she was a "work friend". He says she was a good candidate for the role of marketing but not the VPP role. He denies that he told McDade in the summer of 2010 that he had a replacement for Jodoin. When asked whether he had interviewed McNeal, Lemire hesitated and said he was not sure. He then says perhaps it was late October or early November. He refuses to admit that the company was interviewing that early for Jodoin's position. He denies knowing when McNeal was hired before Jodoin was transferred and denies having any involvement in the transfer.

**67** There is evidence that Davenport was aware that McNeal was already hired. In her e-mail to Kessler and Venegas dated December 22, 2010, Davenport says:

Thanks for your impromptu help with the Harry Jodoin role change earlier today. Please update Dave after the holidays and most importantly -ensure that we have Mary onboard as Harry's backfill!!

Davenport is not part of Nissan Canada. She is the Director of Human Resources, for Nissan America. She lives in Maryland, U.S.A.

**68** Lemire finally conceded that the decision to replace Jodoin with McNeal was all done before 6:00 p.m. on December 22, 2010. He concedes that neither he nor Durward responded to Jodoin's e-mail, sent to them on December 22, 2010 at 12.50 p.m., asking if he could see them.

**69** Lemire's evidence is he had about 5 meetings and conferences with Jodoin between January and end of February 2011. Jodoin's evidence is that they met twice. Lemire acknowledges receiving the January 19, 2011 e-mail from Jodoin about a draft budget and expenses. His evidence is vague about knowing how Jodoin felt about the transfer to the new position and about his resignation.

**70** Lemire concedes that there was no budget set for the VPP role, yet neither he nor Durward referred Jodoin to the Chief Financial Officer to discuss the budget issue.

**71** Lemire concedes that Milito, who took over the VPP position, had no previous experience with sales of vehicles. He admits that the role was not full-time, as the evidence shows Milito worked at it half-time. Milito spent the other half-time in the distribution of vehicles. Milito did not report to Lemire as Jodoin had been told to do. Lemire concedes no one has filled Milito's role as Senior Manager VPP since his illness. It is Jodoin's evidence that Milito's e-mail remains the same and his telephone message is on automatic reply that he is on extended medical leave. A copy of Milito's reply e-mail was entered as evidence. All calls to Milito's phone number continue to be referred to a Call Centre.

**72** Lemire tries to make the issue of Jodoin's move to a cubicle in an area of high employee traffic, seem trivial. It clearly was not and Lemire finally acknowledged that only 3 days after Jodoin's resignation was delivered, the company miraculously found a space it would work on to make an office. There is no evidence that such an office was completed or that Milito was offered such an office.

#### Evidence of Glen Branning

**73** Glen Branning ("Branning") has been with Nissan for 23 years. He is currently the Manager of Corporate Services. He gave evidence about the company's floor plans and the involvement of the hiring contractors to make structural changes to the building. He says if offices are not available, employees are moved to cubicles.

**74** Branning said he was told a new office was to be built. No internal e-mails or letters of instruction were submitted as evidence of this. He says it takes 4-6 weeks to produce an office. He did, however, receive a copy of Jodoin's January 13, 2011 e-mail.

**75** Branning says the Brampton Nissan building is mainly a warehouse and is 8 km. away from the Mississauga building. He acknowledges that space was available in the Brampton building to construct an office for Jodoin, if Bran-

ning had been told to do so. He agrees it could have been done by late February. He could not explain Davenport's February 16, 2011 letter to Jodoin that Nissan could not guarantee an office.

Evidence of Kim Barbara Kessler

**76** Kim Barbara Kessler ("Kessler") has been with Nissan America for 23 years. She has been its Human Resources Operations Manager for 16 years. She says she reported to David Venegas ("Venegas") in the Fall of 2010. Both Kessler and Venegas worked in the U.S.A. office.

**77** In the Fall of 2010 Kessler says not all levels of Senior Management positions earned the same salaries. The 3 levels were classified as CI, CJ, and CK. The role of Senior Manager VPP, she says, was a CI position. Such a person, she says, would typically have an office. She admits there may have been private offices available when Jodoin was transferred, but "not in that area", she says.

**78** While some Senior Managers do not have budgets, Kessler could only identify the Finance/Treasury person, as one. Kessler says transfers within Nissan can be part of a "career-building" process. She admits, however, that in 2011, no such Senior Managers were housed in cubicles.

**79** While Kessler says that she was involved in discussions, with others, about the new VPP role, there were no formal meetings to identify the role. She says it was McDade who told Jodoin about the transfer. She had no face-to-face meeting with Jodoin.

**80** Kessler, however, says she interviewed McNeal, who was offered Jodoin's former role, but says McNeal did not accept the job until Jodoin was transferred out. Venegas' e-mail was copied to her. She acknowledges being surprised when she was sent a copy of Jodoin's February 15, 2011 letter to Childs.

**81** Kessler admits that by April 2011, 15 people were dismissed or terminated from the Canadian operation of Nissan. This did not include Jodoin. McDade, however, was "axed" on July 20, 2011. He received a severance package.

**82** Kessler admits that there never was a job description for the Senior Manager VPP role. She also admits that after Jodoin left, private offices were found for a paralegal (new role), for another Human Resources person, and for the Assistant to the President.

Evidence of Wendy Kilgour Leslie Durward

**83** Wendy Durward ("Durward") has been with Nissan for over 21 years. She is currently the Director of Sales Infiniti Canada, and has been so for the past 5 years. Durward also has been in a number of other different positions in Nissan Canada over the years. It is Durward's evidence that it is common for Nissan to move employees into different management roles. She says that an employee's budget, in a managerial position, is not a reflection of that person's responsibility in that position.

**84** Durward says offices for managerial employees are not always available, and that if a new office is to be constructed, it takes time.

**85** With respect to the new Senior Manager position VPP, Durward says it was Childs who decided that Nissan Canada should put this new role in place. She says, "I shared the excitement of the role." She admits, however, that there were no inquiries about how many units were sold by Nissan America, where the position already existed. When asked whether this new role was still an important position, she says it is.

**86** While Durward could remember with clarity that the new role was still important, despite the clear evidence it was not, she could not remember anything when asked key questions both on examination-in-chief and cross-examination. When asked whether she had interviewed McNeal, Durward admitted she had, but could not remember when. When asked whether she remembers receiving a copy of Jodoin's e-mail to her, Lemire and Wheeler on January 13, 2011, she did not remember receiving it, nor does she remember speaking to Jodoin about where his office would be. She does not remember Jodoin speaking to her about him being badly treated by Lemire. She does not remember Jodoin complaining about what the new role was missing. She does not remember receiving a copy of Jodoin's February 15, 2011 e-mail to Childs about being constructively dismissed, and says she did not know Jodoin was taking this position.

**87** On cross-examination, Durward denies having meetings with Jodoin. She later remembered that any meeting with Jodoin took place before any meeting with McNeal. She also says they were unsure they could get McNeal as "backfill" for Jodoin. She says she does not remember if McNeal was interviewed before Jodoin was told of his move.

She denies knowing that Jodoin had personal issues with Lemire nor does she remember Jodoin had any concerns about his new role before he resigned.

**88** In my view, Durward's evidence was of no help to the Court. Her many failures to "remember" lead to a reasonable inference that it was a waste of time to call her because she was not prepared to say anything which might affect her own position with Nissan.

#### Analysis

**89** Based on the evidence before me, and for the following reasons, I find that Jodoin was constructively dismissed by Nissan.

**90** In *Blight v. Nokia Products Ltd.*, [2012] O.J. No. 1455, 2012 CarswellOnt 4004 (S.C.J.), Mr. Justice B.G. MacDougall referred to the Supreme Court of Canada case, *Farber v. Royal Trust Co.* (1996), [1997] 1 S.C.R. 846 (*sub nom. Farber v. Cie Trust Royal*) 210 N.R. 161, 27 C.C.E.L. (2d) 163 (S.C.C.). On p. 9 of that decision, in para. 20, he said:

To reach the conclusion that an employee has been constructively dismissed, the courts must 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 Court also notes that the fact that the employee may have been prepared to accept some of the changes is not conclusive that constructive dismissal did not occur.

**91** In *Farber, supra*, however, the employee's position was eliminated and the employee was offered a manager's position at another branch of the Trust Company, a position he held eight years earlier. In that case, 11 of 12 regional managers' positions were being eliminated by the Trust Company. The Court found that the Trust Company had made a reasonable offer. In para. 35, the Court noted that each constructive dismissal case must be decided on its own facts, in examining whether the essential terms of the contract have been substantially changed.

**92** In the case before me, the only essential element of the contract that was not changed by Nissan, was Jodoin's salary. While Jodoin was given the title "Senior Manager of VPP", there was nothing to manage. The title was essentially a hollow term.

**93** The contract speaks of business travel and the "possibility of transfers to other locations". The new position did not fit into either of those aspects. It was a title without a job description, no long-term goals, no budget and no one to manage. See: *Blight, supra*, para. 31.

**94** Jodoin was being demoted to a lesser position, as was demonstrated by what took place when he left the new position in March 2011. Milito, Jodoin's replacement, had no sales experience, yet the position was one of sales. Milito never worked full-time in the new position before he became ill. At the end, the position was effectively shrunk to being nothing more than an answering machine in a Call Centre, where someone may eventually return the call.

**95** In my view, a reasonable person, in a similar position would have felt demoted in these circumstances. I find that Jodoin's replacement, McNeal, had been interviewed before Jodoin was told on December 22, 2010, that he was being transferred. Although Lemire attempted to distance himself from that decision, saying the decision was made by others, Jodoin lost his office and was to be sent to a cubicle in an area where heavy employee traffic crossed by. The evidence shows that Lemire knew McNeal quite well. He was closely allied to Childs, the new President, and to Durward. I accept Jodoin's evidence that he had heard from other sources that McNeal would replace him if he was transferred or terminated, as other employees in the company had earlier been terminated or "exited" by the company.

**96** It is admitted by Nissan that there never was a job description for this new position of Senior Manager VPP. None developed after Jodoin was moved into the position. There is, in my view, a reasonable inference that the position was created by Nissan in Canada in order to get Jodoin out of his position so he could be replaced by McNeal. I find Lemire's evidence to be disingenuous about how Jodoin was picked from among others to be transferred to the position because he was the perfect fit. The evidence respecting Milito as his replacement, in the VPP role, negates this.

**97** I find Lemire's evidence to be convoluted, with vague answers to the crucial questions about who decided to add this new position to a company that was in the process of trying to cope with the economic changes taking place in the automobile industry in the U.S.A. and Canada. Lemire waffled around the issue of a budget for the new position. He failed to answer Jodoin's early e-mails, and later when he did, Lemire's answers or directions appear insincere. Jodoin was to report to Lemire, yet their dialogue consisted of no more than 2 brief case conferences with others present plus some e-mails to him and others. He said nothing to Jodoin when he did leave Nissan in March 2011.

**98** Nissan's initial announcement about Jodoin's transfer was perfunctory. It is in a general bulletin sent to all employees listing the names and work descriptions of all transferees or those who left with severance packages.

**99** In his previous position, Jodoin had a large budget of about \$30,000,000 or more for all the projects he controlled and sales advertising and marketing. This is another example of the objective test to be used when the former role is compared to the new position of no budget. In his new role, Jodoin no longer had a profile in the company. He knew the company wanted him to meet a short-term goal of 500-750 car sales but there was no framework within which he could meet that goal.

**100** Even when Jodoin did meet with Childs, Davenport and others, no one took Minutes of the meetings. The Conference Call with Finkelmeyer in the American office, was not documented. Twenty days went by after Jodoin's e-mail of December 22, 2010, before Lemire and Durward ineffectively responded.

**101** Lemire contradicted himself with respect to certain facts about who made the decision to transfer Jodoin from a position where he was clearly successful, as confirmed by Phillips in his evidence, to a new position never before seen in Canada. Jodoin had been a loyal employee for 10 years, never having received a bad report. Why Childs is said not to have liked Jodoin is a puzzle, given that he was very new in the executive position in Canada. In his discovery, at Q. 192, he refused to agree to give an answer to the question taken under advisement as to his recollections of the discussions he had with Finkelmeyer, Al Castignetti and Brian Carolin about establishing the VPP role in Canada. Such refusal could mean that he had no such discussions about establishing the position or that the discussions were about replacing Jodoin with McNeal.

**102** After Jodoin left in March 2011, Milito was in the new role for about 5 months before he became ill. No job description was created for him either. He only spent about 50% of his time covering the new role and filled in the balance of his day with other work related to his former position. All of this evidence contradicted Durward's evidence that the new role was an "important position" to the company.

**103** The private office loss for Jodoin, now to be relegated to a cubicle out of the way from the main managerial offices, was, in my view, another example of how the company never pre-planned for the position. If it was a lateral transfer, as the company tries to make it, why was Jodoin not left in his private office? There were 46 private offices in the main building, some of which were not occupied by Senior Managers or higher positions. While some senior managerial personnel, such as McDade, had to spend a short period of time in a cubicle, he was allowed to work from home. Lemire refused to support Jodoin's suggestion that he move to the Brampton location. There was no mention of giving Jodoin a private office until he resigned on February 15, 2011. A few days later, the company had found a space to convert to make such an office for him.

**104** Jodoin did not delay in complaining about what he saw was a demotion, and by February 15, 2011, he told Childs he had legal advice that he had been constructively dismissed. The Court of Appeal in *Gilbert v. Whittnauer Worldwide L.P.*, 2002 CarswellOnt 3008, 2002 C.L.L.C. 210-039, 23 C.C.E.L. (3d) 35 (C.A.) on appeal overturning the decision of the Trial Judge, [2001] O.J. No. 539, that the Plaintiff had not been constructively dismissed, said in para. 1:

This is based on, among others, factors such as substantial reduction in managerial responsibilities, the removal of the appellant from his office and the perceived and actual loss of leadership in the company.

This applies directly to what happened to Jodoin. He formerly had a leadership position, a responsible, successful Senior Manager position, and was demoted to one with no management at all.

**105** Nissan says the contract was not repudiated and sees Jodoin as having been moved laterally since his salary remained the same and he continued to remain a Senior Manager. It relies on *Meyers v. Chevron Canada Limited*, [2013] B.C.J. No. 459 (S.C.). In para. 39, the Court looks at whether the breach of the terms of the employment, implied or express, constitutes repudiation of the contract. In that case, the Court found that the plaintiff, in his new role, would have had significant leadership responsibilities in a senior position with the same pay scale group. He, however, unlike

Jodoin, continued to have employees reporting to him and the subject matter of his management responsibilities remained the same. The case at bar can be distinguished from that case as it is a significantly different case scenario.

**106** In weighing the evidence of the witnesses at Trial, where Jodoin's evidence differs from that of Lemire and Durward, I prefer the evidence of Jodoin. In my view, both Lemire and Durward tailored their evidence to support each other's position. Jodoin's evidence regarding Lemire's dislike of him was honest and believable. Lemire's evidence about his relationship with Jodoin and the Quebec issue was not.

**107** Both failed to honestly answer when McNeal was interviewed, when she was hired and why she replaced Jodoin so quickly after his transfer. Kessler, on the other hand, tended to be more objective and straight-forward in giving her evidence. Nonetheless, Kessler, as the Human Resources person was aware that the 4:00 a.m. e-mail Jodoin received in January was inappropriate and that there was really only one e-mail that outlined what took place at one meeting the company had with Jodoin after December 22, 2010.

#### Mitigation and Damages

**108** Since I have found that Jodoin was constructively dismissed by Nissan, the Court must determine whether Jodoin attempted to mitigate his damages in finding employment and a new position. The duty of a plaintiff to take steps to mitigate his or her damages where there has been a wrongful or constructive dismissal, is set out in *Mifsud v. MacMillan Bathurst Inc.*, 70 O.R. (2d) 701, [1989] O.J. No. 1967, 1989 CarswellOnt 770, 63 D.L.R. (4th) 714, 35 O.A.C. 356 (C.A.), in paras. 31 and 32. It reads, in part:

The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligations of the employee to look at the new position offered and evaluate it as a means of mitigating damages.

The Court looks at whether the salary offered is the same, what the working conditions offered are like, and what the personal relationships are in any new position offered to the plaintiff. The plaintiff cannot simply offhand dismiss an offer of employment without properly analyzing any offer given to him.

**109** In this case, Jodoin did not immediately leave his employment when he told Childs his Counsel had said he was constructively dismissed. Instead, he remained on the job for another month and a half, leaving at the end of March 2011.

**110** It is Nissan's position that Jodoin should have stayed in the new role and given notice, given that there, in its view, was no breach of the contract. Since I have found that there was such a breach, this factor does not apply. I have also examined, in detail, the circumstances surrounding the breach and what led to my finding of Jodoin's constructive dismissal.

**111** I have found that a reasonable person would have viewed the offer given by Nissan to Jodoin of a position with a similar name and salary, but no job description, no long-term goals, no budget, no office and nothing to manage, as not being acceptable. It would be seen as a demotion and constructive dismissal.

**112** As is pointed out by the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661, [2008] S.C.J. No. 20, 2008 S.C.C. 20, in para. 27, the relationship between employer and employee must be looked at on a case by case basis, when the reasonableness of the employee's mitigation efforts is being evaluated.

**113** In my view, Jodoin was not obliged to stay on with Nissan any longer than he did. I have found that McNeal had already been interviewed for the job of replacing Jodoin before he was even told of the transfer to the new position. In *Evans, supra*, para. 32, the Court says the circumstances of the case must be analyzed in a, "multi-factored and contextual" way.

**114** Jodoin joined Nissan on October 31, 2000. He was constructively dismissed on December 22, 2010, when he was told he was being transferred to Senior Manager of VPP. When Jodoin signed his contract, the only express terms of his contract were that he would have to travel for business and that he could be transferred to other locations. There was no express term that he could be demoted or transferred to a lesser position. If Childs had issues about Jodoin's performance, why was this not reflected in his valuation? How could Childs have really known how Jodoin was performing in the job when Childs only arrived from the U.S.A. in July 2010 and Jodoin, with no bad performances on his record, was transferred out of his job on December 22, 2010, thereby being constructively dismissed?

**115** Jodoin was with Nissan for 10 years, 2 months. He carried on working in 2011 for 3 months until the end of March 31, 2011. On May 24, 2011, McDade, to whom Jodoin had reported in his earlier roles was terminated with notice. The company offered him a severance package that included the following:

- (a) he was to continue working to July 29, 2011, which was inclusive of his entitlement to notice under the *Employment Standards Act, 2000*.
- (b) he was given a lump sum payment (the amount of which is confidential) payable in instalments, including an amount to be deposited into an RRSP Account.
- (c) eight weeks of salary will be eligible for company pension contributions and subject to the terms of the company's current pension plan.
- (d) a benefit with respect to the company's "Assigned Vehicle Policy" and subject to certain deductions.
- (e) eligibility for any variable bonus payout for Fiscal Year 2010, in accordance with the company's variable compensation programme.

Other terms of the agreement are not relevant to Jodoin's circumstances.

**116** It is Jodoin's position that he is entitled to damages for the period of unemployment from March 18, 2011, when he left Nissan, to December 29, 2011 when he obtained a new position with another automobile company, being 285 days of unemployment.

**117** Jodoin's base salary in 2010 was \$99,985 plus he received health benefits of \$4,717.68, use of a company vehicle worth \$10,664.76, an Incentive Plan Benefit worth \$11,518 and an RRSP contribution of \$4,000; for a total compensation of \$130,885.44. This amount averages out to \$10,907.12 per month.

**118** Jodoin says he is entitled to the following amounts based on the 285 days he was out of work:

(a)	Base salary	-	\$78,070.48
(b)	Health benefits	-	\$3,683.67
(c)	Company vehicle	-	\$8,327.28
(d)	Incentive Plan Benefit	-	\$8,993.51
(e)	RRSP Plan	-	<u>\$3,123.39</u>
	Total		\$102,198.33

**119** Jodoin was able to obtain employment in another automobile company in within a reasonable period of time. I therefore award him the sum of \$102,198.33 as damages for his constructive dismissal claim plus pre-judgment interest at the *Courts of Justice Act* rate from March 14, 2011, the date his claim was issued; less the 4 days he continued working to March 18, 2011.

**120** Jodoin is awarded post-judgment interest from the date hereof to the date of payment at the *Courts of Justice Act* rate.

Costs

**121** If the parties cannot otherwise agree on Costs, counsel shall submit to me written submissions within 30 days of the date of this Judgment, no longer than 3 pages plus time docketed, a Bill of Costs and case law, with the Plaintiff delivering his first to the Defendant, who shall have 10 days thereafter to respond and the Plaintiff 5 days thereafter for a Reply, if needed. They shall be delivered to me at Judges' Reception, Osgoode Hall or mailed to me at the Court address.

S.E. GREER J.

cp/e/qlmss/qlrdp/qljac