Docket: 2004-2569(IT)I

BETWEEN:

GERMAIN RIOUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on February 23, 2005 at Montréal, Quebec

Before: The Honourable Justice Gerald J. Rip

Appearances

Agent for the Appellant:	Jacques Dépatie, C. A.
Counsel for the Respondent:	Soleil Tremblay

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 2001 and 2002 taxation years are dismissed.

Signed at Ottawa, Canada, this 21st day of April 2005.

"Gerald J. Rip"

Rip J.

Citation: 2005TCC217
Date: 20050421
Docket: 2004-2569(IT)I

BETWEEN:

GERMAIN RIOUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

[1] Germain Rioux has appealed income tax assessments for 2001 and 2002 by which the Minister of National Revenue denied his claims to deduct amounts paid to his former spouse as an alimentary allowance in accordance with paragraph 60(*b*) of the *Income Tax Act* ("*Act"*).

[2] The appellant's agent has agreed that the following facts assumed by the Minister in making the assessments are true:

a) The appellant and his ex-spouse Hélène Salvail married on September 2, 1983;

b) There are two children of their marriage: Guillaume, born December 15, 1985; and Jasmin, born March 23, 1988;

c) The parties have lived separate and apart since July 1, 1998;

d) On October 27, 1999, a judgment for interim relief was issued ordering the appellant to pay support in the amount of $109 per week for the benefit of the child and an alimentary allowance of $141 per week for the benefit of the spouse;[1]

[1] I assume that the payments were indexed.

e) A judgment varying the interim relief was issued on April 25, 2000, by which it was agreed that until the ex-wife found a place to live, the appellant would have custody of the children and would pay his ex-spouse an alimentary allowance of $250 per week for her benefit;[2]

f) On April 28, 2000, a judgment was rendered confirming the motion to vary the interim relief of April 25, 2000;

g) Since July 1, 2000, the ex-wife has had a place to live and has resumed the joint custody arrangement respecting the children;

h) A divorce judgment was rendered on April 29, 2002, ordering the appellant, commencing May 1, 2002, to pay support for the children in the amount of $547.84 per month and an alimentary allowance for the spouse in the amount of $1,300 per month.

[3] In her reply to the notice of appeal, the respondent refers to paragraphs 56.1(4), 60.1(4) and 60(*b*) of the *Act* and states that the Minister is justified for refusing the deduction claimed by the appellant. Nowhere in her reply, however, does the respondent offer a specific reason for the refusal. At trial, respondent's counsel said the reason was that in 2001 and until April 29, 2002 there was no amount payable as an alimentary allowance by the appellant to his former wife under an order of a competent tribunal or under a written agreement.

[4] Respondent's counsel argued that the judgment of April 25, 2000 nullified the judgment of October 27, 1999. Once the former spouse found a place to live on July 1, 2000 the judgment of April 28, 2000 no longer had any effect; the judgment became caduc and there was neither an agreement nor a judgment ordering the appellant to pay to his wife an alimentary allowance. Both the original judgment of October 28, 1999 and the judgment of April 28, 2000 had ceased to have any effect. Therefore any payments made by Mr. Rioux to his ex-wife in 2001 and until April 29, 2002, the date of the judgment in divorce, were not made pursuant to an order of a competent tribunal or a written agreement and are not deductible by him in computing his income.

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[2] Before April 25, 2000, both parents participated in the custody of the children.

[5] Mr. Rioux's agent argued that the Agreement of April 25, 2000 and the judgment of April 28, 2000 constituted a temporary measure to provide for a temporary change in the former spouse's living arrangements and that once she found living accommodations, the judgment of October 27, 1999 again took effect. Payments made to her by the appellant after July 1, 2000, were made pursuant to the judgment of October 27, 1999. This, he argued, was confirmed by a letter dated December 21, 2000 from the Ministère du Revenu du Québec, Directeur général de la capitale et des régions, to Mr. Rioux which informed him that he must [TRANSLATION] "pay directly to the Ministère du Revenu, for the benefit of the alimentary creditor, the amount of $256.25 per week, which represents the amount of your alimentary allowance, endorsed in accordance with the *Civil Code of Québec* and that the payment is effective January 16, 2001." In my view, this letter proves nothing. In fact, in another letter from the Ministère du Revenu de Québec, Germain Rioux was informed that the amount he paid to the Ministère du Revenu du Québec for the year 2001 was not necessarily the amount that he would have to deduct in computing his income.

[6] The issue before me is based on the intention of the appellant and his former wife when they signed the agreement of April 25, 2000. In *Gagné v. The Queen*,[3] Desjardins J.A. of the Federal Court of Appeal adopted the thoughts of Baudouin J.A.:

> 10 It is settled law, in Quebec civil law, that if the common intention of the parties in an agreement is doubtful, the judge [TRANSLATION] "must try to find what the parties truly intended by their agreement" (Jean-Louis Baudouin, *Les Obligations*, 4th Ed., 1993, Les Éditions Yvon Blais, p. 255). The judge must [TRANSLATION] "place greater weight on the real intention of the contracting parties than on the apparent intention, objectively manifested by the formal expression" (p. 255), and he must ascertain the effect that the parties intended the contract to have (p. 256). To do so, the judge must have a overall picture of the parties' intention, which calls for an analysis of all of the clauses in the contract in relation to one another (p. 258). If there is any remaining doubt as to the parties' real intention, the judge may [TRANSLATION]

[3] 2001 FCA 310, at paragraph 10.

> "examine the manner in which the parties conducted themselves in relation to the contract, in their negotiations, and most importantly their attitude after entering into the contract, that is, the manner in which the parties have interpreted it in the past..."

[7] Unfortunately Mr. Rioux's former wife did not testify. In appeals such as this one I am reluctant to accept self-serving testimony that is not corroborated by independent evidence. This is an appeal under the informal procedure and I would have been prepared to consider exchange of letters between lawyers, for example, that would support Mr. Rioux's position that the agreement of April 25, 2000 was a temporary arrangement until the former Mrs. Rioux found a place to reside. This agreement was ratified by a judgment of the Superior Court on April 28, 2000 that is silent as to the effect of the judgment on the previous judgment of October 27, 1999. There is no mention in the judgment of April 25, 2000 (or relevant agreement) that the judgment of October 27, 1999 would again be in full force once the appellant's former spouse found a residence.

[8] The Quebec Court of Appeal considered the effect of a modification of an agreement for alimentary position in *M.N.K. c. N.N.*[4] in which Vallerand J.A. wrote as follows:

> [TRANSLATION]
>
> The misunderstanding is due to the fact that an entirely new determination is being called a variation. Obviously, there is no way to vary something that is entirely unknown for the moment (in the case at bar, the judgment which, after coming before the Court of Appeal, will be considered the original judgment concerning the allowance.) But our Court has held, and subsequently reaffirmed, that a judge entertaining a motion to vary an alimentary allowance must first determine whether there has been a substantial change in the parties' circumstances. If there has been, the judge must consider the question *de novo* and not be limited to making a proportional adjustment, or, in other words, a variation. The reason for this is as follows. To the extent that it made a determination respecting an uncertain future, the judgment fixing the allowance is in some way a conditional judgment (it is unimportant whether the condition is considered suspensive or resolutory) which will only be lawful so long as the

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4 *Droit de la famille - 728 (SOQUIJ)*, [1989] Q.J. No. 1878 (QL).

circumstances of the parties have not changed. When those circumstances have changed, the judgment no longer lawfully applies to the future, except that it has the authority of a judgment that is still in force. *When dealing with a new motion to "vary", the Court, based on the change of circumstances, will consider the prior judgment expired* ("caduc") *and therefore without any remaining effect from a legal point of view.* And the presumably pending appeal against the first judgment will only apply to the period between the date of the first judgment and the date of the judgment declaring it expired. Consequently, once the "condition" has occurred and the judgment is declared expired from a legal point of view, the "varying" judge will make a new determination, not a variation, based on the parties' circumstances as established before him. In short, the parties' situations either have or have not substantially changed, and if they have, a new allowance must be determined based on the circumstances established before the "varying" judge and without regard to the previous judgment, whether or not it has been appealed.

An example should illustrate how this principle is applied in practice. Let us assume that the debtor of a large allowance has lost all his resources. Must he wait for the outcome of the appeal against the judgment establishing the amount of his allowance? That is to say, must he wait to be able to ask for his obligation to be extinguished, and, in the meantime, risk becoming a delinquent debtor subject to the headaches of execution, including examinations, seizures and perhaps even a contempt finding, when the law says that he owes nothing, because he is nonetheless prevented from asserting in court his right to owe nothing? I think not. The principle applies to cases where no amount is owed, but it is equally applicable where lesser amounts, and, naturally, greater amounts, are owed.

(Emphasis added.)

[9] In *Gagné*, the Federal Court of Appeal was of a similar view:

> [15] It is obvious, in the circumstances, that all of the financial arrangements stipulated in the agreement were premised on the future and uncertain sale of the family residence and not on a predetermined date. The agreement was binding on the parties as long as the condition stipulated did not materialize. This is how the parties themselves understood and performed the agreement.

> [16] . . . That is not the situation in this case. On the contrary, the support in dispute was paid pursuant to an initial written agreement, which was in fact ratified by a court order, until a second agreement replacing the first one, and also ratified by court order, was entered into.

[10] The appeals must therefore be dismissed.

Signed at Ottawa, Canada, this 21st day of April 2005.

"Gerald J. Rip"

Rip J.

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COURT FILE NO.:	2004-2569(IT)I
STYLE OF CAUSE:	GERMAIN RIOUX AND HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	Gerald J. Rip
DATE OF JUDGMENT:	April 21, 2005

APPEARANCES:

Agent for the Appellant:	Jacques Dépatie, C.A.
Counsel for the Respondent:	Soleil Tremblay

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario