



IS THE RECENT DECISION OF THE SUPREME COURT REGARDING RETROACTIVE ADJUSTMENT OF SUPPORT PAYMENTS APPLICABLE IN QUEBEC?

By the family law department: *Suzanne Fortin, Julie Lavoie, Etienne Ruel*, lawyers

In a special edition of *Colonne Juridique* in August, we advised you that the Superior Court of Canada rendered a decision at the end of July, 2006 regarding four appeals from the Court of Appeal of Alberta concerning the retroactive modification of child support payments. In this judgement, the Supreme Court allowed a retroactive adjustment of support payments in two of the four appeals.

We had reservations about whether this decision was applicable under Quebec law. The Supreme Court ruling was with regard to four appeals from a province governed by *Common Law* with federal guidelines in the matter of child support payments. In contrast, in a majority of cases, provincial guidelines apply in Quebec. In particular cases legislators have stipulated that federal guidelines would apply in Quebec cases when a former spouse who is liable for support payments lives in a province other than Quebec and the former spouse to whom the payments are due lives in Quebec. Consequently, it was reasonable to believe that this recent decision of the Supreme Court in family matters would be relatively less important in Quebec. However, in a surprise decision on August 18, 2006, the Honourable Sylvie Devito, judge of the Supreme Court, issued a judgment regarding the possibility of retroactively adjusting child support payments in cases where both former spouses reside in Quebec. This decision was based explicitly on the decision of the Superior Court of Canada.

The facts of this case¹ are very simple: The parties were married on October 9 1982 and were separated in 1994. Their marriage produced two children, age 15 and 18. The child support payments the husband was paying to his ex-spouse at the time of the hearing in August 2006 were based on the incomes of the parties in 1999. The husband always paid the child support payments that had been properly established as per the 1999 child support guideli-

nes and subsequent annual indexations. However it is important to note that the father's income had increased considerably in 2005, from \$42 000 to \$74 624. The husband had refused to help his wife in the fall of 2005 when the oldest child started attending Cegep. This explicit refusal was the reason the ex-wife commenced child support proceedings before judge Devito. The ex-wife asked that the child support payment be modified retroactively from September 1, 2005, the date when she asked her ex-husband for financial assistance to pay for college studies for their child. The ex-husband obviously opposed the request for retroactive application from September 1, 2005.

Surprisingly, Judge Devito applied the decision of the Supreme Court of Canada in a matter concerning provincial guidelines and, through this judgment written by Judge Bastarache, she accentuates that 'parents are legally obliged to support their child according to their income. This obligation, along with a constantly evolving standard that rejects an approach focused on needs, allows us to deduct that a child has the right to increased support payments when the incomes of the parents increase'. Also: 'In the context of a retroactive order, it follows that the parent is not fulfilling his obligation to the child if he does not increase his support payments for the child when his income increases substantially [...] A tribunal of competent jurisdiction could generally award retroactive payments to respect an obligation that was created at a certain moment but was not discharged'.

Based largely on these motives, the Honourable Judge Devito upheld the claim of the former wife and ordered payments retroactive to when the ex-wife approached her ex-spouse explicitly with her financial problems in September 2005. According to the judge, when the ex-husband refused financial assistance to pay a part of the Cegep costs in September 2005, he no longer fulfilled his child support obligations. Consequently, the court ruled that the retroactive child support payments requested by the ex-wife were reasonable and justified.

This judgement was not appealed. However, it is difficult and premature for us to predict to what measure the judges of the Superior Court will follow this decision, as it was the first rendered by Quebec courts since the decision of the Superior Court of Canada. However we recommend that you remain

cautious if you expect your income to increase whether you give or receive support payments. Be aware that until further notice, retroactive adjustment of child support payments is possible if your income increases because the decision of Judge Sylvie Devito created a Quebec precedent to this effect. If you feel you could be affected by this decision, or if you have any questions in this regard, please call Prévost Fortin D'Aoust's family law department without delay.

¹C.P. vs. D.G. 2006 QCCS 4716

TENANTS: CHECK YOUR RENEWAL CLAUSES

By: *Jean-François Mallette*, lawyer

In a recent decision¹, the Superior Court confirmed that a fixed-term lease terminates automatically by right of law at the end of its term, and if the lease is not renewed by the lessor, the lessee has no rights.

In this matter, the lessee had an annual lease that had been systematically renewed for 18 years. The lease was renewed each spring when the lessor sent the lessee a reminder inviting him to renew the lease. The lessee confirmed his intent to renew the lease by simply sending the first rental cheque that represented a reservation for the new year. At the end of the 18th year, the lessor adopted a resolution to not renew the lease and advised the lessee that the lease was not renewed and that he would have to vacate the premises.

The lessee did not comply and applied for an interlocutory injunction to continue to occupy the premises. The lessee claimed that he had a right to renew the lease based on use and tradition. The court concluded that there was no proof of such a tradition or use and also pointed out that in any case, the lessee's position could not be upheld because this argument would mean that the lessee had a life-long lease and the lessor could never terminate the lease.

There is still time to register for the November 25th seminar before October 25th.

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Therefore, based on C.c.Q, article 1877, that stipulates that a fixed-term lease terminates by right of law at the end of its term, and on C.c.Q article 1851, that stipulates that a lease is primarily a contract that gives a lessee the right to use a property for a certain time, the Court reiterated that there is absolutely no legal basis giving a lessee the right to have his lease renewed. The Court also stated that they have no authority to force a lessor to renew an expired lease and that the lessor has the right to regain possession of his property.

Therefore this decision once more confirms that the lessee must always be sure to renew his lease or to have a renewal option to avoid being evicted from the premises when the lease expires, no matter how long he has occupied the premises. If you have any questions on this subject, please do not hesitate to call us.

¹*Riverin vs. Saint-Gédéon de Grandmont*, J.E. 2006-1823 (C.S.)

NEWS FROM OUR FIRM

- Me Etienne Morin was a conference leader at the Fédération Québécoise des municipalités (FQM) in Quebec City on September 30th. The subject of the workshop was psychological harassment in the workplace. Me Morin will also speak on the same subject at the October 26th meeting of the Association des directeurs municipaux du Québec (ADMQ).
- The opening of the Maison de soins palliatifs de la Rivière du Nord, the first of its kind in the Laurentians, took place this past September 27th. This was a moving ceremony that featured Me Suzanne Fortin, president of the board of directors of Pallia-Vie. We want to take this opportunity to thank Me Fortin for her unlimited dedication and constant involvement in this important project and express our pride in this achievement that will help people in the terminal phases of cancer.
- Me Patrick Choquette has been invited by the Barreau du Québec to speak at a conference on recent developments in commercial property law on October 20th in Montreal. Me Choquette will speak about the impact of certain important decisions regarding damages awarded to commercial tenants for problems they had experienced.



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