SMHI LEGAL NOTES
STEINBERG MORTON HOPE & ISRAEL LLP
BARRISTERS & SOLICITORS • TRADEMARK AGENTS
Volume 29 Spring 2012

Jury Duty - A Civic Duty

It's hard to put into words. I just think he's guilty. I thought it was obvious from the word, 'Go'. Nobody proved otherwise.
Juror #2 from Twelve Angry Men

When a summons to jury duty shows up in the mail, people often have a variety of reactions. Some are excited at the prospect of serving on a jury, others are frantically trying to find a way out and still others simply ignore the summons. In this article, we provide you with an overview of what jury duty entails and what your obligations are if you receive a summons to jury duty.

In Canada, juries will most often be used for criminal trials and only rarely for civil trials. A jury in a criminal trial is made up of 12 jurors and they must reach a unanimous verdict. Civil juries, on the other hand, generally consist of 6 jurors and they need only a majority of jurors to render a verdict.

In Ontario, questionnaires are randomly mailed out to individuals to determine whether they can be considered as potential jurors. The names are taken from the most recent voters list. While individuals are required to complete and return the questionnaire, this does not automatically mean that they will be summoned for jury duty. The questionnaire must be completed and returned within five days. Failure to do so is an offence and you could be facing a fine, jail time or both.

Jury panels will be selected from those eligible for jury duty. Jury panels are not juries. Rather, one or more juries will be selected from the jury panel.

If you are selected to be part of a jury panel, you must present yourself at the relevant courthouse at the appointed time. Not only is it your civic duty to attend, but failure to do so is an offence. If you live in Toronto you must attend as a prospective juror for a minimum of a week. If you live outside of Toronto you must attend for the date indicated on the summons and usually another one or two days. Prospective jurors receive no compensation although if an individual lives outside the city limits and more than 40 kms from the courthouse, a travel allowance will be paid.

Individuals who are selected to serve as jurors are entitled to the following compensation:

- From day 1 to 10: no fee
- From day 11 to 49: $40/day
- From day 50 to the end of trial: $100/day

Jurors who live outside the city where the courthouse is located will be paid a daily a travel allowance. There are no allowances for childcare expenses, however.

Although the law requires that employers allow employees to take time off for jury duty, it does not require the employer to pay the employee.

While it is an individual's civic duty to sit on a jury when asked to, there may be a legitimate excuse why this is not possible. For instance, you may have a vacation long booked and paid for, it may be a very inconvenient time to be away from work, financially you may simply not be able to afford to be away from work, particularly if your employer does not pay you. In such cases, you must immediately write to the court office and explain the hardship that jury duty would entail. You must also provide any documents that support your request. A judge will decide whether to grant your request, deny it or advise you of an alternate date to attend. Unless you receive written confirmation that you do not need to appear, you should still attend at the court on the appointed day.

If you receive a summons for jury duty, even if you believe that you are not able to participate, it is important that you not ignore it - after all it is your civic duty.

In this issue

The Landlord's Obligations as Occupier

Persons who are in physical possession of particular premises, those who have responsibility for and control over the condition of the premises or the activities taking place on the premises, as well as those who have control over who may enter the premises can all potentially be held responsible if someone is injured on the premises. The reason this group of people are potentially liable is because all are considered occupiers of the premises pursuant to Ontario's *Occupiers' Liability Act*. In essence, an occupier has an affirmative duty to make sure that "their" premises are reasonably safe.

In this article, we will look at the landlord as an occupier. The Act sets out a special provision with respect to landlords. Section 8 of the Act indicates that where premises are occupied by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, then essentially the landlord will be considered an occupier. For this reason, the landlord owes a duty of care to persons coming onto the rented premises.

We will look at two cases involving landlords, one a residential landlord and one a commercial landlord. It should be noted that residential landlords are subject to the rights and obligations spelled out in the *Residential Tenancies Act* whereas the commercial landlord is governed by the *Commercial Tenancies Act*. With respect to repairs and maintenance, a residential landlord is responsible for repairs and maintenance, a duty which cannot be assigned to the tenant. A commercial landlord on the other hand can make repairs and maintenance the responsibility of the tenant in the lease.

Taylor v. Allen

The premises in this case are a house and yard rented by the tenants, Bobby and Joyce, from the landlord, Robert. In the backyard was a fire pit, built by the landlord, and ringed with partially submerged cinder blocks. In lieu of rent, the tenants had agreed to pay all costs and to be responsible for maintenance and repairs.

The tenants hosted a party attended by Lorne. Lorne, who was quite drunk tripped over the cinder blocks and falling into the fire pit onto the burning embers. He sustained very serious burns. Lorne sued both the tenants and the landlord.

The trial judge concluded that the cinder blocks ringing the fire pit could constitute a danger. He also found that the tenants were occupiers of the premises since they had control over the backyard and it was they who controlled who came into the backyard. The result was that the tenants were found to be 50% at fault for Lorne's damages. (Lorne himself was responsible for the other 50%)

With respect to the landlord, the trial judge concluded that he had no control over the premises, had no say in the operation of the property, and no control over the party. For these reasons, the landlord was found not to be an occupier and therefore not liable for the damages suffered by Lorne.

The Ontario Court of Appeal disagreed with the finding that the landlord bore no responsibility toward Lorne. The appellate court found that the landlord was an occupier and that he owed Lorne a duty of care. Further, the landlord failed in that duty by creating the danger, having built the fire pit. The court also found that the landlord, pursuant to the landlord tenant legislation, had a statutory duty to maintain and repair the premises and that this duty could not be waived in a tenancy agreement. Therefore, he had also breached his duty as set out in section 8 of the *Occupiers' Liability Act.*

The end result was that the landlord, along with the two tenants, were each found at fault for one third of 50% of Lorne's damages.

Musselman v. Cities Bistro

The tenant, who was the owner of Cities Bistro, rented the space for his restaurant from Fred. Gloria had been attending a birthday party at the restaurant. Gloria had gone to the ladies washroom which was located one level below the dining room. On her way back up to the main restaurant, she suffered a serious fall. Among others, she sued the tenant, Cities Bistro, and the landlord.

The trial judge concluded that Cities Bistro, as the tenant was clearly an occupier of the premises and that the duty of care that was owed to Gloria was breached by it since it was responsible for the condition of the staircase.

As for any potential liability on the landlord, the trial judge concluded that the landlord was not an occupier and therefore had no duty to Gloria. This conclusion was based on the lease, which made it clear that all maintenance and repairs to the interior of the premises were the tenant's responsibility and therefore section 8 did not apply. In addition, the trial judge pointed to the relationship between the landlord and the tenant, which clearly demonstrated that the latter had responsibility for and control over the condition of the premises, as well as the activities carried on and the persons allowed to enter the premises.

The Lessons

If you have control over premises, and/or control of who comes onto premises, it is incumbent upon you to reason-

see **OCCUPIER** on page **4**

No Material Change - No Variation

When a marriage breaks down there are many issues that must be sorted out, including custody of the children, division of the couples' property and financial support for the children and possibly for one of the spouses.

There are two ways that the issue of spousal support can be decided. The first is that the parties negotiate an agreement as to whether or not there will be any support paid and if so the amount and length of time. The second is that one of the parties applies to the court for an order of spousal support.

Canada's *Divorce Act* sets out the rules for spousal support for married couples. (Common law spouses are governed by provincial legislation, such as the Family Law Act of Ontario.) Specifically the Act states that a court can make an order requiring one spouse to pay the other spouse, either in a lump sum or by way of periodic sums, such financial support as the court thinks reasonable. The factors that the court will take into account in making its decision are the condition, means, needs and other circumstances of each spouse, including:

- the length of time the spouses cohabited;
- the functions performed by each spouse during cohabitation; and
- any order, agreement or arrangement relating to support of either spouse.

Despite any agreement or court order, at some point down the road, one or both of the parties may want to seek a variation of the arrangement. For instance, the payor spouse may which to bring a halt to the payments or at least a reduction. Another possibility is that the payee spouse seeks to increase the amount of spousal support or begin receiving support that was previously waived or denied. In all these situations, the key question is whether or not there has been a material change in the parties' circumstances.

Once again the *Divorce Act* sets out the rules governing such a request. Section 17 of the Act indicates that the court may make an order varying, rescinding or suspending, prospectively or retroactively, a support order or any provision thereof. However, before varying any order, the court must satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order. And it must take that change into consideration.

In late December 2011, the Supreme Court of Canada, in two separate cases, addressed the issue of variation of spousal support.

LMP v. LS

In the first case, the parties had been married for 14 years at the time they separated. During the marriage, the husband pursued his career, while the wife looked after the household and the children. Shortly after the parties married, the wife was diagnosed with MS.

Following the breakdown of the marriage, the parties entered into a comprehensive separation agreement which was subsequently incorporated into a court order. As part of that agreement, the wife was to receive $3,688 per month for spousal support, indexed. There was no termination date for the spousal support.

Four years later, the husband sought to have the amount of support reduced and ultimately cancelled. His variation application claimed that his financial circumstances had changed and more importantly that his ex-wife should have but had failed to seek employment. Both the trial judge and the court of appeal rejected his claim that his financial circumstances had changed in any significant way. However, both agreed that the wife was able to seek employment outside the home and had failed to do so. The wife appealed these decisions to the Supreme Court of Canada.

The Supreme Court allowed her appeal and restored the original order of spousal support. The basis for their decision was that there had been no material change of circumstances since the making of the original order and therefore no grounds for varying that original order.

In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the prior order or variation. In addition, that change of circumstances must be a material one, meaning a change that, "if known at the time, would likely have resulted in different terms". Therefore, the focus of the analysis by the court is on the prior order and the circumstances in which it was made. The correctness of the order is not at issue and great deference to that order should be given.

Another way to characterize the test for variation is whether any given change "would likely have resulted in different terms" to the order. The flip side is that if the circumstances which are relied on as constituting a change were known at the relevant time they cannot be relied on as the basis for variation.

When the high court applied this test to LMP and LS's situation, it was clear that the wife had MS at the time of the order

see **VARIATION** on page **4**

VARIATION continued from page 3

for spousal support and that she was not expected to seek employment outside the home. Since neither of these facts had changed in the intervening years, there was no change in the parties circumstances since the original order, much less a material change.

RP v. RC

The parties were married in 1958, separated in 1974 and divorced in 1984. The husband was originally ordered to pay monthly spousal and child support in the combined amount of $1,950. After the children moved out in 1991, he was ordered to pay $2,000 a month, indexed, for spousal support. The husband did not contest the order and so was not required to file a financial statement.

Seventeen years later, the husband applied to terminate spousal support. He argued that his circumstances had materially changed, specifically that he had retired and no longer had an income from employment, that the recession had negatively impacted his assets and that his son from his second marriage was in university. Both the trial judge and the appellate court agreed with the husband. The trial judge reduced the support by $500. The Court of Appeal did one better by ordering that the support be gradually reduced and that the support cease in 2010.

The facts in this second case are different from the first, but ultimately the outcome at the Supreme Court of Canada was the same; the original order for support was restored.

In this case, the court could find no material change in the husband's circumstances, primarily because he had failed to produce evidence to support his claim. He produced no evidence that he had actually sold his assets at the time of the application and therefore there was no proof of an actual loss. Additionally, there was no evidence of his actual financial situation at the time of the 1991 order, the result being that no comparison could be made. The onus of establishing a material change is always on the party seeking the variation.

Aside from clarifying the law on when a variation of a spousal support order will happen and on what constitutes a material change in circumstances, these two cases underline the importance of seeking an experienced family law lawyer to negotiate a separation agreement. These cases also suggest that, at the time of negotiation, the parties must think about what the future may hold and that "indeterminate" can be a long time.

OCCUPIER continued from page 2

ably ensure that the premises are safe.

As illustrated in both cases, even though you may have rented out premises you own to another, this does not necessarily mean you will not be found to be an occupier. In the case of residential landlords, it will be quite difficult to escape liability. While it is easier as a commercial landlord to pass on the liability, it will nevertheless be dependant on the terms of the commercial lease and the relationship between you and your tenant.

When you decide to become a landlord, residential or commercial, it is important that you have an understanding of the relevant laws and seek legal advice.

Movie Tip - 12 Angry Men

This 1957 movie stars Henry Fonda. What begins as an open and shut case of murder soon becomes a mini-drama of each of the jurors' prejudices and preconceptions about the trial, the accused, and each other.

Steinberg Morton Hope & Israel LLP

5255 Yonge Street - Suite 1100
Toronto, Ontario M2N 6P4

T: 416 225-2777 F: 416 225-7112
www.smhilaw.com

LAWYERS

Irwin Steinberg
isteinberg@smhilaw.com

James C. Morton
jmorton@smhilaw.com

Jack W. Hope
jhope@smhilaw.com

David M. Israel
disrael@smhilaw.com

Michael E. Cass
mcass@smhilaw.com

Michael Birley
mbirley@smhilaw.com

M. Michael Title
mtitle@smhilaw.com

Shelley Brian Brown
sbrown@smhilaw.com

Patricia Virc
pvirc@smhilaw.com

Derrick M. Fulton
dfulton@smhilaw.com

Taras Kulish
tkulish@smhilaw.com

Antonin I. Pribetic
apribetic@smhilaw.com

David A. Brooker
dbrooker@smhilaw.com

PRACTICE AREAS

Corporate & Commercial
Commercial & Civil Litigation
Residential Real Estate
Commercial Real Estate
Matrimonial & Family Law
Employment Law
Wills, Trusts & Estates
Personal Injury Law
Construction Law
Criminal Law
Trademark Law
Health Discipline Law
Administrative Law