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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
[redacted] and [redacted]	Paul Gemmink, for the Plaintiffs
Plaintiffs	
- and -	
[redacted] and [redacted]	Paul S. Lenardon, for the Defendants
Defendants	
	HEARD: February 26, 2008

AMENDED RULING ON MOTION

Graham J.:

Issue

[1] On the basis of a claim for private nuisance, the plaintiffs seek an interlocutory injunction preventing the defendants from operating the outdoor wood-fired boiler (OWB) located on the defendants' residential property.

Background

[2] The plaintiffs, the [redacted], and the defendants, the [redacted], have been next-door neighbours since the plaintiffs moved into their home in 2004. They live in a predominantly rural area about 4 kilometres south of the town of Uxbridge.

[3] The defendants state that until the fall of 2006 they heated their home using an interior wood-burning fireplace insert and, rarely, an oil furnace. They state that they also used a wood-burning stove and a kerosene heater to heat their garage. They state that their annual heating costs were about $900 per year compared to $3,500 per year paid by the previous owners of their house who used the oil furnace and did not heat the garage.

[4] The defendant, Mr. [redacted], operates a tree cutting and trimming business. He uses wood cut in the course of his business for heating purposes. This benefits him twice because he does not have to pay for the wood and he does not have to pay to dispose of it.

[5] The defendants state that they received some complaints from the plaintiffs about smoke from the fireplace insert although they did not receive any complaints about smoke from the previous owners of the plaintiffs' house.

[6] The defendants state that after the winter of 2005/06 they were worried about chimney fires and felt that they would have to install a stainless steel liner in the chimney in order to continue to use the fireplace insert. They also state that the wood stove had then fulfilled its life expectancy and had to be replaced.

[7] The defendants approached their next-door neighbours, on either side, and asked if they would be interested in buying an OWB together.

[8] An OWB is a wood-fired furnace that is usually housed within a small insulated shed located some distance from a house. Inside an OWB is an oversized firebox that can accommodate large loads. Surrounding the firebox is a water jacket that can be heated. The OWB cycles water through the jacket and delivers hot water to the house by water pipes that run underground to deliver hot water for both space heating and domestic use.

[9] The plaintiffs were not interested. They state that they told the defendants that they were concerned about smoke. The defendants deny that the plaintiffs mentioned smoke. In any event, the neighbours on the other side of the defendants, the Kerrigans, agreed to participate.

[10] In the fall of 2006, an OWB was installed in the defendants' backyard. The defendants state that the cost of the OWB was about $13,400 including installation.

[11] The plaintiffs state that they complained to the defendants about smoke from the OWB the first day it was used and that they have suffered as a result of smoke from the OWB many times since.

[12] The plaintiffs submitted copies from a daytimer which they say contains references to *some* of the occasions that the OWB emitted smoke onto their property.

[13] The entry for October 10, 2006, the day the OWB was first fired up, indicates that [redacted] spoke with [redacted] as the plaintiffs' house was full of smoke because their windows were open.

[14] The daytimer contains five entries for November of 2006. They are: "smoke in bedrooms" (November 4), "Great can't get to sleep smoke in bedrooms" (November 5), "Phoned [redacted] bedrooms stink C[redacted] on sofa again" (November 9), "house stinks" (November 21), and "house stinks of smoke C[redacted] on sofa again" (November 29).

[15] There are seven entries for December of 2006. They are: "house stinks of smoke" (December 3), "house once again smells of wood smoke I'm really getting ticked" (December 13), "tired stinks of smoke" (December 14), "stinks of smoke (am)" (December 15), "house stinks of smoke" (December 24), "house stinks of smoke...getting really tired of this stench" (December 25), and "house stinks of smoke Great Xmas" (December 27).

[16] In January of 2007 there are five entries: "smokey and smells at 3 am Happy New Year" (January 1), "stinks Clark on sofa" (January 3), "stinks Getting...woken up AGAIN ridiculous" (January 4), "stinks" (January 5), and "spoke to [redacted] asked to switch off furnace, would only switch off fan for a couple of hours We warned we would have to take action" (January 26).

[17] In January of 2007, the defendants had the OWB moved a short distance within their backyard. They state that they paid $1,400 to have the OWB moved further from the plaintiffs' house because of the plaintiffs' complaints. As a result of the move, the OWB is now about 90 to 100 feet from the plaintiffs' house.

[18] The plaintiffs' daytimer contains two entries for February of 2007. They are: "stinks" (February 19) and "stinks" (February 21).

[19] The defendants state that they used the OWB until the end of March of 2007 and did not use it again until the fall of 2007. In the interim, they increased the height of the OWB's smokestack, at a cost of about $800, in an effort to address the plaintiffs' concerns. Mr. [redacted] states that he also installed a variable fan which he uses to reduce the amount of smoke when the wind is blowing towards the plaintiffs' property. He states that, for the same reason, he does not open the damper when the wind is blowing towards the plaintiffs' house. Mr. [redacted] also states that he built a device which passes smoke though a curtain of water, thereby removing most of the particulate matter from the smoke, but he found that the device is not practical for use during the winter.

[20] The plaintiffs' daytimer has five entries for November of 2007: "wood furnace ignited" (November 9), "stinks of smoke" (November 11), "stinks of smoke" (November 12), "stinks of smoke" (November 23) and "woken at 4:45 am stinks of smoke unable to get to sleep" (November 24).

[21] There are seven entries for December of 2007: "smoke in bedroom Rob woken up...went outside in afternoon garden stinks but not of normal wood suspect green wood" (December 17), "House and front of property smells of smoke" (December 21), "smells bad in and out the house" (December 22), "stinks of smoke in and out" (December 23), "stinks of smoke in and out" (December 24), "Went to get dogs out back stench took my breath away" (December 25) and "took dogs out stinks out back and smell of smoke in bedroom 06:30...cleaning ice stinks out front – afternoon" (December 30).

[22] No further daytimer entries were provided.

[23] The plaintiffs state that their property is affected when the wind blows anywhere from 70 degrees to 240 degrees on the compass and that they are affected most when the wind blows from 190 degrees to 240 degrees because of the location of their house. They state that because their home is 5 to 6 feet lower than their backyard, any emissions blowing into the back garden tend to roll down the bank and hang around the back of their house.

[24] The plaintiffs state that they are unable to exercise their dogs for a suitable time when the wind blows smoke onto their property because the smell of the smoke clings to the dogs' coats and is particularly obnoxious.

[25] The plaintiffs state that when the smoke is blowing towards their house they are not able to open their windows or spend much time outside. They state that the smell prevents them from getting to sleep or wakes them up during the night at times. They state that as a result they are tired at work. They state that their son has to leave his bedroom and sleep in on the sofa in the living room at times because of the smell of smoke. They state that none of them had problems sleeping before the OWB was installed.

[26] The plaintiffs state that since the OWB was installed they have experienced an increased frequency of headaches and eye, sinus, and throat irritations. They state that the stress of living with the emissions of the OWB is affecting them. Ms. [redacted] states that she enjoys exercise and running but she is unable to complete her routines because of shortness of breath caused by the inhalation of smoke particles. She states that she has recently been prescribed Ventolin by her physician and has been referred to the Stouffville Hospital for testing as a result of her symptoms.

[27] The plaintiffs submitted material, authored recently by the Northeast States for Coordinated Air Use Management (NESCAUM) and the Environmental Protection Bureau under the auspices of the Attorney General of New York State, indicating that OWB's are environmentally unfriendly.

[28] The NESCAUM report, for example, indicates that wood smoke contains a complex mixture of particles and gases, many of which have been shown to produce acute and chronic biological effects, as well as deleterious physiologic responses in exposed humans. The report indicates that the abundance of fine particulates in wood smoke presents a serious health risk to exposed populations. The report indicates that fine particulate matter can be delivered into the deep lung by wood smoke and that exposure to airborne fine particulate matter is associated with cardiopulmonary effects, aggravated asthma, decreased lung function, and chronic bronchitis. The report indicates findings that the emissions from a single OWB are equivalent to emissions from 4 non-certified wood stoves or 10 to 22 EPA certified wood stoves or 205 oil furnaces or 3,000 to 8,000 natural gas furnaces and that 1 OWB can emit as much fine particulate matter as 4 heavy duty diesel trucks. The report also indicates that the gases emitted from OWB's are associated with serious health effects.

[29] Mr. [redacted] states that he is a licensed industrial instrument mechanic. He states that he carried out a measurement of fine particulate matter on the nights of February 14/15 and 16/17, 2008 in the rear extension of his home. He states that readings exceeded 100 parts per million for significant periods of time. The plaintiffs submitted excerpts from the Ontario Ministry of the Environment website indicating that readings over 100 parts per million are considered to indicate very poor air quality that can cause severe respiratory effects.

[30] The defendants state that they burn only seasoned wood that has been cut, split and stacked for at least 6 months. They state that they and their two young children have not experienced any ill effects from smoke, smoke smell, or particulate emissions from the OWB and that none of their house, garage, vehicles, or dog, smell of smoke. They state that they rarely smell smoke in their yard and have not smelled smoke in their house since installing the OWB. They state that none of their friends or family who visit has complained about the smell of smoke. They state that the [redacted], next door, have no smoke concerns.

[31] Mr. [redacted] states that he drove along the road that is several hundred feet behind his home and counted 8 houses that were using wood-burning fireplaces or stoves based on his observations and the smell of the smoke. He states that he believes that wood-burning households are common in the Uxbridge area. He did not, however, indicate whether anyone else in the area has an OWB.

[32] The defendants state that there are other sources of smoke near the plaintiffs' home including diesel-powered gravel trucks that pass by on the highway nearby. They suggest that the plaintiffs may smell smoke because their home is under renovation and might not be well-sealed. They also suggest that Ms. [redacted]'s breathing difficulties may be due to the presence of dust, dog hair, or mould in her home. They also suggest that the plaintiffs are overly sensitive and are unreasonably attempting to exert control over their environment.

[33] The defendants submitted letters from friends, acquaintances and relatives to the effect that they have never noticed excessive smoke at the defendants' home.

[34] Mr. [redacted] states that the defendants and the [redacted] intend to use their interior wood-burning fireplace and/or stoves for heat if the OWB must be shut down. He states that he believes that the use of the interior fireplace and/or stoves will cause the plaintiffs to have the same complaints that they have now.

[35] The defendants provided a study which suggests that the NESCAUM report unfairly compares the particulate matter output of an OWB over time with the particulate matter output of other types of wood stoves over time. The report suggests that because OWB's heat larger areas, a fairer comparison would be relative particulate matter output per unit of heat generated or per unit of fuel burned. Based on that approach, the study indicates that OWB particulate matter output averages only about 22 to 25 percent higher than EPA certified wood stoves.

[36] In reply to some of the defendants' statements, Ms. [redacted] states that she has owned dogs all her life and they have never caused her difficulty breathing. She admits that there is some mould in her house but states that the mould existed before the OWB was installed and she did

not have breathing difficulties then. She also admits that trucks use the road in front of her house but states that although there are far more trucks in the summer than in the winter, her breathing problems occur only in the winter and only since the installation of the OWB. Ms. [redacted] further admits that their house is under renovation but states that the renovations are properly sealed. She adds that, in any event, the house is not new and is not completely airtight. Ms. Scott states that she was never bothered by the [redacted]'s use of their interior fireplace.

The Law – Interlocutory Injunction

[37] The test for an interlocutory injunction has recently been reviewed by MacPherson J.A. in the context of a stay application pending an appeal in *Ontario v. Shehrazad Non Profit Housing Inc.* (2007 ONCA 267) wherein he related that Weiler J.A., in *Longley v. Canada (Attorney General),* [2007] O.J. No. 929 at para. 14 (C.A.) had recently reaffirmed the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, as follows:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be determined on appeal. Second, the court must determine if the appellant would suffer irreparable harm if the application were refused. Finally, the balance of convenience must be determined by assessing which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[38] The court must also bear in mind that, "a pre-trial injunction is a drastic and extraordinary remedy. Thus it should be granted only in those circumstances which warrant taking such a drastic and extraordinary step." (see *Kanda Tsushin Kogyo Co. v. Coveley,* [1997] O.J. No. 56 (Ont. Div. Ct.)).

[39] In addition, Rule 40.03 of the *Ontario Rules of Civil Procedure* requires the moving party for an interlocutory injunction to undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party, unless the court orders otherwise.

Serious Issue to be Tried

[40] The test for a serious issue to be tried was reviewed by MacPherson J.A. in *Shehrazad Housing* wherein he cited Laskin J.A. in *Circuit World Corp. v. Lesperance et al.* (1997), 33 O.R. (3d) 674 (C.A.) at 676-7 as authority that, "the court should not extensively review the merits" but must, nevertheless, determine that the issues raised are not frivolous or vexatious.

[41] In this case, that determination requires a review of the law of private nuisance.

[42] Linden, in *Canadian Tort Law (Seventh Edition)* (2001) (Butterworths), at pages 525-536, says:

> Private nuisance may be defined as an unreasonable interference with the use and enjoyment of land....it is an environmental tort. The use of the term "unreasonable" indicates that the interference must be such as would not be tolerated by the ordinary occupier. The court need not, therefore, be concerned with the effect of the defendant's conduct on any other members of the community, other than the occupier....The onus of proof that the defendant caused an unreasonable interference with the use and enjoyment of the plaintiffs' land rests on the plaintiff, but once that is shown, the onus is on the defendant to establish that the use of the land was reasonable....In determining whether there has been an unreasonable interference with the use and enjoyment of the plaintiffs' land, the court balances the gravity of the harm caused against the utility of the defendant's conduct in all of the circumstances. As for the harm element, the court examines the type and severity of the interference, its duration, the character of the neighbourhood and the sensitivity of the plaintiff's use. As for the conduct of the defendant, the court looks at the object of the activity undertaken and the attitude of the actor towards the neighbours....The interference caused to the plaintiff's use of the land must be substantial. No compensation will be awarded for trivial annoyances....Damages for injury to health may be recovered in an action for nuisance if there is also interference with the use and enjoyment of land....If the defendant's conduct causes only an inconvenience or a minor discomfort to the plaintiff, it is unlikely that the court will hold it to be a private nuisance."

[43] Linden cites the *Restatement of Torts* (4 Restatement of Torts, Second, Comment "G", p. 112, (1965) (The American Law Institute)) as follows:

> Life in an organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with other or involve some risk of interference, and these interferences range from trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience, and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends on the principle of "give and take, live and let live", so that the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances.

[44] Linden adds that, "Whether an annoyance is trifling and must be put up with or whether it is serious and actionable is not always easy to determine." He adds, citing Fleming (The Law of Torts, 9th ed. (1998)) at p. 467, that, "It is clear that "not all amenities...commonly associated with the beneficial use of land are vindicated by the law of nuisance."

[45] Linden also cites Salmond (Salmond and Hueston on the Law of Torts, 19th ed. (1989)) at p. 49, as follows, "The truth is that all wrongful escapes of deleterious things, whether continuous, intermittent or isolated, are equally capable of being classed as nuisances. The type of harm caused by the escape, the gravity of that harm, and the frequency of its occurrence are each relevant (but not conclusive) factors in determining whether the defendant has maintained on his premises a state of affairs which is a potential nuisance."

[46] Linden cites Fleming (supra at p. 467) stating, "a "tolerable balance" must be struck between the competing interests of the landowners "each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other." and adds, "The ultimate question to be asked is whether the defendant is using the property reasonably having regard to the fact that the defendant has a neighbour."

[47] Fleming (supra) identifies the ultimate question as follows, "Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the standpoint of the defendant's convenience, but must also take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he has no neighbour? The question is, "Is he using it reasonably, having regard to the fact that he has a neighbour?"

[48] In *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd. And Huron Steel Products* (1992), 9 O.R. 3d 305n, the Ontario Court of Appeal upheld a permanent injunction granted at 73 O.R. (2d) 641 (H.C.J.O.) by Potts J. who cited the passages from Fleming noted above and added that "each case must be considered in light of the particular facts in question", citing Hodgins J.A. in *Oakley v. Webb* (1916), 33 D.L.R. 35, 38 O.L.R. 151 (O.C.A.) who stated that "the rule...adopted by Sutherland J., in *Beamish v. Glenn*, 36 O.L.R. 10... is the proper test to be applied...It is that "an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances." Potts J. continued by stating that, "Unreasonableness" in nuisance law is when the interference in question would not be tolerated by the ordinary occupier. What constitutes "unreasonable interference is determined by considering a number of factors:

(1) the severity of the interference, having regard to its nature and duration and effect;

(2) the character of the locale;

(3) the utility of the defendant's conduct;

(4) the sensitivity of the use interfered with."

[49] In *Beamish v. Glenn*, the Ontario Court of Appeal upheld a permanent injunction granted by Sutherland J. based upon a private nuisance caused by smoke, odours, and noise emanating from a blacksmith's shop during business hours onto its neighbour's adjoining residential property even though the trial judge found that there was a great deal of noise in the locality from factories and considerable other smoke as well (see [1916] O.J. No. 178, 36 O.L.R. 10).

[50] In *Plater v. Town of Collingwood et al.*, Lacourciere J. granted a permanent injunction based upon a private nuisance to a neighbour's farm caused intermittently, whenever the wind was easterly or south-easterly, by smoke emanating from the burning of garbage at a town dump. The court found that "The plaintiff lives in a rural area where no reasonable resident could be expected to put up with such an annoyance and discomfort. The ordinary resident in the area is entitled to expect that the purity and fragrance of the country air will not be allowed to become artificially contaminated..." The court held that "where the continuation of the nuisance would give rise to a new cause of action from day to day a judgment for damages cannot be said to give the plaintiffs a complete and adequate remedy" (see [1967] O.J. No. 1089, [1968] 1 O.R. 81 (H.C.J.O.)).

[51] Although the plaintiffs were unable to find any Canadian cases specifically addressing residential wood stoves, they found two American authorities.

[52] In *Thomsen v. Greve* (1996) 4 Neb. App. 742, 550 N.W. 2d 49, 1996 Neb. App. Lexis 158, the Nebraska Court of Appeal ordered an abatement of a private nuisance caused by smoke emanating into the next-door neighbour's residence from a sealed wood-burning stove used to heat a home. The court allowed the defendants 30 days to propose a reasonable means to abate the nuisance falling short of ceasing to heat their home with the wood-burning stove but stated that if the defendants were unable to abate the nuisance after reasonable time and efforts that the court would order the nuisance abated by permanently enjoining them from using the wood-burning stove.

[53] The facts in *Thomsen v Greve* are somewhat similar to the case at bar.

[54] The plaintiffs testified that the smoke entered their home when the wind was either still or from the northeast. They described the smoke as "unbearable". Ms. Thomsen testified that besides making her distraught, the smoke got into her throat and nose, causing a burning or scratchy sensation and that the odour at times caused her and her husband to not be able to sleep at night. Mr. Thomsen testified that he got a bad cough as a result of the smoke. Ms. Thomsen testified that the smoke entered their home 140 times during 4 years.

[55] The defendants testified that they used the wood-burning stove to heat their home in lieu of their installed gas furnace and electrical baseboard heating systems. The defendants testified that no one other than the plaintiffs complained about the smoke. They stated that the smoke was not malodorous. They testified that they only burned dry hardwood. They testified that the wind was still or blew from the northeast a total of 21 times during the winter of 1993-94.

[56] The test for private nuisance in Nebraska is similar to the test in Ontario.

[57] According to *Thomsen v. Greve*, "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b)...". Further, "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct or (b)...". Further, "In determining the gravity of the harm...the following factors are important: (a) the extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment involved; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm" and "in determining the utility of conduct...the following factors are important: (a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the harm." Further, "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and (a) the particular use or enjoyment interfered with is well suited to the character of the locality; and (b) the actor's conduct is unsuited to the character of that locality".

[58] The court held, "We have no trouble concluding that , at least in our society, to have the use and enjoyment of one's home interfered with by smoke, odour, and similar attacks upon one's senses is a serious harm. The social value of allowing people to enjoy their homes is great, and persons subjected to odour or smoke from a neighbour cannot avoid such harm except by moving. One should not have to be required to close windows to avoid such harm. On the other hand, aside from the simple right to use their property as they wish, it is difficult to assign any particular social value to the Greve's wood-burning stove. This method of heating does save on fossil fuels, but assuming that the stove used by the Greve's emits foul-smelling smoke, society is certainly blessed if only a few people avail themselves of the opportunity to save fuel by using such stoves. The Greves could avoid invading the Thomsen's property by using other means of heating...We therefore conclude that...the Greve's invasion of the Thomsen's land...is unreasonable".

[59] In *McGrath and Snodgrass v. Durham* (1998) (No. 9403805) the Court of Common Pleas in Montgomery County, Pennsylvania permanently enjoined the defendants from continuing to use the uncertified wood-burning stove they been using to heat their home. The injunction was granted because the stove was creating a private nuisance by emitting smoke which entered the next-door neighbour's residence. The Pennsylvania court, noting that there were no Pennsylvania cases directly on point, cited *Thomsen v. Greve* as authority.

[60] Again, the facts are somewhat similar to the case at bar.

[61] The plaintiffs were not able to open their windows or use their rear deck during the heating season. Even with their doors and windows shut, they smelled smoke in various rooms of their house. At times, the odour of smoke woke them up during the night. Ms. McGrath found that breathing became physically painful when the smoke was thick. She experienced chest pains and headaches. The smoke irritated the plaintiffs' noses, airways and eyes. Their children developed coughing at night. Ms. McGrath sought out and received medical treatment.

The smoke weighed heavily on her mind and eventually caused her to seek counselling. The plaintiffs tried various means to protect themselves from the smoke: they removed a hedge they believed was trapping the smoke, they put in a retaining wall, they installed a 6' fence along their border with the neighbours, they installed a new glass storm door, they installed a new airtight garage door, and they installed an air cleaner at their front door area; all to no avail. The plaintiffs established at trial that invisible microscopic particulate matter in wood smoke can enter a home from the outside even when the doors and windows are shut and that exposure to wood smoke can produce negative health effects. Ms. McGrath kept a log for about 6 weeks during October to December of 1993 which indicated that smoke came onto their property from the defendants' woodstove about 50 percent of the time. The plaintiffs established that the defendants' smoke entered the plaintiffs' property about 140 times over 2 heating seasons (1995/96 and 1996/97).

[62] The defendants had a functioning gas central heating system in their home. The defendants called the previous owner of the plaintiff's property who testified that she was never bothered by the defendants' wood smoke.

[63] The test for private nuisance in Pennsylvania is similar to the tests in Ontario and Nebraska.

[64] The court set out that, "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is...(a) intentional and unreasonable..." and "the harm caused by the invasion is significant".

[65] Further, "An invasion of another's interest in the use and enjoyment of his land is intentional if the actor...(b) knows that it is resulting or is substantially certain to result from his conduct" and "an invasion...need not be inspired by malice or ill will...it is the knowledge of that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional."

[66] Further, "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if (a) the gravity of the harm outweighs the utility of the actor's conduct or (b)...". Further, "In determining the gravity of the harm...the following factors are important: (a) the extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment involved; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm" and "in determining the utility of conduct...the following factors are important: (a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the harm". Further, "An intentional invasion of another's interest...is unreasonable if the harm is significant and it would practicable for the actor to avoid the harm in full in part without undue hardship."

[67] Further, "by significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance in the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land." Also, "the standard for determination of the significant character is the standard of normal persons in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying, or intolerable, then the invasion is significant…".

[68] The court held that the defendants' had acted intentionally because they were aware of the plaintiffs' complaint but continued to use the wood stove anyway. The court found that the defendants' conduct was unreasonable and, in particular, that the gravity of the harm suffered by the plaintiffs outweighed the utility of the defendants' conduct. The court found that the plaintiffs had suffered and were continuing to suffer serious and pervasive harm to their ability to use and enjoy their residential property and home and that the law attaches great social value to this type of use and enjoyment which was entirely suitable to the character of the residential locality and that the burden on the plaintiffs to avoid the harm would involve moving which was extreme. By contrast, the court found, the utility of the defendants' conduct was minimal at best and that while fossil fuels might be saved, the defendants were able to avoid the invasion of the plaintiffs land without hardship by using their existing gas furnace.

[69] In the case at bar, the plaintiffs' daytimer, which the plaintiffs' state is a record of some of the days that the defendants' smoke entered their property, contains entries on 4 days in November of 2006 and on 5 days in November of 2007, for an average of 4.5 days in November which is 15 percent of the number of days in November. The daytimer contains entries on 7 days in each of December of 2006 and December of 2007, which is 22.6 percent of the number of days in December.

[70] While these percentages may not be as high as those in the American cases, the court bears in mind the plaintiffs' evidence that the emissions from a single OWB are equivalent to the emissions from 4 conventional wood stoves or at least 10 EPA certified wood stoves over the same period of time.

[71] Given the deleterious effects of the smoke claimed by the plaintiffs, particularly the physical health issues claimed by Ms. [redacted], the other evidence about the harmful effects of wood smoke, the claimed frequency and severity of the smoke emanating from the defendants' property, the authorities referred to above, the fact that the defendants have alternative means available to heat their home, the character of the parties' neighbourhood, including no indication that anyone other than the defendants has an OWB, the court finds that the plaintiffs' action is not frivolous or vexatious in nature and that there is a serious issue to be tried.

Irreparable Harm

[72] The test for irreparable harm was reviewed by MacPherson J.A. in *Shehrazad Housing* where he cited *RJR-MacDonald* for the proposition that irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured" and found that the harm foreseen in *Shehrazad Housing* "would not be compensable or curable". MacPherson J.A. also

cited *Kanda Tsushin Kogyo Co. v Clovely* for the proposition that irreparable harm "must be clear and not speculative" and found that "while the harm [in *Shehrazad Housing*] was expressed in terms of a "risk", [the] risk seems more than speculative…".

[73] In the case at bar, there is evidence of a real risk of harm and/or continuing actual harm to the health of the plaintiffs, particularly Ms. [redacted] which is not compensable or curable. Further, as in *Plater v. Town of Collingwood et al.,* there is evidence that the continued use of the OWB would give rise to a new cause of action from day to day. Accordingly, the court is satisfied that the plaintiffs have met their burden of demonstrating irreparable harm.

Balance of Convenience

[74] The harm that the defendants will suffer if the interlocutory injunction is granted is relatively minimal. They will have to switch to a different heating system for the balance of the current heating season and quite likely the upcoming heating season if the matter is not tried before then. The cost to them will be purely financial and compensable.

[75] The harm the plaintiffs will suffer if their application is not granted is potentially significant. As noted above, there is evidence of a real risk of harm and/or actual continuing harm to the plaintiffs' health as well as other aspects of loss of use and enjoyment of their home and yard.

[76] The balance of convenience is clearly in favour of granting the relief sought by the plaintiffs.

Undertaking as to Damages

[77] Each plaintiff signed and filed an undertaking as required by Rule 40.03.

Disposition

[78] Based on the foregoing analysis, the court finds that the circumstances in the case at bar warrant taking the drastic and extraordinary step of granting an interlocutory injunction.

[79] Accordingly, the plaintiffs' motion is granted and an interlocutory injunction shall issue forthwith enjoining the defendants from using the outdoor wood-fired boiler located at their property located at 4910 Highway 47, Uxbridge.

Costs

[80] If the parties are unable to resolve the issue of costs, the plaintiffs may serve and file brief written submissions as to costs on or before March 20, 2008. The defendants may serve and file

a brief written response on or before April 2, 2008. The plaintiffs may serve and file a brief written reply on or before April 9, 2008.

Justice F. Graham

Released: March 17, 2008