The Court of Appeal's Decision in *TMS Lighting Ltd. v. KJS Transport Inc.*: Private Nuisance

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One of the tools in an environmental litigator's tool box is the tort of nuisance. Nuisance, which is intended to provide recourse for interference with the plaintiff's rights in property, may be pled in respect of a variety of environmental impacts to land or property. There has been considerable uncertainty over the years as to how to apply the tort, and in particular, what must be proven to recover damages. This uncertainty is complicated by the development of two distinct branches of nuisance: public nuisance and private nuisance, and strict liability (with its origins in the doctrine of *Rylands v. Fletcher*[1]). It appears that the courts are cognizant of the uncertainty surrounding the tort, as recently nuisance has been the subject matter of a considerable amount of judicial treatment.

Most recently, the Court of Appeal has released its decision in *TMS Lighting Ltd. et al. v. KJS Transport Inc. et al.*[2], in which it addressed the applicable test for private nuisance. The facts of the case, as set out by the Court of Appeal, are quite simple, and, one can envision, not uncommon. The parties were neighbouring businesses in an industrial area of Brampton, Ontario. For a period of approximately five years, airborne dust generated by the appellants' trucking operations persistently disrupted the lighting manufacturing business carried on by the respondents.[3] The plaintiffs commenced an action to recover damages they say they suffered due to the nuisance from the dust and the trespasses of the trucks and also sought injunctive relief. The trial judge found the defendants liable in both nuisance and trespass and awarded damages for loss of productivity and the costs of refinishing various lighting fixtures and barrier stones in the total amount of $310,422.50. He also enjoined the defendants from further trespass.[4]

[1] (1868) L.R. 3 H.L. 330 (H.L.).
[2] 2014 ONCA 1 aff'g 2012 ONSC 5907 [*TMS Lighting v. KJS Transport*].
[3] *Ibid* at para. 1.
[4] 2012 ONSC 5907 at paras. 2 & 273.

The defendants appealed to the Court of Appeal. The primary issue addressed by the Court of Appeal related to whether or not the respondents were entitled to damages for an alleged loss of productivity and the method of calculation of the appellants' damages. The preliminary issue addressed by the Court of Appeal, however, was whether the trial judge erred in his nuisance analysis by finding that the appellant's interference with the respondents' use and enjoyment of their lands was unreasonable in the circumstances.[5] The Court of Appeal considered the test for private nuisance and upheld the trial judge's finding of unreasonable interference with the respondents' use and enjoyment of their lands.[6] The Court of Appeal allowed the appeal in part, and set aside the judgment relating to lost productivity damages and ordered a new trial limited to an assessment of damages.[7]

The Court of Appeal's treatment of the damages issues are beyond the scope of this paper, which will focus on the nuisance analysis.

At first blush, it seems an oddity that the Court of Appeal, in its decision, made no reference to its recent decision in *Smith v. Inco Limited*[8], which also dealt with the law of nuisance and what must be proven by the plaintiff to recover. *Smith v. Inco* was concerned with physical injury to land as opposed to substantial interference with its use. The trial judge in *TMS Lighting v. KJS Transport*, noted that the courts have historically treated these two forms of nuisance differently and cited the following passage from *Smith v. Inco*, with emphasis as follows:

> As evident from the definition relied on in St. Pierre, ***while all nuisance is a tort against land predicated on an indirect interference with the plaintiff's property rights, that interference can take two quite different forms. The interference may be in the nature of "physical injury to land" or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land. The latter form of nuisance, sometimes described as "amenity nuisance"*** is not alleged here: see Street on Torts at p. 429 at p. 429; The Law of Nuisance in Canada at pp. 69-71; Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" [1989] Cambridge L.J. 214 ....
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> The courts have taken a somewhat different approach to nuisance claims predicated on physical damage to property and those claims based on amenity or non-physical nuisance. ***Where amenity nuisance is alleged, the reasonableness of the interference***

[5] *Ibid* At para. 3.
[6] *Ibid* at para. 26.
[7] *Ibid* at para. 88.
[8] 2011 ONCA 628 rev'g 2010 ONSC 3790 [*Smith v. Inco*].

> ***with the plaintiff's property is measured by balancing certain competing factors, including the nature of the interference and the character of the locale in which that interference occurred. Where nuisance is said to have produced physical damage to land, that damage is taken as unreasonable interference, without the balancing of competing factors.***[9]

In *TMS Lighting v. KJS Transport*, the plaintiffs were not alleging that the dust from the neighbouring trucking operations caused physical damage to the plaintiffs' lands; instead the plaintiffs alleged that the dust constituted a substantial interference with their use of their property[10]. On the basis of the allegations made by the plaintiffs, the trial judge distinguished the circumstances of the case from those in *Smith v. Inco* and proceeded with an analysis of the law based on "amenity nuisance," which included an assessment of whether the alleged interference was unreasonable.[11]

The trial judge's decision to proceed on this basis was not appealed, and the Court of Appeal gave no consideration to its decision in *Smith v. Inco*, or the tests enunciated therein.[12]

Instead, the Court of Appeal focused its attention on the decision of the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)*[13], which sets out the applicable test for private nuisance.

In *Antrim*, the claimant, Antrim Truck Centre Ltd., owned a truck stop on Highway 417. Antrim Truck Centre Ltd. applied to the Ontario Municipal Board for compensation for injurious affection under the *Expropriations Act* following the construction of a new section of the highway by the Ministry of Transportation ("MTO") which had the effect of rerouting traffic away from the claimant's business. The Ontario Municipal Board found in favour of the claimant and found that it had made out the tort of nuisance, and specifically, that the interference with the claimant's land was as a result of the construction, not the use, of Highway 417. The MTO appealed to the Divisional Court, and the claimant cross-appealed. Both the

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[9] 2012 ONSC 5907 at para. 19.
[10] *Ibid* at para. 21.
[11] *Ibid* at paras. 26 & 27.
[12] *Supra* note 2.
[13] 2013 SCC 13, [2013] S.C.J. No. 13 [*Antrim*].

appeal and the cross-appeal were dismissed. The parties then appealed to the Court of Appeal. The Court of Appeal allowed the MTO's appeal and dismissed the claimant's cross-appeal.[14]

Epstein J.A., writing for the Court of Appeal, reviewed the relevant legal principles to the tort of nuisance and highlighted the uncertainty that has been faced when trying to establish the tort: ie, what conduct amounts to a nuisance at common law? At para. 79, Epstein J.A. stated the following:

> While the courts have recognized that the law of nuisance is, in fact, a nuisance, it is capable of a simple definition: "any activity or state of affairs causing a substantial and unreasonable interference with a claimant's land or his use and enjoyment of that land" ...[15]

Accordingly, to succeed in nuisance, a plaintiff must prove that the annoyance or discomfort is both substantial and unreasonable. The issue then becomes how to establish this two-part test, when what is substantial may or may not be unreasonable. To be substantial, the interference must be non-trivial; it must amount to more than a slight annoyance or trifling interference.[16]

To address the issue of unreasonableness, Epstein J.A. cited with approval a list of factors identified by the Divisional Court to be considered in the assessment:

1) the severity of the interference;
2) the character of the neighbourhood;
3) the utility of the defendant's conduct; and
4) the sensitivity of the plaintiff.

Epstein J.A. found that by carefully weighing these four factors, the courts will be able to balance the competing interests of the parties.[17]

The Court of Appeal in *Antrim* ultimately found that in failing to consider the character of the neighbourhood and any abnormal sensitivity of the plaintiff and in failing to recognize the elevated importance of the utility of the defendant's conduct where the interference is the product of an essential public service, the Ontario Municipal Board's analysis of whether the

[14] 2011 ONCA 419, (2011), 106 O.R. (3d) 81 at paras. 1 - 8.
[15] Ibid at paras. 78 – 79.
[16] *Supra* note 10 at paras. 19 & 22.
[17] *Supra* note 11 at para. 83.

interference was unreasonable was flawed.[18] The Court of Appeal found that an analysis and proper weighing of these factors supported a finding that the interference was not unreasonable and allowed the appeal.[19]

The Court of Appeal's decision in *Antrim* was further appealed to the Supreme Court of Canada by Antrim Truck Centre Ltd., and that appeal was allowed.

Cromwell J., writing for the Court, agreed with the Court of Appeal's conclusion that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable.[20]

Cromwell J. found in favour of retaining the two-part approach, with its threshold of a certain seriousness of the interference. To be substantial, an interference must be one that is non-trivial. Once that threshold is met, the inquiry proceeds to the reasonableness analysis. Cromwell J. further found that the two-part approach recognizes that not every interference, no matter how minor or transitory, is an actionable nuisance, and some interferences must be accepted "as part of the normal give and take of life".[21]

Where the Supreme Court of Canada differed from the Court of Appeal in its approach was the analysis of unreasonableness. It was agreed that there are factors relevant to the assessment of whether a substantial interference is also unreasonable, however, unlike the Court of Appeal, the Supreme Court of Canada was not prepared to be bound by a specific list. Instead, it found that courts should "consider the substance of the balancing exercise in light of the factors relevant in the particular case."[22]

Cromwell J. noted that "the focus of the reasonableness analysis in private nuisance is on the character and extent of the interference with the claimant's land; the burden on the claimant is to

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[18] *Ibid* at para. 129.
[19] *Ibid* at para. 140.
[20] *Supra* note 10 at para. 18.
[21] *Ibid* at paras. 19 – 21.
[22] *Ibid* at para. 26.

show that the interference is substantial and unreasonable, not to show that the defendant's use of its own land is unreasonable."[23]

The Supreme Court of Canada ultimately disagreed with the Court of Appeal's analysis and found that it erred in finding that the Ontario Municipal Board was required to expressly consider all four of the factors identified.[24] Cromwell J. found that there was no exhaustive or essential list of factors which must be expressly considered in every case and that the failure to mention one or more is not, on its own, a reviewable error.[25] No reviewable errors of the Board's analysis of reasonableness were found, and the Board's order was restored.

Of note, Cromwell J. rejected the appellant's submission that reasonableness does not need to be considered when the interference constitutes "material" or "physical" damage to the land as opposed to other types of interference such as loss of amenities.[26] Cromwell J. stated that the balancing that is inherent in the reasonableness analysis is at the heart of the tort of private nuisance.[27] He did acknowledge that where there is significant and permanent harm caused by an interference, the reasonableness analysis may be very brief, however concluded that reasonableness is to be assessed in all cases where private nuisance is alleged, regardless of the type of harm involved.[28]

This conclusion is contrary to the above passage of the Court of Appeal in *Smith v. Inco,* cited by the trial judge in *TMS Lighting v. KJS Transport*.[29] It must be noted, however, that the Court of Appeal in *Smith v. Inco* also stated that it need not decide the issue, and was approaching the appeal on the basis that competing factors cannot be balanced where the nuisance involves actual physical damage to the claimants' lands.[30]

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[23] *Ibid* at para. 28.
[24] *Ibid* at paras. 52 & 53.
[25] *Ibid* at para. 54.
[26] *Ibid* at para. 46.
[27] *Ibid* at para. 48.
[28] *Ibid* at paras. 50 – 51.
[29] *Supra* note 6.
[30] *Supra* note 5 at para. 48.

One can assume that because the alleged harm in *TMS Lighting v. KJS Transport* was characterized as amenity damage and not damage to property, the Court of Appeal did not use the opportunity to further address its comments on this point in *Smith v. Inco.*

In *TMS Lighting v. KJS Transport*, the Court of Appeal applied the test set out by the Supreme Court of Canada in *Antrim* to the reasonableness analysis conducted by the trial judge and found no palpable or overriding error in the analysis.[31] The Court of Appeal noted that in respect of the reasonableness test, courts are not limited by any specific list of factors[32] and that the factors considered by the trial judge, namely (1) the incompatibility of the dust generated on the appellants' property with the character of the neighbourhood in which the parties' businesses are located; (2) the nature and utility of the appellants' conduct; and (3) the alleged sensitivity of the respondents' manufacturing operations to damage from dust, were proper considerations.[33] The Court of Appeal further found that there was sufficient evidence before the trial judge to support his analysis of these considerations.[34]

What appears clear from the recent jurisprudence is that to succeed in a claim for private nuisance, a plaintiff will need to prove that the interference is significant, such that it is non-trivial, and that it is unreasonable, regardless of the type of harm alleged. To establish that the interference is unreasonable, a plaintiff will need to be cognizant of all of the factors that may be relevant to his or her case, and tender evidence in support of them.

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[31] *Supra* note 2, at paras. 14 – 26.
[32] *Ibid* at para. 15.
[33] *Ibid* at para. 19 & 25.
[34] *Ibid* at paras. 21 – 24.