

Order under Section 35  
Tenant Protection Act, 1997

File Number: TNT-03370

In the matter of: Bathurst St  
Toronto ON M6B 4K1

Between: Tenant

and

Giovanni Cacciola Landlords  
Josephine Cacciola

(the 'Tenant') applied for an order determining that Giovanni Cacciola and Josephine Cacciola (the 'Landlords') substantially interfered with the reasonable enjoyment of the rental unit by the tenant or by a member of her household.

This application was heard in Toronto on May 27, 2003 and June 16, 2003. The Tenant testified on her own behalf. Both Landlords testified and they called as witnesses Dan Mazzocato and The Landlords were represented by Bhupinder Nagra.

This application was heard together with application TSL-50794.

**For reasons attached hereto, it is determined that:**

1. The Tenant failed to prove, on a balance of probabilities, that the Landlords substantially interfered with the reasonable enjoyment of the rental unit by the Tenant or by a member of her household.

**It is ordered that:**

1. The Tenant's application is dismissed.
2. The parties shall be allowed until July 11, 2003 to file with the Tribunal (and to serve upon each other) any written submissions they wish me to consider with respect only to the issue of the costs of this application.

**June 25, 2003**  
**Date Issued**

---

Richard Feldman  
Member, Ontario Rental Housing Tribunal

Toronto North District  
7th Floor, 47 Sheppard Ave E  
Toronto ON M2N 5X5

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

REASONS

In the matter of: Bathurst St  
Toronto ON M6B 4K1

Between: Tenant

and

Giovanni Cacciola Landlords  
Josephine Cacciola

Reasons to Order TNT-03370 issued on June 25, 2003 by Richard Feldman.

The Tenant applied for an order determining that the Landlords substantially interfered with the reasonable enjoyment of the rental unit by the Tenant or by a member of her household.

This application was heard in Toronto on May 27, 2003 and June 16, 2003. The Tenant testified on her own behalf. Both Landlords testified and they called as witnesses Dan Mazzocato and . The Landlords were represented by Bhupinder Nagra.

The relevant history between the parties (at least up to mid-November 2002) has been detailed in Order TST-04047 issued on December 30, 2002. In brief, the Landlords were found to be in breach of their obligations because they failed to take reasonable steps to ensure that the Tenant was not unduly disturbed by the noise and tobacco smoke that was entering her rental unit. I granted an abatement of rent to the Tenant and ordered the Landlord to have work done to the Tenant's bedroom floor that was, according to an expert hired by the Tenant, supposed to substantially reduce the amount of sound that would "leak" into the bedroom for the barbershop below.

This application is based upon the Tenant's allegation that since December 2002, the same problems (i.e. noise and tobacco smoke) have continued, that the Landlords have failed to comply with Order TST-04047 and that the Landlords still have not taken adequate steps to prevent this interference with her reasonable enjoyment of the rental unit.

Smoke

The Tenant admits that the tenant who lives in the bachelor apartment below the rear portion of her unit ( , referred to as " " in TST-04047 and also known as " " ) is hardly ever in his unit. While the Tenant did not smell any tobacco for most of October and November 2002, she began to smell it again in mid-December 2002. She wrote to the Landlord's agent about this on December 13, 2002. She states that she can smell tobacco usually twice a day, very early in the mornings and very late at night. Sometimes the Tenant smells a floral odour (which she finds equally offensive) that she believes the other tenant is using to mask the smell of tobacco. The Tenant purported to keep a log of her observations but, by her own admission, the log is incomplete. The Tenant is not allergic to tobacco smoke. She alleges that

the tobacco smoke aggravates her allergy to dust but has produced no reliable, objective medical evidence to substantiate this allegation. The Tenant states that the smell of tobacco gives her a runny nose and irritates her throat occasionally. She finds it unpleasant to bathe late at night (her bathroom is at the rear of her unit and is thus more affected by what occurs in the bachelor apartment that lies beneath). The Tenant admits that the smell of tobacco was significantly less pronounced for most of February 2003 but then, in her opinion, got worse again. She is unaware of what steps, if any, the Landlords took to address her concerns (but assumes they did nothing).

Based upon the testimony of \_\_\_\_\_ (who I found to be an entirely credible witness), I find that \_\_\_\_\_ typically leaves his unit early in the morning (between 7:00 and 8:00 a.m.) and generally does not return until about 10:30 p.m. He does not smoke in the rental unit in the mornings. Upon his return to the unit at night, he watches television and has a few cigarettes and then goes to sleep around midnight. He is rarely at home on weekends. He has lived in his unit for about 7 years and has always smoked in his unit. He used to smoke quite a bit but he has been cutting down to about four or five cigarettes a day and hopes to quit smoking within the next couple of months.

According to the Landlords and \_\_\_\_\_ the Landlords have taken steps to address the concerns of the Tenant. Initially, the Landlords requested \_\_\_\_\_ to try to smoke outside of his unit. He complied for most of the last winter but when he heard from the Landlords that the Tenant was still complaining, he decided that he might as well be comfortable and smoke inside his unit. The Landlords provided \_\_\_\_\_ with a small air purifier to use in his unit. When the Tenant's complaints about the smell of smoke continued, in February 2003 the Landlords provided \_\_\_\_\_ with a larger air purifier, which he states he faithfully uses every time he smokes in his unit.

The Tenant takes the position that while these steps may have helped, they have not eliminated the odour of tobacco and they have not removed the risk to her health of being exposed to second-hand smoke. The Tenant would like (in addition to an abatement of rent) the Tribunal to force the Landlord to bring eviction proceedings against \_\_\_\_\_ or, in the alternative, force the Landlord to purchase for her approximately \$\_\_\_\_\_ worth of HEPA air cleaners for her unit which she hopes will be adequate to deal with the situation. The Tenant adduced no evidence as to the quantity of airborne pollutants (if any) in her unit or whether the presence of the odour of tobacco necessarily indicates the presence of carcinogens and/or other health-threatening substances. The Tenant adduced no expert evidence concerning the nature of the air cleaners with which she would like to be provided and adduced no evidence as to whether they would remove just the odour in question or also remove the potentially dangerous substances found in cigarette smoke.

In any event, it is not the presence or absence of the odour of cigarette smoke in the Tenant's unit which is the determining factor in this case. The Tenant must demonstrate that the presence of such an odour substantially interferes with her reasonable enjoyment of her rental unit for all usual purposes and that the Landlords ought to be held accountable because, when alerted to the problem, they failed to take reasonable steps to protect the Tenant's reasonable enjoyment of her unit.

Based upon the evidence presented, I am not satisfied that the Tenant has demonstrated in this application that from December 2002 to the present, the occasional odour of tobacco in the air

has substantially interfered with the Tenant's reasonable enjoyment of her unit for all usual purposes. I find that she has exaggerated the frequency of this problem, its duration and the impact it has had upon her. Unlike the previous application, the Tenant's evidence on this application was almost entirely subjective and unsupported by any objective or independent evidence. On the previous application, I also did not have the opportunity to hear testimony from

When the prior application came before me, the Tenant was successful on this issue because the evidence clearly showed that the Landlords had made little effort to address her concerns. Since then, however, the Landlords have made reasonable efforts. They have investigated the matter, spoken with the other tenant involved and provided him with a large air purifier to use while smoking in his unit. In some cases, the appropriate thing for a landlord to do is commence an application against the tenant who is allegedly engaging in disruptive conduct and let the Tribunal decide whether or not to evict that tenant. In this case, however, where [redacted] was a tenant prior to this Tenant moving in upstairs, where he has always been allowed to smoke in his unit, where there were apparently no complaints about his smoking prior to this Tenant moving in, where he is rarely at home and where the Landlords have correctly come to the conclusion that [redacted] has a tendency to exaggerate. I find that the Landlord was correct in opting not to commence such an application against [redacted]. In my view, the Landlords have fulfilled their obligations under the Act.

### Noise

The Tenant acknowledges that the Landlord did have her bedroom floor redone in late February 2003. She further acknowledges that it has resulted in a reduction of the volume of sound coming from below. She simply states that it is still not quiet enough and that it is the Landlord's fault for not having the work done properly.

Dan Mazzocato was one of the workers who performed this renovation. While he had difficulty recalling exact dates, I am satisfied that his memory concerning the work performed was reliable. He indicated that he and his fellow workers carefully followed the specifications set out in the report of the Tenant's engineer (John Coulter) and that they even waited for an engineer (Howard Patlik) from that firm to inspect their work and approve it before they completed the job. He stated that the gentleman did come and approve the work. The Tenant denied this and stated that the work was already completed by the time that Mr. Patlik arrived, but I draw a negative inference from the failure of the Tenant to either produce Mr. Patlik as a witness or, at the very least, attempt to introduce into evidence an affidavit from him. Based upon the evidence presented, I am satisfied that the Landlords have demonstrated that the work that I ordered in TST-04047 was done in accordance with the specifications of Mr. Coulter.

The Tenant is not alleging that the Mr. Cacciola, in operating his barbershop, is making an unreasonable or unusual amount of noise. She was, however, able to prove in the previous application that due to the age and unusual construction of the bedroom floor, an extraordinary amount of sound (even sound of ordinary conversational volumes) was being transmitted from the shop below up to her bedroom. It was because of this that I ordered the Landlords to effect the work recommended by the Tenant's expert. That work has now been done and the Tenant acknowledges that it has made some improvement. She just feels that it is not enough of an improvement. This is highly subjective and, unlike the previous application, is unsupported by

any objective measures. The Tenant contends that the Landlord refused to allow any acoustic tests to be conducted in 2003. The Tenant, however, never requested (as she did in the previous application) that I order that the Landlord cooperate in permitting such tests and she has admitted that she did not wish to incur the added expense of again retaining the services of an expert.

Similar to my analysis of the previous issue (smoke), I find that it is not the presence or absence of sound in the Tenant's unit which is the determining factor in this case. The Tenant must demonstrate that the presence of such sound substantially interferes with her reasonable enjoyment of her rental unit for all usual purposes and that the Landlords ought to be held accountable because, when alerted to the problem, they failed to take reasonable steps to protect the Tenant's reasonable enjoyment of her unit.

Based upon the evidence presented, I am not satisfied that the amount of sound that enters the Tenant's bedroom from below is sufficiently loud to substantially interfere with her reasonable enjoyment of her rental unit for all usual purposes. Even if I had come to the contrary conclusion, however, I would still dismiss this application because the Landlords have done everything reasonably necessary to address the Tenant's complaints and have done everything I ordered them to do in my order of December 2002.

### Conclusion

Although the Tenant filed many cases for me to consider (and I have read them all carefully and considered the Tenant's submissions with respect thereto), I have not discussed them by name for a number of reasons. Most are distinguishable on the facts. Many were issued under different legislation or in different jurisdictions. Many espouse principles with which I clearly agree given my rulings in Order TST-04047 and there should be no need to repeat those principles.

The "bottom line" is that a landlord must investigate a tenant's complaints and must take reasonable steps to address any legitimate concerns. While the Landlords in this case were initially slow to respond, once I issued my order the Landlords did act reasonably. The Tenant failed to present any corroborative evidence to support her allegation that tobacco smoke and unreasonable levels of noise continued to enter her apartment after November 2002. The Tenant failed to prove that, during the period of mid-December 2002 to the present, the Landlords substantially interfered with her reasonable enjoyment of her unit for all usual purposes.

Had it been necessary, I also would have found that the Tenant did very little to mitigate the situation but, given my findings above, it is unnecessary for me to go any further into this issue.

For these reasons, this application shall be dismissed.

The Tenant requested that the parties be given an opportunity to make written submissions with respect to the costs of this application. I have made an order in accordance with that request.

**June 25, 2003**  
Date Issued

\_\_\_\_\_  
Richard Feldman  
Member, Ontario Rental Housing Tribunal