ORDER NO: **W2007-000506**

THE RESIDENTIAL TENANCIES BRANCH

BETWEEN

Beverly E. Reeves

Tenant

- and-

Globe General Agencies

Landlord

ORDER

ADDRESS OF RENTAL UNIT: **617 - 233 Booth Drive**
Winnipeg, MB R3J 3M4

The Residential Tenancies Branch held a hearing on **January 25, 2007.**

Appearances: Tenant: Yes Landlord: Yes

By authority of Sections 152 and 154 of *The Residential Tenancies Act*, the director determines that:

The landlord's non smoking policy is reasonable within the meaning of Section 11 of *The Residential Tenancies Act.*

February 21, 2007
Date

B. Andrews
Residential Tenancies Officer
(204) 945-2484
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Fax: (204) 945-6273
Email: bandrews@gov.mb.ca

If you want to appeal this Order you must apply to the Residential Tenancies Commission, 1650 - 155 Carlton Street, Winnipeg MB R3C 3H8 in person or by mail (telephone: 945-2028, toll-free: 1-800-782-8403, fax: 945-5453) no later than **March 12, 2007.** You must file a copy of this Order with your Notice of Appeal. An appeal suspends the Branch's Order.

This Order, including the Reasons for Decision, is a matter of public record.

Manitoba

SCHEDULE "A"

GLOBE GENERAL AGENCIES
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NOTICE TO ALL EXISTING TENANTS

Globe General Agencies is pleased to announce that effective October 1st, 2006, all of our buildings will have a **non smoking policy**.

All existing tenants will be "grandfathered" during their length of tenancy. This means, that you, your visitors or guests will continue to be allowed to smoke inside your rental unit, balconies or patios. Should you apply for another unit in the same building or other Globe General Agencies properties this means that you will not be allowed to smoke inside that rental unit as well as your visitors or guests. There will be no smoking in the common areas of the building and the grounds.

All new tenants, visitors, or guests will not be permitted to smoke in any of the rental units, balconies and patios as well as on the property.

Globe General Agencies is a progressive property management company that strives to offer the best in quality rental accommodation to its tenants. In keeping with the policies adopted by the City and Province to protect the health of Manitobans, we too are adopting a no smoking policy in our buildings. A smoke free building means a healthy, clean, safe environment, a place where it's a pleasure to live. This will make Globe General Agencies unbeatable as a company that offers the best in rental accommodation for anyone looking for a home that offers exceptional lifestyle advantages.

Sincerely,

GLOBE GENERAL AGENCIES

REASONS FOR DECISION

The landlord gave a tenant, Beverly Reeves, a written document setting out a new rule that would go into effect on October 1, 2006 prohibiting smoking on the landlord's property. This rule is attached as Schedule A to the order. The tenant asked the Residential Tenancies Branch to hold a hearing to determine whether the landlord's rule was reasonable. The Branch held a hearing January 25, 2007. The tenant Beverly E. Reeves attended the hearing, and Ron Penner represented the landlord; both gave evidence.

LEGISLATION: Sections 11(2) and 11(3) of *The Residential Tenancies Act*, cited below, deal with rules:

House rules

11(2) "A landlord may, in addition to the obligations set out in a tenancy agreement, establish and enforce a rule concerning the tenant's use, occupancy or maintenance of the rental unit or residential complex or services and facilities if the rule is in writing, is made known to the tenant, and is reasonable in all the circumstances.

Provision or rule to be reasonable

11(3) A provision or rule is reasonable if

(a) it is intended to

(i) promote a fair distribution of services and facilities to the occupants of the residential complex,

(ii) promote the safety, comfort or welfare of persons working or residing in the residential complex, or

(iii) protect the landlord's property from abuse;

(b) it is reasonably related to the purpose for which it is intended;

(c) it applies to all tenants in a fair manner; and

(d) it is clearly expressed so as to inform the tenant of what the tenant must or must not do to comply with it. "

The landlord said that a City of Winnipeg bylaw and a Province of Manitoba law prohibit smoking in enclosed common spaces, but that no law affects the practice of smoking inside rental units or elsewhere on a landlord's property outside a building. He said that:

- Tobacco smoke contains many toxins, including carcinogens with no safe levels of exposure;
- Tobacco smoke drifts from suites, balconies and outside areas into rental units, despite all best efforts to limit the drift of smoke;
- Many non-smokers including tenants, guests, landlord's employees, and service workers in the complex suffer adverse health consequences caused by drifting tobacco smoke;
- Smoking tobacco in rental units, which includes balconies and patios, increases the risk of fire, death, injury, and damage to property, and that in turn increases a landlord's insurance costs;
- Tobacco smoke and chemicals in the smoke stick to every surface in a suite; when tenancies end this increases a landlord's cleaning and painting expenses and can force the landlord to replace carpets, underlay and curtains that would not otherwise have to be replaced;
- When these extra costs at the end of tenancies cannot be collected from the tenant who smoked, then they (as well as increased insurance premiums) are passed on to all tenants in the form of rent increases; and

- Landlords who allow non-smoking tenants to be exposed to known health risks may be considered to have failed to provide quiet enjoyment of the unit.

The landlord submitted printed supporting information on these issues.

INTRODUCTORY REMARKS:

The landlord said that his company received many complaints from tenants who objected to tobacco smoke entering their units from other units, from hallways and from outside the building; many of these tenants asked the landlord to ban smoking. Two tenants appeared and gave evidence for the landlord; they said that tobacco smoke drifted into their units from other units, from hallways, balconies and from outdoor common areas, and this caused physical distress to them and to their visitors.

The landlord said that all these considerations led the landlord to consider a rule banning smoking in rental units including balconies and patios, and on the landlord's property outside the buildings. He said the landlord decided not to ban smoking outright, but rather to adopt a phased-in approach: to ban smoking in rental units (including balconies) where the tenancy began on or after October 1, 2006, and to allow smoking in rental units (including their balconies) where the tenancy in the present unit began before October 1, 2006 (he referred to tenancies that began before October 1, 2006 as 'grandfathered' tenancies). He felt this would bring positive change to the buildings and to the lives of non-smokers, while preventing undue hardship and stress for smoking tenants already living in the complex on October 1, 2006.

The tenant said she did not disagree with a rule prohibiting smoking. She did not address or dispute the landlord's assertions about the harmful nature of tobacco smoke, smoke drifting into units, the increased fire risks and increased insurance premiums caused by smoking (though she felt fire risks on balconies were not as severe as the landlord outlined), the effect of smoking on a landlord's maintenance expenses and insurance premiums and thus on tenants' rents, or on potential legal ramifications of allowing smoking in a residential complex. Rather, she said that she had asked the Branch to hold the hearing and to decide on the question for two reasons: first, because she wanted to make sure that the landlord's rule was thoroughly and rationally debated; and second, because she disagreed with how the landlord's non-smoking rule was being implemented.

CONSIDERATIONS:

When hearing and deciding this matter, I considered the issues raised, and the information provided and the arguments advanced by the parties in their pre-hearing submissions and at the hearing. In addition I am familiar with the large amount of current research and conclusions relating to:

- the health hazards of exposure to tobacco smoke, including second-hand smoke;
- the difficulties faced by smokers who want to stop smoking;
- the prevalence of tobacco smoke throughout multi-unit complexes due first to the extreme difficulty of constructing complexes that do not allow the drift of smoke into and between rental units, and second to the virtual impossibility of retro-fitting already-constructed complexes to prevent this drift;
- the problems associated with finding and moving to new rental accommodation; and
- the long-lasting adherence of toxins and carcinogens from tobacco smoke to surfaces with which it comes in contact, whether in multi-unit complexes or in single-family dwellings.

In addition, I noted and considered:

- the wide-ranging and extensive efforts of governments, non-profit agencies, and individuals themselves to protect people from unwanted and involuntary exposure to tobacco smoke;
- the changing attitudes in individuals and in society toward tobacco smoking, toward the hazards associated with it, and toward the issue of individual responsibility toward other people; and

- the fact that these efforts and these changing attitudes have led directly to trends both in legislation and in decisions in the courts and administrative tribunals that restrict the right of individuals to act in ways that harm others.

EVIDENCE, ARGUMENT AND CONCLUSION:

-SECTION 11(2): the parties agreed that the landlord's rule met this section's requirement that the rule be put in writing and that it be made known to the tenant. Section 11(2) goes on to say the rule must be reasonable in all the circumstances; section 11(3) provides four criteria for a reasonable rule, and a rule must comply with each of them in order to be considered reasonable.

-SECTION 11(3)(a): Is the rule intended do at least one of the following things: to promote a fair distribution of services and facilities to the occupants of the residential complex; to promote the safety, comfort or welfare of persons working or residing in the residential complex; or to protect the landlord's property from abuse?

The landlord said the rule is intended to do each of those things, and he explained his opinions:

- -Fair distribution: The landlord said many tenants are denied the peaceful enjoyment of their rental units, to which all tenants are entitled, because tobacco smoke drifts into their units. He suggested that the rule would cause the reduction and eventual elimination of tobacco smoke in the complex, and that meant this denial of peaceful enjoyment would be reduced and would eventually cease. He suggested that the rule would thus lead to a fairer situation for all tenants.

- -Safety, comfort, welfare: The landlord said that the rule would improve the safety, comfort and welfare of non-smoking employees, tenants, guests, and service workers who entered the building, because the creation of tobacco smoke and the drift of smoke into non-smokers' units would be reduced and eventually eliminated.

- -Protect property from abuse: The landlord said that the reduction and eventual elimination of tobacco smoke due to the rule would mean that the damage to the landlord's property and the additional cleaning, painting and replacements caused by smoking would be reduced and eventually eliminated.

The tenant did not dispute the landlord's arguments on this clause.

The landlord's argument is persuasive, and I conclude that the rule will improve people's access to peaceful enjoyment of their units and of the complex, it will improve the safety, comfort and welfare of tenants, their guests, and workers at the complex, and it will reduce and eventually eliminate cleaning and replacement expenses brought about by the prevalence of tobacco smoke. I find that the landlord's rule complies with the requirement of clause 11(3)(a).

-SECTION 11(3)(b): Is the rule reasonably related to the purpose for which it is intended?

The landlord said that the rule will fulfil the intentions set out in the preceding section (11(3)(a)), and he explained his views:

- -Fair distribution: He said the rule will improve tenants' access to clean and non-toxic air and improve their peaceful enjoyment of the unit and the complex.

- -Safety, comfort, welfare: He said the rule will reduce the risk of death, injury and property loss caused by smoking-related fires, and it will give tenants, their guests and trades workers increased comfort and improved health through lowered exposure to toxins and carcinogens in tobacco smoke.

- -Abuse of property: He said the rule will reduce turnover expenses for cleaning, painting and replacements, and it will allow the landlord to negotiate reduced fire insurance premiums.

The tenant did not dispute the landlord's arguments on this clause.

The tenant did, however, suggest a number of alternative methods that the landlord could have used to introduce his non-smoking policy. She suggested that the landlord might have introduced his non-smoking rule more gradually than he has done. She noted that people now go outdoors to smoke, and she argued that the landlord should allow people to smoke on balconies of all units, and not only grandfathered units. As well, she said the landlord should allow all tenants to smoke outdoors on the landlord's property. She felt that the landlord's rule was harsher than it needed to be to meet the landlord's intentions. The landlord said that allowing unrestricted smoking on balconies or out of doors on a property was not a good solution to the problems he intended to address with the rule, because smoke often drifts from balconies or other outdoor areas into rental units through windows, patio doors and exterior doors. He said that allowing smoking outside buildings has resulted in litter and dense smoke near building entrances, smoke that enters a building when building doors are opened. He referred to the evidence of his witnesses, who had complained of smoke coming in their windows from outside.

I explained at the hearing that my authority in this matter is not to determine whether other types of smoking prohibitions or phase-in plans were available or were preferable to the landlord's rule. Rather, my sole authority in this case is to determine whether the landlord's *current* rule is or is not reasonable. Therefore I cannot give any weight to the tenant's only comments on the question of whether the rule is "reasonably related".

Having said that, I note that the variation proposed by the tenant would affect different tenants differently, in that not all units in every complex would have balconies, and not all units in every complex would have the same degree of convenient access to building exits. These things mean that the tenant's proposal would result in an unequal and unfair distribution of rights to tenants, and so it would not meet the requirement of section 11(3)(b).

I conclude that the landlord's rule would improve peaceful enjoyment and quality of life in the complex, it would have the effect of decreasing and then eliminating health problems caused by drifting tobacco smoke as well as fires caused by smoking, and the rule will decrease and eventually eliminate additional cleaning and replacements after tenancies caused by smoking. The rule will lead directly to fulfilling each of the purposes referred to in clause (a), and so it is reasonably related to the landlord's purposes. Therefore the landlord's rule complies with the requirements of section 11(3)(b).

-SECTION 11(3)(c): Does the rule apply to all tenants in a fair manner?

The landlord said the rule complies with this criterion. He explained that the rule does not require existing tenants to stop smoking in their units, or to move out of their units, and so the rule treated them fairly. He said new tenants were also treated fairly. He explained that, for tenancies that began on or after October 1, 2006, his advertising, his application forms, and his tenancy agreements for new tenancies all state the rule, and his staff ensure that applicants and new tenants are aware of the rule before they apply for tenancy, and before they sign a new tenancy agreement. He said that meant that anyone who applied for a tenancy, or who signed a tenancy agreement that commenced on or after October 1, 2006 did so in the full and complete knowledge that they were moving into a 'no smoking' environment.

The tenant said that it is wrong for a landlord to attempt to control what people can and cannot do in the private space. She said this is an unreasonable limitation of a person's liberty to choose what she or he wishes to do. The landlord responded that the values of our society provide people with a very widespread freedom of choice, and with freedom to act as they wish. He said that these rights and

freedoms are legitimately limited, however, when a person's actions have a harmful effect on others. He said there is no scientific doubt that tobacco smoke is harmful, that it drifts into rental units, and that it adheres to surfaces within units, affecting the health of subsequent tenants. He said these facts mean that the smoking of tobacco is a matter about which it is reasonable for landlords to create rules. He noted that the rule (because of the 'grandfather' provisions) does not force smokers to move out of their homes, nor does it force them to stop smoking, or to stop smoking in their homes.

The rule does not require grandfathered tenants to move or to stop smoking, and the landlord's procedures ensure that new, non-grandfathered tenants are fully aware of the new rule before they enter a tenancy. Therefore I conclude that the rule applies to all tenants in a fair manner, and so it complies with section 11(3)(c).

-SECTION 11(3)(d): Is the rule clearly expressed so as to inform the tenant what the tenant must or must not do to comply with it?

The landlord said the rule was clearly stated on the document given (on about October 1, 2006) to all existing tenants in every building the landlord owns or manages. He submitted a copy of the policy that is given to every new applicant, along with a copy of the Application for Tenancy form setting out the rule. He said that all tenancy agreements for tenancies that begin on and after October 1, 2006 contain the new rule. He said there is no doubt in the minds of any tenants about what they must do and must not do to comply with the rule.

The tenant referred to the landlord's December 2006 newsletter that was distributed to tenants of the Courts of St. James complex. The newsletter contained an article about the new rule. The landlord and tenant agreed that the article described two aspects of the rule somewhat differently than did the October rule which was distributed to all tenants of the complex. The tenant said this meant that the landlord had changed the rule significantly, and the changes were so major that the resulting confusion meant that tenants did not know what they must or must not do to comply with the rule.

The landlord argued that the rule was embodied in, and only in, the October 2006 document. He said that the December 2006 document was merely a description of the rule (although the ideas were not expressed as clearly as in the October rule). He said the December newsletter article was not a rule, and it was not a change in the rule. The landlord asked his witnesses whether any discrepancy between the October rule and the newsletter article had confused them. They replied in the negative. The landlord said that none of the tenants of the 754 rental units in the complex had contacted the landlord to express confusion or to request clarification about what they must or must not do to comply with the rule.

The landlord and tenant agreed that the tenant herself didn't contact the landlord at any time about this issue. The landlord said that the tenant is an assertive and straightforward person who is quite comfortable asking for explanations if something doesn't make sense to her. He argued that her failure to contact the landlord at that time was quite inconsistent with her statement that she had been confused, and he said that inconsistency ought to lead me to conclude that Ms. Reeves was not actually confused about how to comply with the rule.

I prefer the landlord's argument. It is clear that the October document was "the rule", whereas the later newsletter simply commented on the policy. It does not appear that anyone was confused about what they must do to comply with the rule. Furthermore: if, hypothetically, an adjudicator had to decide upon an actual conflict between the landlord's rule and an article about the rule in the landlord's newsletter, the newsletter article would be found to have less weight and significance than the original rule itself. On this issue I do not find that the rule breaches section 11(3)(d).

I will provide some comment on issues of clarity raised by the tenant.

-First, the tenant noted that the October 2006 rule said that tenants and guests of tenants for 'grandfathered' tenancies could continue to smoke "...inside your rental units, balconies or patios..." whereas the December newsletter said that tenants and guests of 'grandfathered' tenancies could smoke "...inside their rental unit only." It is important to note that for the purposes of *The Residential Tenancies Act* a rental unit *includes* its balcony or patio. That means that there is no difference whatever in the meaning of the phrases used in the two documents.

-Second, the tenant said that the rule and the newsletter said different things about whether tenants and guests of a 'grandfathered' tenancy could smoke in a location that is outside the buildings and outside the balconies and patios, but that is on the landlord's property. I do not find a discrepancy between the two documents. Both clearly say that the landlord has a no smoking rule that applies for the entire property. There is one exception stated: for tenancies that began before October 1, 2006, smoking is permitted in the rental unit, which includes a balcony or patio attached to the unit.

-Third, the tenant asked for clarification with respect to situations where tenants want to sublet (temporarily part with possession of their rental units) or (permanently) assign their tenancy agreements to somebody else. Would the in-coming tenant be allowed to smoke? In these situations the sublet or assignment tenant inherits the same rights and obligations that the departing tenant had. That means that if the tenant who is parting with possession of the unit had the 'grandfathered' right to smoke, then the tenant taking over possession by sublet or assignment of that tenancy agreement would have the same right. On the other hand; if the tenancy was not a 'grandfathered' tenancy, then a sublet or assignment tenant would not be able to smoke in the unit.

-Fourth, the tenant objected to a part of the rule which says that if a tenant of a 'grandfathered' tenancy moves after October 1, 2006 to another unit in the building or the complex, or moves to a different property managed by this landlord, then the first 'grandfathered' tenancy ends, and a new tenancy begins at the new rental unit, and that new tenancy, because it would begin after October 1, 2006, does not include any right to smoke. The landlord said that when an existing tenant moves to a different rental unit after October 1, 2006, a new tenancy is established and so the non-smoking rule would apply to the new tenancy. It has long been held as a fact by the Residential Tenancies Branch that when you move to a different rental unit you end the tenancy from the first address, and establish a new tenancy at the second address. That means you would not be allowed to smoke in the new post-October 1, 2006 tenancy (unless you happened to take over somebody else's pre-October 1, 2006 'grandfathered' tenancy by means of sublet or assignment).

There is no evidence or reason to believe that any tenant would be unaware of what she or he must do and not do in order to comply with the landlord's rule. Therefore the landlord's rule meets the requirements of section 11(3)(d).

SUMMARY: The landlord's rule prohibiting smoking for tenancies that began on or after October 1, 2006 and prohibiting smoking in all outdoor common areas for all tenancies complies with the requirements of sections 11(2) and 11(3) of the Act, and so I determine that it is a reasonable rule.

February 7, 2007

Date

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