The CO-OPERATIVE HOUSING FEDERATION of Canada

A BRIEF TO THE MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING ON RECEIVERSHIP AND SALE PROVISIONS IN THE *SOCIAL HOUSING REFORM ACT*

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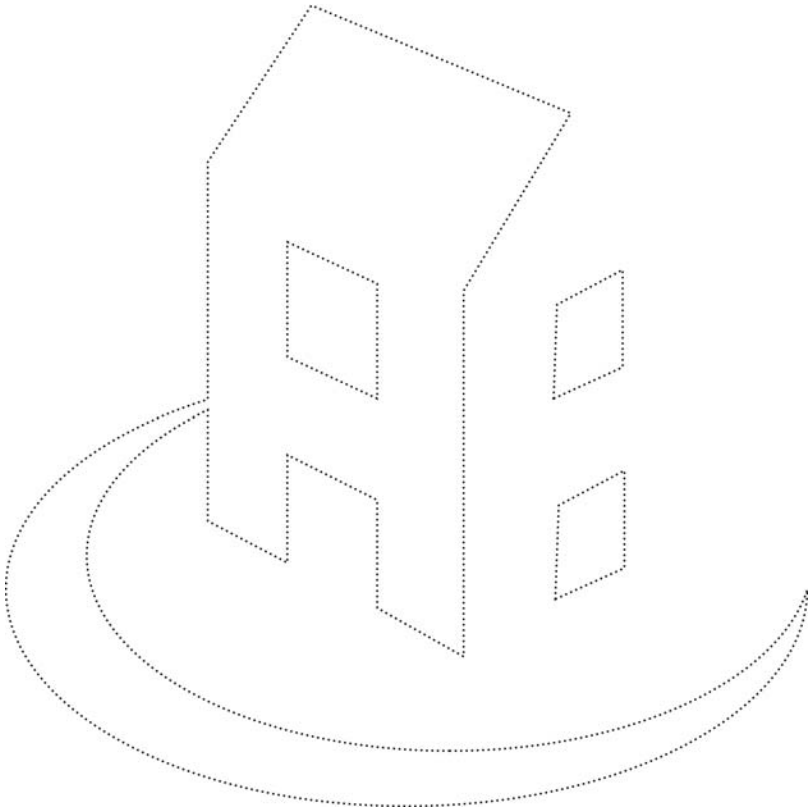

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The Co-operative Housing Federation of Canada's Ontario Region represents and serves over 500 housing co-ops in the province, home to some 125,000 Ontarians.

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1. Introduction

This brief supplements the recommendations on the receivership and sale provisions in the *Social Housing Reform Act* (SHRA) made by the Ontario Region in our November 2009 submission on the Affordable Housing Strategy. In preparing our brief, we consulted with two lawyers who have specialized expertise in this area and the comments and recommendations that follow incorporate their analysis and advice. The papers they prepared are attached.

The first paper, "Receivership under the *Social Housing Reform Act, 2000*", is by Frank Bennett who is recognized as the leading Canadian authority on receivership and related matters. His numerous publications include *Bennett on Receiverships* and *Bennett on the Commercial List.* The recommendations in Mr. Bennett's paper on improvements that are needed to the receivership and sale rules in the SHRA support and are consistent with CHF Canada's.

The second paper, "SHRA Receiverships and SHRA Remedies," is by Bruce Lewis who is the Ontario Region's general counsel. Bruce has unique expertise in the laws affecting Ontario's housing co-ops and has provided essential advice to CHF Canada and the Ontario government on legislation and social housing programs for more than 30 years.

2. The need for reform

There is an urgent need to reform the sections of the *Social Housing Reform Act* dealing with breaches ("triggering events") by providers and the remedies available to Service Managers to deal with them. Particularly problematic are the open-ended receivership and sale provisions that leave co-ops vulnerable to takeover by Service Managers.

CHF Canada's Ontario Region is calling on the Ministry of Municipal Affairs and Housing to make these amendments a priority in the upcoming review of the SHRA, promised as part of the Affordable Housing Strategy.

In two cases now before the courts, the Receiver/Manager[1] in place at the co-op and the Service Manager, are seeking court approval to transfer ownership of the co-ops to the municipal housing company. In both cases, the co-ops are entirely viable and could, with some help, continue to operate as member-controlled co-ops but the Service Managers have decided they prefer to run the housing directly.

Under the SHRA, it is relatively easy for Service Managers to identify triggering events and put co-ops into receivership without full examination of whether the triggering events exist or whether the requirements for appointing a Receiver under the SHRA have been followed. Once in receivership, it is almost impossible for a co-op to defend itself unless CHF Canada intervenes and funds legal action. The co-op board has no access to funding and cannot hire a lawyer. This gives the Service Manager an open door to move from receivership to sale.

In one case, CHF Canada did intervene to help a co-op challenge receivership. The Divisional Court quashed the receivership and strongly criticized the Service Manager's actions, saying that "it must . . . be remembered that the applicant is a non-profit housing co-op, democratically operated by its members . . . It is not a mere agency of the municipality and its decisions must be given some deference by the municipality for this reason, a deference markedly absent from the evidence before us." [2] But even in this case, where costs were awarded against the Service Manager, the net cost to CHF Canada for the legal action was still well over $100,000.

CHF Canada believes that few, if any, of the receiverships under the SHRA to date have been *legally* justified and that they would have been quashed in court if challenged. We don't believe that the receiverships have been justified on a *policy* basis either as the

[1] For ease of reference, we will subsequently refer simply to "Receiver" though the appointment typically involves both Receiver and Manager.

[2] *Labourview Co-operative Homes Inc.* v Chatham-*Kent (Municipality)*, [2007] O.J. No. 3166 (QL), Divisional Court.

record of Receivers in addressing underlying problems in co-ops has been poor and the costs have been extremely high.

The receivership and sale system that has found its way into the SHRA makes any housing co-op with operating or financial problems very vulnerable to takeover by the Service Manager. Many co-ops will be faced with these kinds of problems in the years ahead, sometimes because of governance or management issues, but more often for reasons that are outside of their control, particularly lack of adequate funding under the SHRA. There is a very real risk that, over time, a significant number of co-ops that could continue to operate successfully will be lost if Service Managers can decide that it suits them to take over a co-op and add it to their housing portfolio rather than give it the help it needs to return to self-governance.

3. Background and concerns

3.1 Why co-ops matter

For the last 40 years, since government turned from public housing to a community-based approach, funding programs—federal and provincial—have supported the development of a *mix* of social housing. This includes municipal non-profits, various forms of private non-profits, and non-profit co-op housing. Government has recognized that each model brings its own benefits and offers people looking for affordable housing an important choice in the housing available to them. The *Social Housing Reform Act,* while making sweeping changes to social housing programs, preserved this mix as an essential part of the social housing system in Ontario.

As the government overhauls the SHRA, it should be guided by the goal of giving applicants to social housing more choice and the residents more power. Co-op housing should be looked to as a form of tenure that has an important role to play in meeting this goal. Critically, the government needs to act to preserve co-op housing by protecting co-ops that run into difficulty from takeover by Service Managers under the receivership and sale rules in the SHRA.

The benefits of co-op housing that need to be preserved are well-recognized and documented.

Housing co-ops build social cohesion by bringing together a mix of low- and moderate-income households of diverse backgrounds who form well-integrated communities operating on the principle of mutual self-help.

Successive program evaluations by Canada Mortgage and Housing Corporation, including the most recent one in 2003, have found that co-ops provide a platform for residents to develop new skills, acquire organizational experience and gain employment. Residents in co-ops report an improved sense of community, better relations with friends and neighbours and improved social supports compared to other forms of rental housing.

Together, co-op members, supported by professional managers, make the business and community decisions about their housing. Because they have a direct stake in the consequences of these decisions, members are motivated to act responsibly and become engaged in their community. By working collectively to run their housing, co-op members develop broader forms of interaction and strong communities are created. This involvement very often extends to the wider community as well where co-op members are known to be engaged citizens.

Co-op housing is not a suitable form of tenure for everyone looking for affordable housing but it is the preferred choice of many.

Appendix A to our November 2009 brief on the Affordable Housing Strategy, "The Benefits of Co-operative Housing", offers more detail on what distinguishes the co-op model from other forms of social housing. Bruce Lewis's paper, included with this brief, also reviews why co-ops matter and should be protected.

In addition to the benefits of empowerment, skills development and community support for residents provided by co-op housing, the courts have recognized that co-op members have statutory rights under the *Co-operative Corporations Act* that would be lost if the co-op was converted to another form of non-profit housing. A February, 2009 Divisional Court ruling concerning the proposed takeover of Thornhill Green Housing Co-op by the Service Manager emphasizes the importance of the rights that co-op members have, compared to tenants in rental housing:

> [66] The decision to consent to the proposed sale of the Co-op affects the rights and interests, property or privileges of all members of the Co-op. This is so, even though members of the Co-op do not have an ownership interest in the assets of the Co-op. The Co-op members have statutory rights related to their security of tenure (as addressed in paragraphs 77 and 78 below) under the CCA which would be put in jeopardy by the proposed sale.
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> [77] Non-profit housing co-operatives are democratically run, independent co-operative corporations, and, as such, members of the co-operatives have rights under the CCA [*Co-operative Corporations Act*]. For example, members control the governance of their homes through the election of a resident board of directors (s. 90), all of whom must be members (s. 87), and through their power to approve by-laws (s. 23(b)). Members can requisition meetings (s. 79) at which they can exercise their right to vote on matters affecting the co-op, including the removal of directors (s. 104).
>
> [78] Perhaps most importantly, co-op members—unlike regular tenants under the common law or the *Residential Tenancies Act*, S.O. 2006, c. 17--have the right to occupy their unit in the co-op as long as they respect the obligations of membership and abide by the by-laws. . . .[3]

[3] *The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc* [2009] O.J. No. 696 (QL) (Div Ct).

3.2 Policy intent of receivership and sale provisions in the SHRA

The receivership provisions in the SHRA are rooted in the ones in CMHC's Operating Agreement for the Index-Linked Mortgage Program, which was the last federal co-op housing program. These provisions were later reflected in the provincial Project Operating Agreements, and subsequently, in the SHRA. However, as the receivership provisions were carried from federal agreement to provincial agreement to statute, the function of receiverships and the powers of the Receivers were significantly expanded. *We believe that this happened without policy consideration or intent.*

Before 1989, none of the federal-program Operating Agreements used receivership as an element of social housing regulation. The technique was inserted in the ILM Operating Agreement by CMHC solely to deal with a perceived problem of selling the assets of a non-profit project before CMHC could intervene. Receivership was conceived as a *temporary measure designed to prevent sale in an emergency*. Under the ILM Operating Agreements, a receivership had to be confirmed by the courts within *eight days.*

In the provincial Project Operating Agreements for co-ops used by the Ministry of Municipal Affairs and Housing, a Receiver that was appointed by the Minister had a term of *sixty days* unless confirmed by court order.

Under the SHRA, a Receiver appointed by a Service Manager has a term of *one year* before a court order is necessary.

This extension of the time period has resulted in a major change in the nature of co-op receiverships. The lack of timely judicial review means that Service Managers can, and do, use receiverships where they are not justified under the SHRA with a frequency that could never have been contemplated. Receivership is no longer used as an emergency measure, but has become the common technique for resolving problems perceived by Service Managers. As a result, Service Managers have resorted to receivership many more times than MMAH under provincial Operating Agreements or CMHC under federal Operating Agreements.

In addition to the extended time period, the *powers* of a Receiver changed under the SHRA, again with an unclear policy basis:

- Under **CMHC's ILM Operating Agreement** there is no power of sale and the Agreement specifically contemplated that the receivership would end and the project would be turned back to member control.

- Under the **provincial Project Operating Agreements for co-op**s

    - the appointment of a Receiver required a decision of the Minister of Housing, which could not be delegated to any officer, employee or agent of the Ministry
    - there is no power of sale
    - there is a specific statement that, "it is the intention of the Ministry to reinstate the Co-op whenever feasible, as determined by the Ministry, as a self-governed entity retaining substantial control of the management of the Project within sixty (60) days". (Such determination by the Ministry would have to be reasonable under clause 2.3(2) of the Agreement.)

- Under the ***Social Housing Reform Act***

    - a Receiver can be appointed by a Service Manager staff person with no requirement for Ministerial Consent unless the co-op has been identified as a Project in Difficulty
    - a power of sale is included in the standard list of receivership powers in Regulation 368/01. This power can be subject to "conditions and restrictions" imposed by the Service Manager. But this means that the Service Manager would have to take a special initiative to restrict the power of sale and it is not clear if it could completely remove the power of sale
    - there is no reference to the goal of reinstating co-op self-governance.

Not only does the SHRA introduce the power of sale by leaving it in the standard list of receivership powers, but it fails to specify any process, guidelines or limits for the Receiver in exercising the power of sale. As a result, in the two cases now before the courts, the Receiver is arguing that it has an essentially open-ended right to sell the co-op even though this is not an appropriate or necessary way to deal with the underlying concerns about governance and management. And, in an unprecedented move not explicitly blocked by the SHRA, the Receiver and Service Manager are proposing that the Service Managers' own housing companies purchase the co-op assets at a fraction of their true value.

The combined effect of these changes to the provisions in the SHRA has been to create a loophole that allows takeover of a co-op as a response to operating difficulties without any of the normal safeguards that would apply to an expropriation.

As noted above, we believe that this has happened without any policy consideration or intent. It is doubtful that any deliberate policy would have invested Receivers with the kind of power that is now being used. The SHRA created novel remedies for Service Managers to use compared to those available earlier, such as appointing outside directors, but it does not mention taking over or selling social housing projects as an available remedy.

It seems clear that if the power of sale had been intended as a remedy under the SHRA, an open and transparent process would have been set out in the Act to guide its use.

In Attachment B to his paper, "SHRA Receiverships and SHRA Remedies", Bruce Lewis provides a fuller examination of the development of the receivership and sale provisions over time and the unintended powers it has given to Service Managers and Receivers to consolidate ownership of municipally funded social housing under their housing companies.

3.3 Receivership not an appropriate remedy in community housing

Frank Bennett, who is advising CHF Canada on the two cases before the courts, says that the remedy of receivership and the power of sale available to Service Managers under the SHRA are "inappropriate in the context of a social housing complex except in the situation where the housing provider is in financial difficulty and unable to pay creditors. Where no money is overdue to a creditor, the sale of the housing project is a meaningless remedy. It destroys the very object of the Act, namely to provide social housing and, in the case of non-profit housing co-operatives, to permit its occupants to manage the project. . . . A sale that does not involve repayment of a debt is, in effect, an expropriation without compensation. There are no safeguards in the Act or in the Regulations to protect the housing provider and the occupants." [4]

In the same paper, Mr. Bennett argues that a management/governance problem requires a management/governance solution, not sale of the property. "The receivership remedy in the SHRA context does not fit in a traditional creditor and debtor scenario. The appointment of a receiver with a power of sale is a clear case of misuse of a receivership remedy when the remedy should be to replace management and restore the property."[5] In an earlier communication to CHF Canada on the two cases before the courts, he calls the inappropriate use of receivership and sale powers in the cases "receivership law gone amok".

Use of receivership under the SHRA to try to address perceived governance and management problems has failed consistently. Receivers who are used to acting in commercial circumstances where the concern is to collect debts, simply lack the skills, expertise, and experience in the governance of non-profit corporations, and particularly non-profit housing co-ops, that are needed to be effective. And our experience has been that Receivers are not inclined to draw on outside resources to improve governance and management.

In his paper, "SHRA Receivership and SHRA Remedies", Bruce Lewis comments that "Receivers approach co-op boards as if they were, or ought to be, comprised of typical

[4] Bennett, Frank, "Receivership under the *Social Housing Reform Act, 2000.*" 2010, p.8
[5] Bennet, 2000, p.8

business people. For instance, the receiver mandated by the Court to return governance of Matthew Co-op to the residents, recommended instead that ownership be transferred to the Service Manager. In its report to the Court it observed that board members (composed almost entirely of single mothers) often brought their children to meetings. It noted that the board members sometimes missed meetings. It concluded that any board composed of Matthew Co-op members did not have the capability to govern the co-operative. It might have said the same about any of the 550 successful co-ops in Ontario. Receivership is simply not able to foster processes that will remedy governance problems. Quite the contrary, governance processes are harmed or destroyed by receivership."[6]

There is no need for private appointment of a Receiver to be available as a remedy under the SHRA for Service Managers to deal with operational problems in a co-op and it should be removed from the Act. In a true emergency (and it is hard to imagine when one could exist) a Service Manager could seek an injunction or the appointment of a Receiver on a short-term basis under the *Courts of Justice Act*.

In place of receivership, supervisory management should be identified in the SHRA as a remedy that Service Managers could use in extreme circumstances to deal with operational problems in a co-op. This would be in addition to the appointment of outside directors which is already available as a remedy. The Act should state that the goal of supervisory management is to return self-governance to the co-op as soon as possible (as the Project Operating Agreement did) and Ministerial Consent should be required as control of the housing would be taken away from the co-op.

Supervisory management would be a constructive remedy designed to give Service Managers temporary control of certain decisions in a co-op in order to stabilize operations, while leaving the framework of member control and engagement in place. Under the arrangement, a Manager with specialized skills in co-op management and governance, would deliver day-to-day management services while also designing and delivering (in co-operation with the co-op housing sector and under the direction of the Service Manager) a "turn around service" that deals with operational problems and prepares co-op members to take back control of their housing.

CHF Canada has recently set up a management company (the Community Housing Management Network) that specializes in working with projects in difficulty, under a supervisory management arrangement. The Network could provide these services as could other Ontario companies that specialize in co-op housing management.

Under supervisory management, the co-op board would remain in place, receiving training and carrying out corporate co-op responsibilities such as admitting members and dealing with evictions but with restricted authority as set out in an agreement with the

[6] Lewis, Bruce, "*SHRA* Receivership and *SHRA* Remedies." 2010, p. 18-19

Service Manager. Co-op members would continue to carry out their responsibilities under the *Co-operative Corporations Act* (electing a board, approving a budget, hearing eviction appeals, etc.) and would receive training to strengthen co-op governance.

This approach would be dramatically less expensive and, because it draws on the resources of the co-op housing sector and is designed to rebuild the co-op's capacity rather than find an alternative to co-op ownership, would be much more effective in preserving co-op housing as a social housing choice for applicants and residents.

3.4 Receivership leads to failure rather than recovery of co-ops

Our experience has shown that, once in receivership, co-ops become weaker, not stronger, and their prospects of returning to self-governance are poor. Unless a co-op successfully challenges receivership in court, its future depends entirely on what the Service Manager wants to happen. Under current SHRA rules, if the Service Manager isn't committed to helping the co-op deal with its operating problems and emerge from receivership, there is nothing the co-op can do to prevent eventual court approval of a sale.

As described in the previous section, one key factor that contributes to a co-op's failure under receivership is that receivership is not an appropriate remedy in the context of co-op housing. There are also other important reasons why, under the SHRA system, receivership will almost always contribute to a co-op's failure rather than support its recovery.

As soon as a Service Manager appoints a Receiver, the co-op instantly loses all control and the cohesion of the co-op community begins to disappear. The Receiver arrives unannounced, accompanied by the Service Manager and a locksmith who changes the locks. The board is shut out of the office and the board and members lose all decision-making authority. The formal and informal relationships that result from members working together and participating in co-op events largely disappear.

The Receiver may make a limited effort to involve residents by, for example, holding information meetings or meeting occasionally with the former board. Meetings of this kind, however, have limited value as members can make no decisions and their access to information is limited to what the Receiver chooses to share with them. Residents find these meetings frustrating and patronizing and are less and less likely to attend as time passes. One purpose the meetings do serve is to allow the Receiver to claim in its report to the court that its best efforts to put the co-op back on its feet are failing.

The effect of a receivership on a housing co-op is very different from the effect on a non-co-op non-profit housing provider. In a non-profit project, a receivership would primarily affect the directors and non-resident members of the housing provider corporation. The

residents would likely notice little or no difference. In fact, Receivers frequently keep the same property management company and/or staff as the housing provider used prior to the receivership.

In a housing co-op there is a dramatic and disturbing change that follows loss of control when a Receiver takes over that fundamentally affects the lives and well-being of co-op members. The benefits of personal empowerment, community responsibility, and social inclusion that are so characteristic of life in a co-op disappear under the management of a Receiver. Board members may feel that they have failed and let their fellow members down. The impact on member morale generally is devastating.

The board has very limited ability to challenge the receivership. It no longer has any management support or access to funds to retain a lawyer. Far from advising the board that it should seek independent legal advice, the Receiver and Service Manager tell the board that they have no role to play. (See also the section below on procedural fairness.) The co-op can only mount a legal defence if CHF Canada is in a position to support and pay for the legal action. If the board doesn't immediately challenge the receivership the courts have made it clear that it loses its legal ability to do so.

The inclination of the board to move quickly to try to challenge receivership may be undermined by reassurances from the Service Manager that receivership is in the co-op's best interest and is only temporary. When the Service Manager changes its mind and decides it prefers to transfer ownership to its housing company it is almost impossible for the co-op to mount an effective challenge in court as it has missed the legal window available to it.

Over time under receivership, the co-op loses more and more of its governance capacity and sense of community. As the membership turns over, many of the residents will never have had experience of the co-op operating as a co-op. The Service Manager's contention that the co-op is not capable of self-governance becomes self-fulfilling.

3.5 Adversarial Service Manager—co-op relationship engendered

A further significant problem with the use of receivership, especially as takeover of the co-op may follow, is that it engenders an adversarial relationship between Service Managers and co-ops—and, by extension, CHF Canada. If private appointment of a Receiver continues to be permitted under the SHRA, CHF Canada will have to advise co-ops that they should routinely challenge a Service Manager's interventions in the co-op's affairs at the earliest possible stage in order to protect themselves and potentially build a case for fighting receivership in court.

The first step would be for co-ops to work with their lawyer to challenge whether a triggering event has occurred. Then, if the Service Manager appoints a Receiver, our

advice would be that co-ops should treat the Receiver as a trespasser and attempt to bar them from taking possession of the property, forcing the Service Manager to go to court to get the Receiver appointed. Then co-ops should move quickly to challenge the receivership in court. From the three court cases that CHF Canada has been involved with, we have learned that failure to take these steps to challenge the Service Manager's and Receiver's actions will make it very difficult to win in court at a later stage.

We would also advise co-ops that if a Receiver does take over, they should be very sceptical of reassurances from the Service Manager about its plans to restore self-governance and, throughout the receivership, should assert the board's legal right to continue to perform certain corporate functions and receive financial and other information. This would be important if the co-op ends up in court opposing a sale.

It would be very regrettable if co-ops and CHF Canada have to continue to take this adversarial approach rather than working constructively with Service Managers to resolve problems. However, there is too much at stake for the co-op for any other approach to be prudent. We argue in this brief that Service Managers don't need receivership as a tool to deal with co-ops in difficulty and that it should be removed as a remedy under the Act and replaced by more positive and productive approaches to addressing problems.

3.6 Need for procedural fairness

In its February 2009 ruling in the Thornhill Green case, the Divisional Court found that co-ops are entitled to procedural fairness when a Service Manager is exercising its powers under the SHRA which York Region failed to provide. We believe that, by extension, co-ops are entitled to procedural fairness when the Minister considers a Service Manager's request for consent.

In the Thornhill Green case, York Regional Council made the decision to support the takeover of the co-op by its housing company in February 2008. It did not consult with the co-op or even inform it that it was considering doing this. The Region subsequently requested Ministerial Consent to take over the co-op. Again, it did not inform the co-op that it was doing this, nor did the Ministry, and the co-op was not given a hearing or consulted in any way before the Ministry decided to grant consent. Court documents show that the decisions of the Service Manager and the Ministry were deliberately withheld from the co-op until May 15, 2008 when the co-op's board was served with documents related to a court motion to sell the co-op. The court hearing was scheduled for two weeks later. It was the clear intent of the Region and the Receiver to give the co-op as little time as possible to respond.

The Divisional Court ruling is highly critical of the lack of fairness in how York Region treated the co-op and clear in its findings on the requirement for procedural fairness. The following are excerpts from the Divisional Court ruling (emphasis added):

> [83] The Region is a public authority, whose decision affected the rights of the Co-op members. These members had a statutorily-protected security of tenure. That security of tenure as addressed above, is a reflection of the public will and is thus consistent with the public interest. *In these circumstances, a duty of procedural fairness engages.*
>
> [91] In our view, when a Service Manager is considering, under s95 of the SHRA, selling (or if a Receiver is in place, recommending or agreeing to the sale of) the assets of a co-op the Service Manager is required to provide reasonable notice to the co-op of its intentions, and to provide the co-op with a meaningful opportunity to make submissions, before the Service Manager makes a decision. These obligations exist whether or not the Receiver has notified or consulted with the co-op members regarding its findings and intentions.
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> [73] The Region's decision [to consent to the transfer of the co-op] is one of two statutorily mandated pre-conditions to the proposed sale. The other is the consent of the Minister. The Legislature has given two separate governmental entities, the Region and the Minister, the power to control whether a proposed sale will take place. This ensures that the public interest in social housing and its availability will be taken into account in any proposed disposition of a "housing project," as defined in the SHRA.[7]

The planned amendments to the SHRA need to reflect the Divisional Court finding that Service Managers, and by extension, the Minister, owe housing providers a duty of fairness when exercising their authority under the Act.

To ensure fundamental justice for co-ops, the SHRA should also specify that a co-op will have the right to full legal representation at any court proceeding affecting it and on any occasion when the Minister is making a decision about a remedy or a transfer of the co-op property. To ensure full representation, the reasonable legal costs incurred by the co-op should be paid out of co-op revenues and, if those are insufficient, by the Service Manager. In his paper included with this brief Frank Bennett comments, "Irrespective of whether the receiver is privately appointed or court-appointed, the housing provider must have independent legal representation. . . . . There is ample authority that states the defendant/respondent may apply for a retainer for legal representation even at the risk of

[7] *The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc.* [2009] O.J. No. 696 (QL) Divisional Court).

the security holder realizing less on its debt."[8]

3.7 Service Manager conflict of interest

In the two receivership cases before the courts at the moment, the Service Managers are asking for approval to transfer ownership of the co-op's assets to their municipal housing company. In this brief, we are calling for very strict limits to be included in the SHRA on when a sale or transfer of assets could take place but there would continue to be circumstances where it could occur.

Because of this, the Act must forbid a Service Manager or related company from becoming the owner of a non-profit housing co-op under any circumstances as there is a fundamental and irreconcilable conflict of interest between the Service Manager's role as program regulator and decision-maker and its role as owner of a housing company that would receive the assets. Valid judgments by Service Manager staff are not possible as long as ownership by the Service Manager's housing company is a possibility. This impediment to good judgment and fair dealing should be removed from the SHRA process.

[8] Bennett, 2000. p.7

4. Recommended amendments to the SHRA and Regulations

In this section, we make a number of recommendations on how to address the concerns that we have outlined about a receivership and sale system in the Social Housing Reform Act that makes housing co-ops very vulnerable to takeover by Service Managers. Some context and explanation is provided for each recommendation.

Remedies under the *Social Housing Reform Act*

1. Identify the goal of restoring member control of co-op

Recommendation 1

The SHRA should state that, in the case of housing co-ops, the goal of exercising a remedy will be to maintain or reinstate full member control of the co-op as soon as that becomes feasible and that the Service Manager and others involved must work towards that goal.

This intention was expressed in both Ontario's Project Operating Agreement and CMHC's ILM Operating Agreement. The point was that intervention was used to solve problems, not to undermine the fundamental nature of the co-op and take away the rights of the members to self-governance.

Since the early 1970s, all Canadian social housing programs have included the option of resident-control through non-profit housing co-operatives. The benefits of co-op housing include resident empowerment, pride of ownership, self respect and skills development for residents, and strong community support. These benefits have been repeatedly recognized in CMHC studies.

They have also been recognized by the courts:

> **[23]**… The enforcement provisions of the SHRA must be interpreted so as to best ensure the objects of the Act. In the present case, it must also be remembered that the applicant is a non-profit housing co-operative, democratically operated by its members who, largely, are its tenants. It is not a mere agency of the municipality and its decisions must be given some deference by the municipality for this reason, a deference markedly absent from the evidence before us.[9]

The approach by Receivers and some Service Managers has shown a lack of respect for the values of non-profit housing co-ops and the ability and right of ordinary people to manage their own housing. This is something that should be affirmed in the SHRA so as to enshrine a clear policy intent to guide program administration.

[9] *Labourview Co-operative Homes Inc.* v. *Chatham-Kent (Municipality***)** [2007] O.J. No. 3166 (QL) (Div Ct).

2. Remove power to appoint a Receiver from the SHRA

Recommendation 2

The power of a Service Manager to privately appoint a Receiver should be removed from the SHRA.

In the case of a true emergency, Service Managers would have the right to seek the appointment of a Receiver by the court or seek injunctions or other emergency measures under the* Courts of Justice Act *under the conditions now stated in section 120 of the SHRA.

Receivers not needed for original purpose: As stated earlier and reviewed in more detail in Attachment B to Bruce Lewis's paper on SHRA receiverships, the original purpose of receiverships in social housing is being fulfilled by section 95 (Restrictions on transfer of housing project) of the SHRA. Receivers are not necessary to prevent unauthorized sales.

Receivers not right for actual purpose: The underlying concern that has led Service Managers to appoint Receivers for co-ops has been concern about governance and management. As Frank Bennett makes clear in his paper on SHRA receiverships, this is not an appropriate use of receivership.

Receivers cause unnecessary problems: Not surprisingly, receiverships have proven to be very destructive of co-op processes. Although many efforts have been made by co-op housing sector organizations and individual co-ops to work with Receivers towards restoration of co-op governance, the basic attitude of Receivers has been that the co-ops are at fault, co-op residents lack the expertise to run their housing and have no rights while in receivership, or as few as the Receiver may be forced to concede.

Receivers are not cost-effective: Experience under the SHRA has confirmed what every business person knows. Receiverships are exceedingly expensive. Even if receiverships were effective in addressing underlying problems (which they are not), it is not possible to justify any of the co-op receiverships when the cost is compared to the amount of money at issue.

Court receivership available if needed: As noted above, there is a general power under the *Courts of Justice Act* for appointment of Receivers and granting injunctions and similar relief. This would adequately serve the public interest in an exceptional case where receivership was an appropriate mechanism. And the co-op would be protected by the court processes.

3. Enhanced supervisory management

Recommendation 3

In place of receivership, the SHRA should include as a remedy appointment of a Manager under a supervisory management arrangement in the circumstances referred to in Section 120 (Restrictions on transfer of housing project) of the SHRA.

The SHRA introduced unusual powers for Service Managers to address concerns about operating problems. These included the power to remove or appoint directors to housing provider boards and the power to perform the duties of a housing provider.

Service Managers have not extensively used these powers. In a few cases they have appointed outside directors, though a more productive approach has been to work with the co-op housing sector and the co-op to voluntarily arrange for outside directors to assist the resident members in operation of the co-op for a few years.

But CHF Canada is not aware of any cases where Service Managers have directly performed the duties of a co-op in any significant way. They are no doubt concerned about liability and similar issues and seem to have substituted use of receivership for this power.

Another intervention technique that has been used on a voluntary basis is called supervisory management where a Service Manager is given enhanced powers with respect to a housing provider's operations. These powers are often similar to those set out in section 34 of Ontario Regulation 339/01 with respect to additional subsidy agreements. They include the right of the Service Manager to choose or approve the property manager.

CHF Canada feels that this technique provides a better approach and should be added to the SHRA as a remedy that can be used when a Service Manager has justified concerns about co-op operations. If supervisory management is used properly, it will not be destructive of the co-op's self-governance prospects, but will enhance them.

In some cases, supervisory management would be combined with appointment of outside directors. In general both these remedies will be more successful if used in conjunction with efforts by the co-op housing sector to address the problems.

Although this solution will cost somewhat more than conventional property management, it will clearly be far more cost-effective than receivership and will produce significantly better outcomes.

Process for imposing remedies

4. Enhanced approval process for exercise of "significant remedy"

Recommendation 4

The SHRA should require an enhanced approval process for the exercise of any remedy that takes democratic control away from a co-op's members (such as supervisory management or appointing a* majority *of external directors to the co-op's board) or reduces the co-op's subsidy. This is referred to here as a "significant remedy".

At the heart of the concerns expressed in this paper about the use of receivership is our view that any Service Manager action that detracts from the essential nature of a co-op as an organization of ordinary people democratically controlling their housing requires

greater regulatory control. The receivership system currently in the SHRA is modelled on one designed for a purpose that is not relevant —emergency measures for debt collection.

A revised system should include an enhanced and more appropriate process for making decisions about how to protect the public interest with due regard for the procedural and substantive rights of all concerned. The enhanced approved process should apply whenever exercise of a remedy would take control of the co-op out of the hands of its members.

Recommendation 5

The enhanced approval process required before a significant remedy can be exercised should be as follows:

- ***Service Manager decision: When a Service Manager intends to ask for Ministerial Consent to exercise a remedy, an open, transparent and procedurally fair process must be followed that includes advance notice and disclosure of information to the co-op, and a full opportunity for the co-op to make submissions.***

- ***Ministerial Consent: Advance approval of the Minister should be required before any significant remedy is exercised, with a stipulation that the approval must be given by the Minister personally and not delegated. Before consent is given, a procedurally fair review by the Minister should be required that includes full advance disclosure of information to the co-op and a full opportunity for the co-op to make submissions.***

The SHRA should encourage voluntary solution of problems through co-operation among the Service Manager, the co-op and the co-op housing sector. However, if voluntary efforts do not work, then Service Managers should have the ability to take other significant steps. Since these steps can be destructive of a co-op and can be unwarranted, it is important that the Service Manager's decision to use a significant remedy is made fairly and transparently and that it require approval of the Minister.

Fair decision-making by Service Manager

The procedural fairness of a Service Manager's decision-making process was severely criticized by the Divisional Court in the only case in which it was brought up .[10] That decision related to the decision to approve a sale under section 95 of the SHRA, but the same reasoning would apply to the decision to exercise a remedy. The court referred to the democratic rights of members of the co-op, their security of tenure, the public will and public interest as reflected in the SHRA and decided that there was a duty of procedural fairness.

[10] *The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc* [2009] O.J. No. 696 (QL) (Div Ct). See especially paragraphs 77 to 79, 83 and 90 to 92.

The court stated:

> [90]… Earlier, we referred to the democratic and independent nature of co-operative corporations which are governed by the *Co-operative Corporations Act*, and to the rights and obligations of membership. It is our view that the fact that Thornhill Green is a Co-op should have been relevant to the Region's decision-making process. This fact is important because it informs the legitimate expectations of co-op members with respect to a duty of fairness. A co-op is an independently-functioning entity distinct from the Region, and must have a hand in determining its own destiny … It was an error for the Region to treat this important feature as immaterial.[11]

In the context of the section 95 decision the court went on to say:

> [91]… the Service Manager is required to provide reasonable notice to the co-op of its intentions, and to provide the co-op with a meaningful opportunity to make submissions, before the Service Manager makes a decision.
>
> [92] … It is not the form of the notice that is so important; it is the fundamental opportunity for the co-op to make meaningful submissions to the Service Manager before the Service Manager makes a decision involving a sale of the co-op.

The requirement for procedural fairness applied because of the nature of the section 95 consent under the common law and the *Judicial Review Procedures Act*.[12] CHF Canada's lawyers are confident that it would equally apply to the decision to implement any remedy that had the effect of taking control of the co-op out of the hands of its members. However, it would not be prudent to require the trouble and expense of more court applications to determine this principle and its parameters. They should be directly stated in the SHRA.

Fair review by Minister

A key problem with the receivership system under the SHRA is that Service Managers were given the ability to resort to this remedy without appropriate oversight by the Ontario government which is responsible for ensuring that the objects of the Act are respected as it is administered. There is a clear need for such oversight which goes beyond what the courts can provide. The Minister, with staff advice, will have the

[11] *The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc* [2009] O.J. No. 696 (QL) (Div Ct), paragraph 90.
[12] *The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc* [2009] O.J. No. 696 (QL) (Div Ct), paragraph 58.

necessary expertise and experience in dealing with co-op housing issues. And only the Minister can ensure equitable treatment for co-ops across the province with consistent regard for the purposes of the Act.

Although the receivership remedy is not appropriate in the context of social housing, Service Managers have turned to it far too frequently with very negative consequences. The Ontario Project Operating Agreement required the personal consent of the Minister to the appointment of a Receiver for sixty days. Under the SHRA, the decision to appoint a Receiver can be made by a single Service Manager employee for up to a year with no scrutiny of whether the decision was justified unless the co-op challenges it in court.

The purpose of the Minister's involvement in remedies is in part to protect the public interest by providing oversight of Service Managers' actions and in part to ensure fairness in treatment of the residents of a co-op. Both these goals can only be achieved if the co-op is given an opportunity to state its case in an open and fair hearing. For instance, such an opportunity would likely have disclosed the mathematical error made by Chatham-Kent with respect to the Labourview Co-op accumulated deficit that showed the deficit being almost twice as large as it in fact was.[13]

In the Thornhill Green Co-op case, the Divisional Court found that the Service Manager had a duty of fairness to the co-op and should have allowed Thornhill Green to present its case before making its decision to support the proposed sale. We believe that the duty of fairness also applies to the approval of the Minister under section 95 of the SHRA and approval of remedies by the Minister. This should be stated directly in the Act.

6. Similar, fair process for receivership applications

Recommendation 6

A similar, procedurally fair process should be required related to a decision by a Service Manager to apply to the courts for appointment of a Receiver or Receiver and Manager, except in case of emergency.

Although it is our hope that a revised SHRA will lead to very limited use of receiverships, some Service Managers may still wish to use the remedy in exceptional circumstances under the *Courts of Justice Act*. The SHRA should clarify that the Service Manager's obligation of procedural fairness also applies to the decision to apply to the court. The Service Manager's obligation is independent of the judge's decision-making.

7. Right to legal representation and necessary funds

Recommendation 7

The SHRA should enact that a co-op will have the right to full legal representation at any Ministerial, Service Manager, or judicial proceeding affecting the co-op or its property. To ensure full representation, the reasonable legal costs incurred by the co-op should be paid out of co-op revenues and, if those are insufficient, by the Service Manager.

[13] See Attachment C.

This is a matter of both fundamental justice and the public interest.

In normal remedies systems, such as receiverships, the persons who have invested in the business pay the costs of any challenges. The members of non-profit housing co-ops do not have the resources to do this. Nor is it fair or reasonable to suggest that they should. Preservation of the rights of residents and of the co-op is a matter of public interest that should be undertaken as part of the remedy process with the costs borne in the same way as the costs of the Service Manager. Without this, fairness is impossible amd good decisions are unlikely.

The public interest is in having a full and fair hearing of all relevant matters through the review processes of the SHRA and in court. Such processes might disclose things like the major mathematical error in the *Labourview* case noted above.[14] They are not just to ensure fairness for co-op members but for the overall public benefit of preserving non-profit housing co-ops—or at least ensuring that any loss of co-op housing is unavoidable.

Although it is self-evident that co-ops should have these rights where their property is affected, Receivers have refused to allow the money of the co-op to be used to fund this representation and Service Managers have not done anything about this. This too is an area where significant litigation will be necessary if there is not legislative reform.

It is also a reason why co-ops will have to refuse to allow a Manager or Receiver to take control of the co-op property. This would force the Service Manager to go to court while the co-op still has control over its bank accounts so as to be able to pay for its legal defence.

Administration of remedies

8. Any Manager appointed should be experienced in co-op housing

Recommendation 8

The SHRA should provide that a supervisory management arrangement must involve Managers experienced in residential property management including co-operative governance and management in the case of non-profit housing co-ops.

Although this recommendation would appear to be self-evident, it should be flagged in the SHRA or Regulations in an appropriate way. This is because addressing co-op governance problems requires a different kind of experience and expertise than simply managing a rental property. In fact, where Receivers, Service Managers or co-ops themselves have used property managers without background in co-op housing there has generally been an increase in governance and other operational problems.

Most Service Managers would agree with this position. However, in any request for proposals, experienced co-op property managers may be undercut by other parties and there needs to be a clear indication in the SHRA that this type of experience is required.

[14] See Attachment C.

9. Co-op's right to information

Recommendation 9

The SHRA should provide that during any period of supervisory management, receivership or* any *other situation that takes control of a co-op out of the hands of its members, the board and members will be entitled to full financial and other information on the operations of the co-op.

During receivership, Receivers and Service Managers have repeatedly refused to provide information about co-op operations to the co-op board and members. The reason for the secrecy is not clear. There is no valid policy reason why information about a project that is prepared for the Service Manager could not also be given to the co-op.

Providing such information is a necessary part of granting fairness to co-ops, since they will need it to evaluate the effect of any remedy on their finances.

Court receivership

Even if, as recommended, private appointment of a Receiver is removed from the SHRA, any party, including a Service Manager, will still be able to apply for appointment of a Receiver under the *Courts of Justice Act*. It is important that such a practice be reserved for the normal receivership purpose and not be used to limit the rights of housing co-ops. Therefore, certain measures need to be enacted as part of the planned amendments to the SHRA related to court receivership and possible sale of co-op property.

10. Standard form of court receivership order

Recommendation 10

The SHRA should be amended to prescribe a standard form of court receivership order that is tailored specifically to the requirements of the SHRA and the underlying issues of social housing.

This order should include a statement that the receivership is temporary and that, in the case of a non-profit housing co-operative, the Receiver must work towards restoration of the co-op.. This statement would be similar to the corresponding statements in the CMHC ILM Operating Agreement and the provincial Project Operating Agreement.

In the two cases now before the courts, the application to extend the receivership beyond one year has also increased the powers of the Receiver beyond those provided in Ontario Regulation 368/01 to include powers that are in the model template receivership order that is used in ordinary receiverships. This has been used to justify actions beyond those contemplated in the SHRA and the wording has been accepted by the courts to a certain extent.[15]

[15] Re The Regional Municipality of York v. Thornhill Green Co-operative Homes Inc., 2009 CanLII 37907 (ON S.C.) at paragraph 27 the court stated …

27 The power to sell the assets found at paragraph 7(l) of the Appointment Order is language which is included in the Model Receivership Order . . ..

In addition, there must be a clear understanding and a clear direction given to the Receiver that the eventual outcome is to be restoration of the co-op.

11. Limited rights and power of Receiver

Recommendation 11

The SHRA should provide that any court appointment based on an application by a Service Manager or* related *body would be limited to the rights, powers and obligations stated in the SHRA and its Regulations and a judge would not be able to override or vary these.

This limitation on a judge's power to vary or override the rules in the SHRA should apply as a general principle in the case of a court-appointed Receiver.

12. Board role during receivership

Recommendation 12

The SHRA or Ontario Regulation 368/01 should be amended to confirm the role and responsibilities of a co-op's board and membership during any receivership, including such things as the continuation of co-op meetings and delivery of information by the Receiver to the co-op board and members (including the annual audited financial statements).

In a typical small-business receivership there is no role for the corporate organs of the business. Usually, they abandon the business in any event. This is what Receivers are accustomed to dealing with. However, if a community organization such as a co-op, is to be given a chance to restore itself, it must continue to have some involvement.

In addition, the Receiver is formally the agent of the co-op. Since the co-op members are residents of the housing project, it is reasonable for them to be given information on the financial and other affairs of the project. Given the large costs and limited financial effectiveness of receiverships, this could only lead to increased efficiencies.

Receivers have been notably reluctant to provide financial or any other information to housing co-ops. There are no reasonable grounds for this other than a general approach that the role of the membership is permanently over. There would be no material additional cost of such reporting since the information is already given to Service Managers by a Receiver.

13. Fair and open sale process

Recommendation 13

The SHRA or Ontario Regulation 368/01 should be amended to provide that a court sale or similar process may take place only after a fair, open and unbiased call for tenders, other proposal call or other process to seek an appropriate party to continue to operate the housing project under the SHRA.

In the two cases now before the courts the Receiver has completely ignored the normal processes used in a court sale. Receivers seem to pick and choose which parts of the

"normal" system apply to housing providers, such as the normal form of order and the normal power of sale, and which do not apply, such as the Receiver's obligation to expose the property to the market. In the case of housing projects under the SHRA, no-one is interested in a normal sale, but it does not follow that the project should go to the Service Manager. Receivers have shown no reasonable basis for this practice.

14. Independent expert report before any sale

Recommendation 14

The SHRA or Ontario Regulation 368/01 should be amended to provide that the courts will not give the normal deference to a Receiver about the desirability of sale or the evaluation of parties who might take title, but an independent report must be obtained from expert parties and this report may be challenged by evidence on behalf of the co-op and the other normal methods for testing evidence.

Under the present system, the courts defer to the Receiver's judgment on these matters. That is sensible in the case of normal dispositions of a commercial business. However, Receivers are simply not qualified by experience, capacity, training or attitude to evaluate community-based non-profit organizations, especially non-profit housing co-ops. The court should be given factual evaluations by independent parties with expertise in the area.

In addition, the deference given to a Receiver means that the court process does not include the normal right to challenge a Receiver's reports and statements. That is not justified in a case like this which is outside the usual functions of receivership and which has a history of inadequate judgments and may be tainted by conflict of interest.

End to Service Manager conflict of interest

Recommendation 15

The SHRA should enact that a Service Manager or any constituent municipalities or any body controlled or related to them should not have the power to become owners of any non-profit housing co-operative or its assets under any circumstances.

Amendments to the SHRA should specifically forbid ownership of a non-profit housing co-op's project by a Service Manager or a related body.

The existence of this possibility creates a fundamental and irreconcilable conflict of interest. Valid judgments by Service Managers and their staff are not possible as long as ownership by the Service Manager's housing company is a possibility. This impediment to good judgment and fair dealing should be removed from the SHRA process.

The current opportunities and proposals to take over ownership of co-ops have arisen through an unanticipated loophole in the SHRA. Other loopholes may be possible or may be developed that would allow Service Managers to attempt to consolidate ownership of social housing under their housing company. It is important that there be a direct enactment that disallows this.

Extension of SHRA default and remedies system

Recommendation 16

The SHRA should be amended to provide that the default and remedies system under the Act would also apply* to *any other agreement of any kind between a housing provider and a Service Manager, municipality or related body.

As stated earlier in this paper, the process that allows a Service Manager to take ownership of a co-op through a Receiver is an unintended loophole in the SHRA system that must be closed in order to preserve co-op housing. However, without further safeguards, it would still be possible for Service Managers to end run the system in the SHRA by incorporating unreasonable remedies into other agreements with co-ops, particularly agreements providing additional funding.

These agreements are often framed as providing loans or forgivable loans but essentially they are ways of providing additional subsidy to co-ops in circumstances in which the basic subsidy system is inadequate, for example, for capital work that can't be paid for out of capital reserves. These agreements frequently provide for events of default and remedies that disregard the system in the SHRA and are typically far more severe and arbitrary.

Though they may be called loans, they are part of the basic funding arrangement under the SHRA to provide co-ops with the financial resources they need to operate. The appropriate default and remedy system is the one stated in the SHRA, not some other system where the remedy may be unreasonable.

The need for additional funding is not a problem limited in any way to projects that are in default. Many Service Managers have a policy of permitting co-ops and other providers to retain the half of an annual operating surplus that the Service Manager could claw back and add it to its capital reserve. The agreements governing this commonly allow the Service Manager to exercise remedies far beyond those permitted under the default and remedy system in the SHRA.

The same is true of a variety of other funding and additional subsidy agreements.

A large number of projects now have one or more of these agreements and one can envisage a future where almost all projects have them. **The default and remedy system in the SHRA can become irrelevant if Service Managers proceed as creditors under these agreements**.

Although the policy of the SHRA is to provide discretion to a Service Manager in funding a project beyond the basic formula in the SHRA, the Service Manager does retain a responsibility to operate in accordance with the overall policies and intent of the Act. Therefore, the SHRA should prohibit a Service Manager from creating remedies that would not also be available in the same circumstances under the system set out in the SHRA. The SHRA system should govern all relations between a Service Manager and its related bodies and the housing provider.

Clarifications of the intent of the SHRA

17. Ministry consent to sale

Recommendation 17

The SHRA should be amended to clarify that the requirement for the Minister's consent to a sale or other transaction under section 95 of the SHRA applies in all circumstances, even in the case of a court sale.

In the litigation relating to Thornhill Green Co-op, at one point the lawyer for the Service Manager took the position that the consent of the Minister was not necessary under section 95 of the SHRA if the court approved a sale. This position was dropped before it was argued in court, but it should be clarified as part of the amendments to the SHRA.

18. Mutual problem solving

Recommendation 18

Subsection 117(1) of the SHRA* should *be amended to clarify that a notice of default (triggering letter) must state how a situation is to be corrected whether or not a plan is to be submitted.

Service Managers often require a co-op to develop and submit a plan to cure the default(s) identified in the triggering letter. Requiring a co-op to present a plan should not allow the Service Manager to avoid its responsibility under the SHRA to tell a housing provider how to cure a situation that gave rise to a triggering event. The common practice of shifting responsibility to the co-op to come up with a way to put things right encourages unrealistic plans to be submitted and generally induces a lack of confidence in the fairness of the system.

Often the problem the co-op is dealing with is a systemic lack of funding that has led to a deficit that the co-op cannot cure without more funding from the Service Manager. No belt tightening or better governance will fix the problem. This would become apparent if, as the SHRA rules require, the Service Manager had to provide guidance on how the problem can be addressed. Clarification of the SHRA rules are clearly necessary because they are frequently being ignored by Service Managers, with no consequences.

Alternative amendments

If CHF Canada's recommendations are not accepted, and the private receivership system were to remain in effect under the SHRA, a number of other amendments to the Act and Regulations would be needed to address, to the extent possible, the concerns set out in this brief. It must be stressed, however, these improvements would essentially be tinkering with a system that, in Frank Bennett's terms, "is inappropriate in the context of a social housing complex". It would be far better to change the system as recommended above.

A1. Clarification that receivership remedy only for emergencies

Alternative recommendation 1

Section 120 of the SHRA and particularly clause 120(1) should be amended to clarify that a Receiver may be appointed only in emergency situations and other situations that require immediate action.

Although this seems to be the clear meaning of the present wording of this section of the SHRA, as described in this paper, it has frequently been ignored in practice and Service Managers have resorted to receivership to deal with management and governance concerns. In light of this, the intended limitations on the use of receivership under the Act need to be stated more clearly and strongly.

A2. Time limitation on private appointment

Alternative recommendation 2

Subsection 120(9) of the SHRA should be amended to provide that the duration of a receivership may not exceed thirty days unless a court orders an extension.

Eight days was considered sufficient duration for private receivership under CMHC's ILM Operating Agreement. Sixty days was the period stated in the provincial Project Operating Agreement. Both agreements recognize that in a true emergency only a very short period is needed before completing the judicial process. If private appointment of a Receiver continues to be permitted under the SHRA, a similarly restricted duration should be identified.

5. List of recommendations

Remedies under the *Social Housing Reform Act*

1. Identify the goal of restoring member control of co-op

Recommendation 1

The SHRA should state that, in the case of housing co-ops, the goal of exercising a remedy will be to maintain or reinstate full member control of the co-op as soon as that becomes feasible and that the Service Manager and others involved must work towards that goal.

2. Remove power to appoint a Receiver from the SHRA

Recommendation 2

The power of a Service Manager to privately appoint a Receiver should be removed from the SHRA.

In the case of a true emergency, Service Managers would have the right to seek the appointment of a Receiver by the court or seek injunctions or other emergency measures under the* Courts of Justice Act *under the conditions now stated in section 120 of the SHRA.

3. Enhanced supervisory management

Recommendation 3

In place of receivership, the SHRA should include as a remedy appointment of a Manager under a supervisory management arrangement in the circumstances referred to in Section 120 (Restrictions on transfer of housing project) of the SHRA.

Process for imposing remedies

4. Enhanced approval process for exercise of "significant remedy"

Recommendation 4

The SHRA should require an enhanced approval process for the exercise of any remedy that takes democratic control away from a co-op's members (such as supervisory management or appointing a* majority *of external directors to the co-op's board) or reduces the co-op's subsidy. This is referred to here as a "significant remedy".

Recommendation 5

The enhanced approval process required before a significant remedy can be exercised should be as follows:

- ***Service Manager decision: When a Service Manager intends to ask for Ministerial Consent to exercise a remedy, an open, transparent and procedurally fair process must be followed that includes advance notice and disclosure of information to the co-op, and a full opportunity for the co-op to make submissions.***

- ***Ministerial Consent: Advance approval of the Minister should be required before any significant remedy is exercised, with a stipulation that the approval must be given by the Minister personally and not delegated. Before consent is given, a procedurally fair review by the Minister should be required that includes full advance disclosure of information to the co-op and a full opportunity for the co-op to make submissions.***

6. Similar, fair process for receivership applications

Recommendation 6

A similar, procedurally fair process should be required related to a decision by a Service Manager to apply to the courts for appointment of a Receiver or Receiver and Manager, except in case of emergency.

7. Right to legal representation and necessary funds

Recommendation 7

The SHRA should enact that a co-op will have the right to full legal representation at any Ministerial, Service Manager, or judicial proceeding affecting the co-op or its property. To ensure full representation, the reasonable legal costs incurred by the co-op should be paid out of co-op revenues and, if those are insufficient, by the Service Manager.

Administration of remedies

8. Any Manager appointed should be experienced in co-op housing

Recommendation 8

The SHRA should provide that a supervisory management arrangement must involve Managers experienced in residential property management including co-operative governance and management in the case of non-profit housing co-ops.

9. Co-op's right to information

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The SHRA should provide that during any period of supervisory management, receivership or* any *other situation that takes control of a co-op out of the hands of its members, the board and members will be entitled to full financial and other information on the operations of the co-op.

Court receivership

10. Standard form of court receivership order

Recommendation 10

The SHRA should be amended to prescribe a standard form of court receivership order that is tailored specifically to the requirements of the SHRA and the underlying issues of social housing.

This order should include a statement that the receivership is temporary and that, in the case of a non-profit housing co-operative, the Receiver must work towards restoration of the co-op.. This statement would be similar to the corresponding statements in the CMHC ILM Operating Agreement and the provincial Project Operating Agreement.

11. Limited rights and power of Receiver

Recommendation 11

The SHRA should provide that any court appointment based on an application by a Service Manager or* related *body would be limited to the rights, powers and obligations stated in the SHRA and its Regulations and a judge would not be able to override or vary these.

12. Board role during receivership

Recommendation 12

The SHRA or Ontario Regulation 368/01 should be amended to confirm the role and responsibilities of a co-op's board and membership during any receivership, including such things as the continuation of co-op meetings and delivery of information by the Receiver to the co-op board and members (including the annual audited financial statements).

13. Fair and open sale process

Recommendation 13

The SHRA or Ontario Regulation 368/01 should be amended to provide that a court sale or similar process may take place only after a fair, open and unbiased call for tenders, other proposal call or other process to seek an appropriate party to continue to operate the housing project under the SHRA.

14. Independent expert report before any sale

Recommendation 14

The SHRA or Ontario Regulation 368/01 should be amended to provide that the courts will not give the normal deference to a Receiver about the desirability of sale or the evaluation of parties who might take title, but an independent report must be obtained from expert parties and this report may be challenged by evidence on behalf of the co-op and the other normal methods for testing evidence.

End to Service Manager conflict of interest

Recommendation 15

The SHRA should enact that a Service Manager or any constituent municipalities or any body controlled or related to them should not have the power to become owners of any non-profit housing co-operative or its assets under any circumstances.

Extension of SHRA default and remedies system

Recommendation 16

The SHRA should be amended to provide that the default and remedies system under the Act would also apply* to *any other agreement of any kind between a housing provider and a Service Manager, municipality or related body.

Clarifications of the intent of the SHRA

17. Ministry consent to sale

Recommendation 17

The SHRA should be amended to clarify that the requirement for the Minister's consent to a sale or other transaction under section 95 of the SHRA applies in all circumstances, even in the case of a court sale.

18. Mutual problem solving

Recommendation 18

Subsection 117(1) of the SHRA* should *be amended to clarify that a notice of default (triggering letter) must state how a situation is to be corrected whether or not a plan is to be submitted.

Alternative amendments

A1. Clarification that receivership remedy only for emergencies

Alternative recommendation 1

Section 120 of the SHRA and particularly clause 120(1) should be amended to clarify that a Receiver may be appointed only in emergency situations and other situations that require immediate action.

A2. Time limitation on private appointment

Alternative recommendation 2

Subsection 120(9) of the SHRA should be amended to provide that the duration of a receivership may not exceed thirty days unless a court orders an extension.

APPENDIX A

Receivership under the *Social Housing Reform Act, 2000*
By Frank Bennett

1. Introduction to Receivership
2. Receivership under the *Social Housing Reform Act*
3. The Right to Judicial Review of the Service Manager's Decision to Appoint a Receiver and Subsequently a Sale of the Property
4. The Need for a Power of Sale Clause
5. The Adequacy of Information before the Court
6. Conclusion
7. Recommendations

1. *Introduction to Receivership*

Receiverships under the *Social Housing Reform Act, 2000*, S.O. 2000, c.27 ("SHRA") are generally a misguided use of the remedy.

Traditionally, the use of the receivership remedy generally occurs as an interlocutory or temporary remedy pending the disposition of a dispute between two or more parties. In most cases, receiverships are invoked to protect the interests of a major creditor, or in other cases, all the creditors arising out of a creditor and debtor relationship. While receiverships are usually invoked in a commercial setting, they can also be invoked in other situations including, for example, in partnership disputes, protection for beneficiaries under a deceased's estate, protection of one spouse in a family law dispute, protection of the assets in a shareholders' dispute and protection for creditors in a bankruptcy and insolvency context. In all these cases, a receiver and manager is interposed between the parties to protect and preserve the assets for the parties. Sometimes there is a judgment directing payment of money to repay a debt or a payment representing one's interest in the property. Most of the time, there is no judgment as there is a presumption that the debt is outstanding. The receivership remedy is, in short, an interim remedy; it is not a final remedy except where the defendant's or respondent's property is sold and the sale proceeds are distributed as a payment of a debt or as an interest in the property.

The term "receiver" is used to describe a person who has been appointed either by instrument under security or by the court to take possession of property belonging to a third party in the context of a creditor and debtor relationship. As the remedy developed

in the English Court of Chancery and subsequently imported into the laws in Canada, and specifically in Ontario, the remedy developed to protect the rights of persons who had an interest in the defendant's property. The receiver had only the power to collect the income and profits and then sell the assets to pay the debt. As a result, if it was necessary to continue the defendant's business even for a short period of time, the security instrument had to contain a provision to appoint a *manager* with power to continue the business. Where the security instrument was silent or in the case of a court appointment, the court would appoint both a receiver and a manager.

The historical distinction between a "receiver" and a "manager" has been carried forward to today and is often blurred. A person who has the power to take possession and dispose of the assets is called a receiver and the person who has the power to carry on the business is called a manager. In practice, a receiver is usually appointed as both a receiver and a manager.

2. *Receivership under the SHRA*

Conditions precedent

Under the SHRA, a service manager has the power under section 120 of the Act to appoint a receiver. Service managers are designated with the responsibility for administering and funding social housing programs to housing providers including non-profit housing co-operatives. There are several conditions precedent before a service manager is in a position to appoint a receiver. First, the housing provider must be in default of an obligation under the Act. With defaults, the service manager must then find any one of a number of "triggering events" occurring. Section 115 sets out 13 different circumstances which, if any one occurs and is not rectified within a reasonable period of time, the service manager may appoint a receiver. These are listed in Attachment A.

Generally, these triggering events refer to basic defaults by the housing provider in the management of the housing project. Many of the events of default are generic in form and can be readily seen in commercial paper, commercial and industrial mortgages, debentures and security agreements. For example, a triggering event will occur if the housing provider contravenes the SHRA or its regulations, if the housing provider becomes bankrupt or insolvent, dissolves, or becomes subject to a receivership by another. Many of these events are factual in nature, but some provide for both objective and subjective reviews in determining whether a triggering event has occurred.

If it is determined that a triggering event has occurred, the service manager has a number of rights referred to in subsection 116(1) of the Act including the right to:

- discontinue or suspend subsidy payments,
- reduce the subsidy payment,

- use the subsidy payment to pay a creditor,
- perform the duties of the housing provider,
- remove some or all of the directors and appoint others in their place, and
- appoint a receiver.

Section 116 requires any remedy exercised by the Service Manager to "be reasonable in the circumstances". To determine if a remedy is reasonable a service manager must focus on the purpose of the remedy having regard to the nature of the default, such as the need for new management, repairs and restoration to the property, and to recover past debts, the effect on all stakeholders, as well as the overall effect of the remedy, such as the effects of the cost of a receivership as against the expected benefit.

In particular and with reference to a receivership, subsections 116(1) 5 and 6 provide:

> 5. The service manager may appoint a receiver or receiver and manager for a housing project operated by the housing provider.
>
> 6. The service manager may seek the appointment by the Superior Court of Justice of a receiver or receiver and manager for a housing project operated by the housing provider.

Therefore, upon the housing provider's default and a triggering event occurring, and not being rectified, the service manager must then give written notice to the housing provider of his or her intention to exercise a remedy under the Act. Subsection 117(1) provides that a service manager shall not exercise a remedy under section 116 until a written notice of default has been given to the housing provider and a statement to the effect that if the housing provider does not comply with notice within the period specified in the notice, then the service manager may proceed to exercise a remedy.

In addition to this notice, the service manager may also require the Minister's consent in certain cases. If the housing project is "in difficulty" such as where any mortgage on the property is guaranteed by the Province and is in default, the service manager must obtain the prior written consent of the Minister pursuant to subsection 117(2) before it exercises any remedy against the housing provider.

Types of Appointment

Once the service manager is in a position to exercise a remedy, and specifically, the appointment of a receiver, the service manager can:

1. appoint a private receiver by instrument if security was given, and take all necessary steps according to law.
2. appoint a private receiver by instrument under subsection 116(1)5 of the Act; or

3. apply to the Superior Court of Justice for a court-appointed receiver under subsection 116(1)6 of the Act. In addition, section 101 of the *Courts of Justice Act* provides that the court has the jurisdiction to appoint a receiver and manager where it is "just and convenient" to do so.

Insofar as a court appointment is concerned, that decision will depend upon a number of factors including the seriousness and extent of the triggering events, whether the housing provider is no longer able to continue with management, whether the housing provider or others contest the appointment, whether there is sufficient need to have the receivership governed by the court, and whether a non-court appointment requires additional time to complete its administration. These circumstances are not set out in the Act or prescribed in the Regulations.

Section 120 of the Act sets out additional conditions precedent to the appointment which appear to safeguard the housing provider from frivolous actions and to limit the use of receivership to cases of some urgency. The section covers the receiver's powers, remuneration, its responsibilities, and duration. Under subsection (1), the service manager must satisfy itself or the court as the case may be that:

1. some significant financial event has occurred and as a result of that event the housing provider is, or, in the service manager's opinion is likely to become, unable to pay its debts as they become due;
2. the housing provider's operation of the housing project has resulted in, or in the service manager's opinion, is likely to result in significant physical deterioration of the housing project or significant danger to the health or safety of the occupants; or
3. in the service manager's opinion, there is likely to be a misuse of the assets of the housing provider, such as for personal gain.

In the case of a private appointment or one under subsection 116(1) 5, the service manager must have sufficient evidence to show that all the elements of the triggering event have taken place, that notice has been duly given (including details of how to correct the situation), that the housing provider has failed to rectify the triggering event, that the appointment of a receiver is a reasonable remedy and that one or more of the three conditions precedent in section 120 have taken place or exist. In the case of a court appointment, the service manager must set out this material in affidavit evidence to support the appointment.

A receiver can also be appointed under a security instrument held by the service manager. Such a receiver will have the powers set out in the instrument. These powers generally give the receiver the right to take possession of the housing provider's assets, the right to manage the property and ultimately the right to realize on the property so that the receiver may repay the security holder.

A receiver appointed under subsection 116(1) 5 is given specific powers under subsection 120 (2) as set out in Ontario Regulation 368/01. These are set out in Attachment B.

Section 18 of the Ontario Regulation 368/01 gives the receiver a wide range of powers including the traditional powers covering the power:

1. to carry on the business of the housing provider,
2. to take possession of and operate the housing project,
3. to sell the housing project,
4. to litigate,
5. to borrow money,
6. to compromise debts;
7. to enter contracts.

These powers may be modified by any condition or restriction in the Act or in the appointment. Under subsection (6) of the Regulation, before the receiver acts under this authority, the receiver must obtain insurance coverage satisfactory to the service manager and undertake that it will not do anything that would result in a conflict of interest and shall comply with the policy regarding the collection, use and disclosure of personal information.

Lastly, a receiver appointed under subsection 116(1)5 is terminated after one year of its appointment, unless the service manager obtains a court appointment before the year expires. Subsection 120(9) states that this receiver's appointment terminates automatically unless extended by a court appointment. If the receiver cannot complete its administration within the one year, the service manager will apply for a court appointment and have its conduct and activities approved.

In the case of a court appointment initially or prior to the one-year expiry, the service manager can apply to the court for the appointment of a receiver under subsection 116(1)6 of the Act and section 101 of the *Courts of Justice Act.* Section 101 provides:

> (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
> (2) An order under subsection (1) may include such terms as are considered just.

In Ontario, there is a model template receivership order. While not prescribed under any federal or provincial legislation, the courts generally follow the template order unless the respondent and other interested persons apply to vary the terms. Provision is

made for any interested person to "come back" to the court to vary any provision. As a matter of practice, interested persons do not regularly use this provision, if at all, unless they are affected. The courts are reluctant to entertain any review where the interested person delays in bringing the motion to vary paragraphs in the order.

The model template receivership order is designed for a normal commercial receivership. It is very broad in nature and contains numerous provisions relating to the receiver's powers and duties. The model template receivership order is attached as Attachment C. In the context of the SHRA, the court order may contain specific reference and incorporate the powers of a receiver under section 18 of the Ontario Regulation. In effect, a receiver appointed by the court has extensive powers. It is incumbent on the housing provider and other interested persons to respond to the motion in a timely manner. If they do not appear, and subsequently challenge any provision, the court is likely to dismiss their motion for delay.

Lastly, if the housing provider is also insolvent, the court will grant the receivership order pursuant to section 47 of the *Bankruptcy and Insolvency Act.* That section provides for the appointment of an interim receiver where the court is satisfied that a notice of intention is about to be sent or has been sent to the debtor of an intention to enforce security. If a receivership order is made having reference to section 47, it may be readily enforced across Canada.

Status of a Receiver

A court-appointed receiver is agent of neither the security holder nor the defendant/respondent. The receiver is an officer of the court appointed by the court and accountable to the court which made the appointment as well as being accountable to and owing fiduciary duties to all interested parties, including the defendant/respondent. As a court officer, the receiver must discharge its duties properly and is afforded protection on any motion for advice and directions. The receiver is not subject to the control of the applicant who applied to the court for the appointment nor is the receiver subject to the control of the defendant/respondent which did not appoint the receiver.

Once appointed by the court, the receiver should not take the position of either side but should act impartially and even-handedly to all interested parties. In a court appointment, the receiver ought to have independent counsel in order to avoid any bias, conflict or prejudice. A court-appointed receiver must avoid any real or perceived conflicts of interest, and must act with prudence, due care and skill. If a court-appointed receiver is in doubt as to its powers and duties, it may apply to the court for directions.

Funding for representation

Irrespective of whether the receiver is privately appointed or court-appointed, the housing provider must have independent legal representation. The Regulation is silent as

to funding representation. At best, the housing provider should request funds from the receiver to retain counsel with respect to the receivership. However, in the case of a private appointment, the receiver is really the agent of the service manager who will not likely release money so that the housing provider can challenge the receivership. This is patently unfair to the housing provider and good reason for the housing provider to repel the privately appointed receiver from taking possession and control of the property. If so, the service manager will then have to decide whether to invoke a court appointment. The housing provider will then have access to the court to request funding for its representation. There is ample authority that states the defendant/respondent may apply for a retainer for legal representation even at the risk of the security holder realizing less on its debt.

3. The Right to Judicial Review of the Service Manager's Decision to Appoint a Receiver and Subsequently a Sale of the Property

Prior to exercising any remedy under the SHRA, the service manager must be satisfied that there is a default, that a triggering event has occurred, that notice has been properly given, that the housing provider has not rectified the triggering event, that the remedy is reasonable in the circumstances, that in the case of receivership one of the three conditions precedent exists and that in certain cases, the Minister has given consent to the enforcement. Each of these steps is the type of conduct that permits the housing provider to apply to the Divisional Court for a judicial review. The housing provider is entitled to both procedural and substantive fairness in the process. The housing provider and the occupants of the housing project should be given an opportunity to put forward their views before a decision to appoint a receiver is made. The housing provider and the occupants are entitled to know the basis of the decision to appoint a receiver. In view of the service manager's position as a public authority, the housing provider is entitled to have that decision reviewed under the *Judicial Review Procedure Act* in the Divisional Court.

In addition, section 95 of the SHRA provides that "a housing provider shall not, without prior written consent of the service manager and the Minister, transfer, lease or otherwise dispose of … a housing project…." As a result of the service manager's statutory power to decide, the housing provider is entitled to have that decision as well reviewed by the court.

Without disclosing the material before the service manager, the housing provider cannot determine whether the decision to appoint the receiver is appropriate and cannot determine whether it is appropriate in the first place to cause the property of the housing provider to be sold. These decisions, made without consultation and an opportunity to review documentation, amount to an abuse of power. As a public authority, these

decisions should be made in an open and fair process for which the housing provider should be able to engage legal counsel to respond.

4. *The Need for a Power of Sale Clause*

The service manager's remedy of invoking a receivership with a power of sale is inappropriate in the context of a social housing complex except in the situation where the housing provider is in financial difficulty and unable to pay creditors. Where no money is overdue to a creditor, the sale of the housing project is a meaningless remedy. It destroys the very object of the Act, namely to provide social housing and, in the case of non-profit housing co-operatives, to permit its occupants to manage the project. The onus is on the service provider to establish the need for a sale. A sale that does not involve a repayment of a debt is, in effect, an expropriation without compensation. There are no safeguards in the Act or in the Regulations to protect the housing provider and the occupants.

Most court-appointed receiverships are creditor-debtor oriented where the creditor seeks to enforce its security by the appointment of a receiver with a power to sell and distribute the proceeds primarily to the initiating creditor, trust claimants and then other creditors. The receivership remedy in the SHRA context does not fit in a traditional creditor and debtor scenario. The appointment of a receiver with a power of sale is a clear case of misuse of a receivership remedy when the remedy should be to replace management and restore the property. Where management has breached covenants under its agreements, the remedy is not to sell or transfer the housing project, but to repair and turn back control to an appropriate management team.

There are no guidelines either under the Act or Regulations for the receiver in exercising the power of sale. Both the Act and the Regulation are silent as to when and under what circumstances the power of sale can or should be exercised. As a result, the receiver must look to the common law for guidance. At common law, the function of the court is to look to the purpose of interposing a "receiver" and/or "manager" over the property. If this purpose is not default on debt payments, then sale of property is not an appropriate remedy.

5. *The adequacy of information before the court*

Before the power of sale is exercised under a court appointment, there should be a hearing or a trial and a judgment in favour of the service manager declaring that the housing provider is in breach of the Act and its regulations, and that in order to repay a debt outstanding, the project should be sold. If no debt is outstanding, the court should determine the issue as to whether a sale ought to take place and why, and if so, determine who is entitled to the sale proceeds.

However, if there is a significant debt outstanding and if the receiver exercises the power of sale clause in a security instrument or exercises the power of sale under a court order, then the receiver must adequately market the project, obtain current appraisals and negotiate openly with prospective purchasers in order to safeguard the equity of the housing provider, its occupants and all creditors. In a comparable ordinary sale prospective purchasers who are related or connected to the secured creditor who initiated the appointment are able to tender for the property, but only in a public tender where there is a confidential reserve bid to protect the stakeholders.

The reserve bid should be the fair market value of the property. In the case of property that is subject to the SHRA, appropriate appraisal techniques should be used to determine this value, which would be based on reports by qualified appraisers.

The fact that the owner of the housing project is a charitable or non-profit corporation makes no difference to the price that should be realized. The owner is entitled to any equity, which it can then use for its charitable or non-profit purposes. Alternatively, the owner may wish to cease operations, in which case the remaining assets would have to be distributed appropriately.

6. *Conclusion*

The right to invoke the receivership remedy in the context of social housing under the SHRA should be restricted to a creditor and debtor situation. Receiverships under the SHRA are not like commercial receiverships. Apart from the enforcement of debt obligations, the service manager, or other government authority, should be able to invoke a remedy which calls for substitution of management of the housing provider until the situation is remedied. Where the housing provider is in default of payments, the service manager should have the right to enforce its debt through the standard receivership remedy, namely the right to seize the project, manage it, and ultimately sell it to repay the debt. In all other cases of a breach of a non-monetary covenant, the service manager should be able to invoke a management remedy with power to substitute management as the need arises, restore and repair the property, and return the project to an appropriate management team. The receiver in its capacity as a manager should canvass alternative remedies with the housing provider including training sessions, educating board members or even recruiting new members. There should be no power to sell the project if there is no substantial debt owing.

7. *Recommendations*:

The Ministry should reconsider the remedy of receivership with a view to making the remedies under the SHRA more suitable to the concept of social housing. Apart from enforcement of debt, the Ministry should review the provisions of the statute and regulations having regard to the primary purpose of enforcing defaults under the Act, regulations and written agreements. The following are suggested areas for review:

a) The triggering events should be reviewed with a view to making them more objective in nature and to ensure that they relate only to situations where the housing provider is at fault, rather than the victim of economic circumstances.
b) The notice provisions should be reviewed to ensure that the housing provider is given notice of defaults and a reasonable period of time to rectify them.
c) The receivership remedy relating to the appointment of a receiver and specifically including the power to sell should be redefined to be available only for the enforcement of debt. This need not be dealt with in the SHRA, since each debt instrument will have its own enforcement provisions.
d) In place of the power of sale remedy, the appointment of a manager may be appropriate in certain situations for the purpose of educating existing members and assisting professionals in the day-to-day management of the housing provider.
e) Prior to exercising any remedy there should be a hearing to determine whether the housing provider is in default, whether a triggering event has occurred, and a determination of the proper remedy.
f) The service manager should supply all the material that it is relying upon before making the appointment or applying for an order as the case may be so that the housing provider will have an opportunity to respond.
g) The legal entity chosen to be the manager should be one associated with management of residential apartments and condominiums rather than the traditional "receivership" firm whose expertise is general in nature. In the case of non-profit housing co-operatives the manager should have skills and experience in community organization, particularly in co-operatives.
h) The housing provider should be able to receive full accounting from the "manager" on a regular basis without having to apply to the court for an order.
i) The manager should report as to the management on a regular basis in a prescribed form.
j) The housing provider should be able to draw on the revenue of the project for legal representation.
k) The court order appointing the manager should be prescribed and tailored to the situation. In addition, in cases where a receiver is appointed pursuant to section 101 of the *Courts of Justice Act* there should also be a specific prescribed form of order.
l) A receiver or manager of a housing project should not have a power of sale unless appointed under a conventional debt instrument where the housing provider is in default.

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Attachment A

Triggering events

115. The following are triggering events for the purposes of this Part:

1. The housing provider contravenes this Act or the regulations.
2. The housing provider becomes bankrupt or insolvent, takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment or arrangement with its creditors.
3. Steps are taken or proceedings are commenced by any person to dissolve, wind up or terminate the existence of the housing provider or to liquidate its assets.
4. The housing provider ceases or threatens to cease to carry on business in the normal course.
5. A trustee, receiver, receiver and manager or similar person is appointed with respect to the business or assets of the housing provider.
6. The housing provider makes a bulk sale, other than a bulk sale made under the *Bulk Sales Act* in conjunction with a transfer approved by the Minister.
7. Any assets of the housing provider are seized under execution or attachment.
8. The housing provider is unable to meet its obligations as they come due.
9. The housing provider incurs an expenditure that is material and excessive, having regard to the normal practices of similar housing providers.
10. The housing provider incurs an accumulated deficit that is material and excessive, having regard to the normal practices of similar housing providers.
11. The housing provider has failed to operate the housing project properly, having regard to the normal practices of similar housing providers.
12. In the case of a housing project on land in which the housing provider has a leasehold interest under a ground lease, the housing provider contravenes the ground lease.
13. In the case of a housing project comprising one or more buildings in which the housing provider has a leasehold interest under a lease, the housing provider contravenes the lease. 2000, c. 27, s. 115.

Attachment B

Powers of receiver, subs. 120 (2) of the Act

18. (1) This section prescribes, for the purposes of subsection 120 (2) of the Act, the powers of a receiver or receiver and manager appointed by a service manager under paragraph 5 of subsection 116 (1) of the Act for a housing project operated by a housing provider. O. Reg. 368/01, s. 18 (1).

(2) The powers of a receiver or receiver and manager who is appointed for more than one housing project operated by a housing provider apply with respect to all the housing projects for which the receiver or receiver and manager is appointed. O. Reg. 368/01, s. 18 (2).

(3) The receiver or receiver and manager has the exclusive power to act as the housing provider with respect to the housing project and the assets and liabilities of the housing provider relating to the housing project. O. Reg. 368/01, s. 18 (3).

(4) Without limiting the generality of subsection (3), the powers under that subsection include the following:

1. The receiver or receiver and manager may carry on the business of the housing provider.
2. The receiver or receiver and manager may take possession of and operate the housing project and may take possession of, preserve and protect the assets of the housing provider.
3. The receiver or receiver and manager may sell, lease, give as security or otherwise dispose of the housing project and the assets of the housing provider.
4. The receiver or receiver and manager may commence, conduct or defend legal proceedings.
5. The receiver or receiver and manager may borrow money.
6. The receiver or receiver and manager may receive payments or anything else in satisfaction of any obligation to the housing provider and may compromise any such obligation.
7. The receiver or receiver and manager may enter into contracts, sign documents or do anything incidental to the exercise of its other powers. O. Reg. 368/01, s. 18 (4).

(5) The powers of the receiver or receiver and manager are subject to any conditions and restrictions,

(a) under the Act;

(b) in the appointment of the receiver or receiver and manager by the service manager; or

(c) in an agreement between the receiver or receiver and manager and the service manager relating to the appointment. O. Reg. 368/01, s. 18 (5).

(6) The receiver or receiver and manager shall not exercise any of its powers unless all of the following are satisfied:

1. The receiver or receiver and manager has insurance acceptable to the service manager and has provided the service manager with proof that the receiver or receiver and manager has such insurance.

2. The receiver or receiver and manager provides the service manager with undertakings, satisfactory to the service manager, that the receiver or receiver and manager and all persons who the receiver or receiver and manager procures the assistance of in the carrying out of the powers of the receiver or receiver and manager,

i. shall not do anything that would result in a conflict of interest, and

ii. shall comply with the requirements, to which the housing provider was subject, relating to the collection, use, disclosure and safeguarding of privacy of personal information and for a person's access to his or her personal information. O. Reg. 368/01, s. 18 (6).

Attachment C

Model Template Receivership Order

[Document ID: CLUC Version No. 1, Date: September 14, 2004]

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE ___	)	__DAY, THE ___ DAY
JUSTICE _____	)	OF _____, 2004

PLAINTIFF

Plaintiff

- and -

DEFENDANT

Defendant

ORDER

THIS MOTION, made by the Plaintiff for an Order pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O 1990 c. C.43, as amended (the "CJA") appointing [RECEIVER'S NAME] as interim receiver and receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of [DEBTOR'S NAME] (the "Debtor") was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of [NAME] sworn [DATE] and the Exhibits thereto and on hearing the submissions of counsel for [NAMES], no one appearing for [NAME] although duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of [RECEIVER'S NAME] to act as the Receiver.

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 47(1) of the BIA and section 101 of the CJA, [RECEIVER'S NAME] is hereby appointed Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $_____, provided that the aggregate consideration for all such transactions does not exceed $_____; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate

purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply.

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(s) to take any steps reasonably incidental to the exercise of these powers,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names,

provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge").

18. THIS COURT ORDERS the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in

its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

20. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $_____ (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge .

21. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

23. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

GENERAL

24. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

26. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

27. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

28. THIS COURT ORDERS that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

29. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

_____

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the interim receiver and receiver and manager (the "Receiver") of all of the assets, undertakings and properties of [DEBTOR'S NAME] appointed by Order of the Ontario Superior Court of Justice (the "Court") dated the ___ day of _____, 2004 (the "Order") made in an action having Court file number 04-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2004.

[RECEIVER'S NAME], solely in its capacity
as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____

Name:

Title:

Appendix B

LEWIS & COLLYER

Barristers & Solicitors

Bruce Lewis, M.A., J.D. 160 John Street, Suite 401
Nancy Collyer, B.A., LL.B. Toronto, Ontario
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March 22, 2010

SHRA RECEIVERSHIPS AND *SHRA* REMEDIES[1]

INTRODUCTION

1. Recent developments relating to receiverships under the *Social Housing Reform Act*[2] can lead to the loss of a significant number of non-profit co-operative housing projects. The SHRA should be amended to prevent the transfer of ownership of co-ops to municipal housing companies and to stop the increase in litigation which has started and will continue unless the situation is resolved through statutory reform.[3]

2. This situation is the unanticipated result of the receivership sections of the SHRA and Ontario Regulation 368/01. I understand that there has never been any policy discussion of this possibility. It is the result of the novel use of a number of legal techniques that are not sanctioned or anticipated in the SHRA and are inconsistent with the purpose of the SHRA.

3. It is an unintended loophole in the SHRA system that should be closed in order to eliminate this threat to co-op housing and to assist both co-ops and Service Managers to use the SHRA as a system for "assisting and educating housing providers, rather than limiting or punishing them".[4]

[1] This paper has been prepared based on personal knowledge of a number of fact situations acquired in years of acting as lawyer for the Co-operative Housing Federation of Canada, the Co-operative Housing Federation of Toronto and for many individual housing co-ops and other co-op housing bodies. In addition, some of the factual statements are based on information provided by CHF Canada and others rather than personal knowledge.

[2] S.O. 2000, C. 27, as amended.

[3] See Attachment A for a list of recent litigation related to SHRA receiverships, including some comments on other aspects of the SHRA default and remedy system.

[4] *Labourview Co-operative Homes Inc.* v *Chatham-Kent (Municipality),* [2007] O.J. No. 3166 (QL), Divisional Court, paragraph 28.

4. In addition, other changes should be made in the SHRA remedies system to provide a more effective and less expensive method of dealing with issues in social housing and to provide fairness to all concerned.

NON-PROFIT CO-OPERATIVE HOUSING

5. Non-profit co-operative housing is different from other types of housing developed under Ontario provincial housing programs. It is fair to say that, in municipal housing and in non-co-op non-profit housing, the emphasis is on meeting the fundamental needs of people for safe, secure and affordable housing.

6. **Empowerment, dignity, self-respect:** Non-profit housing co-ops play an additional role in our society. They also perform the function of empowerment of members of a variety of disadvantaged groups. Co-op membership is made up of a very diverse group of people. These groups are similar to the residents of other provincially sponsored non-profit housing, although a conscious decision was made in the design of the co-op programs to have more residents of housing co-ops who pay the full market housing charge (rent) for their unit. This ensures that housing co-ops contain more of a mixed economic community that is better integrated into the overall neighbourhood and society.

7. But the main element of difference is that co-op residents are members of the corporation that owns and operates the housing project. Thus each member has a stake in the community that is absent in other forms of non-ownership housing. Persons who otherwise would have little economic opportunity to control their housing are able to exercise a substantial degree of control over their housing—within the constraints of the government housing program.[5]

8. This leads to development of a community where co-op members achieve a degree of involvement, dignity and pride that is absent from other forms of social housing or not present to as great an extent. Many members spend a great deal of volunteer time working on co-op issues and concerns. There is both a community and a sense of community that make co-ops very good places to live.

9. **Effectiveness of co-ops:** Having greater power over their housing, and thus their lives, is one way of addressing the needs of lower-income groups and other groups protected under the *Human Rights Code*. It is a way that has been proven effective. I understand that CMHC has three times conducted major evaluations of non-profit co-operative housing and each time the verdict has been positive.

10. The most recent evaluation conducted by CMHC Audit and Evaluation Services was published in 2003. Its summary included:

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[5] As a lawyer for many non-profit housing co-ops, I have often been touched and inspired when I go to meet the board of directors of a co-op about some legal issue. I look around the table and see persons who are members of protected groups under the *Human Rights Code* and whose lives would not ordinarily include giving instructions to lawyers. I have always been impressed by the sincerity, life experience and common sense that co-op members bring to issues that I advise them on. My personal view is that co-ops are like the jury system—ordinary people can make wise decisions within the context of an organizational framework that is designed to permit them to do so.

> More than 90 percent of co-operative residents have participated in the operation of their housing and 65 to 70 percent feel they have the ability to influence decisions about their housing through participation. . . . Households in co-operative housing have achieved more improvement than residents in other housing on key quality of life indicators such as an improved sense of community, improved relations with friends and neighbours and increased social supports.[6]

11. CMHC has the following statement on one of its web pages, under the heading "Suitability for Replication":

> The co-operative programs both provincially and federally have been one element of a multi-faceted approach to provide affordable housing in Canada which includes public and private non-profit and public housing. A challenge for the other sectors will be to emulate some of the measures in co-operative housing, encouraging residents to be more cost conscious and efficient.[7]

12. Ontario co-ops use the same centralized waiting list as other non-profit housing providers. However, experience shows that when people move into co-operatives and become used to the benefits and the sense of self-worth and self-respect of being a member, they soon become attached to their community and glad they are living in a co-op.

13. **Regulation of co-ops by Service Managers:** Co-ops present a unique opportunity to a Service Manager and raise unique issues. In dealing with co-ops, Service Managers and their staff are dealing with the residents themselves, not a board of outside volunteers. This often requires a different kind of approach and the two approaches can lead to conflict at times.

14. My understanding is that some of the problems that have occurred between co-ops and Service Managers really arise from difficulty in establishing appropriate relationships to deal with the issues of concern.

15. On reviewing the reports of receivers appointed by Service Managers, it is clear that receivers and their staffs find the concept of resident involvement alien. The very factors that make co-ops unique, valuable and empowering are seen as insurmountable problems which can only be resolved if the property ceases to be a co-op.

16. Because co-operatives are different, co-op members consistently resist ownership by a municipal housing company. Although geared-to-income rents would remain the same, co-op members are not prepared to accept this as the sum of their experience. They want to live in a co-op, not some other form of social housing.

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[6] *Co-operative Housing Program Evaluation*, CMHC September 2003, page iii. This is available at http://dsp-psd.pwgsc.gc.ca/Collection/NH15-418-2003E.pdf.

[7] <http://www.cmhc-schl.gc.ca/en/inpr/afhoce/tore/afhoid/opma/intedema/intedema_005.cfm>

NATURE OF LEGAL PROBLEM

SUMMARY OF LEGAL PROBLEM

17. It is relatively easy for Service Managers to identify triggering events and put co-ops into receivership without establishing that the triggering events actually exist or whether the requirements for appointing a receiver under the SHRA have been followed. Co-ops have had little practical defence in the past.

18. Service Managers will ordinarily provide a power of sale among the powers of a receiver. Under OR 368/01 they would have to take positive steps to avoid this.[8]

19. A process has now been developed that is described as a "sale" to a municipal housing company[9], although the process does not resemble anything that would be recognized as a proper sale process in any other receivership and works only because of a conflict of interest that would be indefensible in any other circumstances.[10]

20. Although the SHRA provides a complete system of defaults and remedies, including some quite novel remedies, it nowhere mentions that one of the remedies is for the Service Manager to take ownership of a housing project.

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[8] Subsection 116(2) of the SHRA states that a receiver has the prescribed powers "subject to the conditions and restrictions that are set out in the terms of appointment". Subsection 18(4)(3) of OR 368/01 contains a power of sale. Subsection 18(5) of OR 368/01 states that the powers of a receiver are subject to any conditions and restrictions in the Act, in the appointment and in an agreement between the Service Manager and the receiver relating to the appointment. Although CHF Canada has seen limited examples of such documentation, its understanding is that no receiver's powers have been limited in any way under these provisions.

[9] The sale of the Thornhill Green Co-op project to the Regional Municipality of York's housing company in return for assumption of the indebtedness is now before the courts. A Report of the Commissioner of Community and Health Services to the Community Services and Housing Committee of the Regional Municipality of York dated February 13, 2008 with respect to Thornhill Green Co-op stated at page 2, item 13: "… the Co-operative has considerable equity, with a 2005 appraised value as a market rent property of approximately $14.5 million and an outstanding first mortgage of only $6.8 million".
The Divisional Court—in tongue-in-cheek manner—characterized the analysis that led to a recommendation to retain this facility within York Region's portfolio as a "happy result" (*Re The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc.* [2009] O.J. No. 696 (QL) Divisional Court, paragraph 50).

[10] The basic reason presented to the courts for not following the normal court sale procedure was that additional funding under the SHRA was required for repairs to the project. This funding would come from the Region of York as Service Manager, which was prepared to invest it. However, the Service Manager would not provide that funding unless the project was transferred to the Region's housing company.
Another conflict is the control of Social Housing Renovation and Retrofit Program funding. Such funding was granted to a number of projects by York Region and in the ordinary course would have provided all the additional funding needed by Thornhill Green Co-op. However, the co-op did not receive any funding under SHRRP. If it had received the funding, the rationale for the sale to the Regional housing company would have collapsed.

21. **Loophole:** The takeover has been proposed by changing the purpose of a number of legal processes to achieve a goal not mentioned in the SHRA. That is why I am calling it a "loophole".

INCREASE IN LITIGATION

22. Since two Service Managers are now before the courts attempting to transfer ownership of co-ops to the municipal housing company through this loophole, the stakes for all co-ops have significantly increased.

23. In addition, recent court decisions indicate that housing providers can best protect themselves by ensuring that at an early stage they refuse to co-operate with use of the system by Service Managers. This is bound to exacerbate the basic difficulties of the system.

24. This is because the courts expect any challenge to a receivership appointment to occur near the beginning of the process. If a party does not make an early challenge, it is virtually impossible to have the receiver removed or changed later on.[11] Therefore, current legal advice is that a housing provider should challenge the appointment at the beginning by physically refusing admittance to the receiver, or by immediately going to court to have the receivership cancelled or the receiver changed.

25. Furthermore, CHF Canada's legal advice has been that few, if any, receiverships have complied with the SHRA and that all of them could be successfully challenged if done so at an early stage. This was done in one case and the receivership was set aside.[12]

26. In part, the lack of early challenges to receivership has been the result of assurances by Service Managers and receiver personnel and a basic confidence of co-op members in the good intentions of the Service Managers. However, experience now shows that this has proved imprudent in both cases before the courts. Therefore, it is unlikely that housing providers will permit this to be repeated.

PUNITIVE DEFAULT SYSTEM

27. Because of the way the SHRA is structured, Service Managers and housing providers are forced to use a punitive methodology that has limited likelihood of success in resolving the underlying issues and is often very expensive and destructive.

28. At its most basic, the problem is that SHRA contains a fault-based system of rules for dealing with default by housing providers and remedies to address the default.

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[11] For example in *Re The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc.*, 2009 CanLII 37907 (ON S.C.) at paragraph 25 the court stated:

> … in my view, any utilization of the comeback clause should have been made immediately or shortly after the granting of the Appointment Order. In my view, the motion by Thornhill Green and CHFC is nothing but a late attempt to appeal the decision of Pepall J.

[12] *Labourview Co-operative Homes Inc.* v *Chatham-Kent (Municipality)* [2007] O.J. No. 3166 (QL) (Div Ct).

This system resembles typical debtor-creditor agreements. Those agreements are designed to deal with issues and problems that are quite different from problems that arise in the context of non-profit housing.

29. The purpose of commercial agreements is collection of debt by creditors. The purpose of the SHRA system is to address problems in the governance and operation by housing providers. These different problems require different techniques to deal with them.

30. The worst element of this system is the use of receivers. The SHRA has been used to permit Service Managers to resort to receivership as a method of dealing with issues at housing providers to an extent unheard of under prior regulatory systems administered by the Ministry of Municipal Affairs and Housing or Canada Mortgage and Housing Corporation.

31. The use of receivers has been presented by Service Managers as a relatively benign way of addressing perceived problems. However, it has proved clear that the process of receivership administration in non-profit housing co-ops is malignant and that it does not solve any of the underlying problems. The situation at co-ops is always made much worse—both with respect to governance issues and financial issues (especially when the fees of the receiver are taken into account).

USE OF RECEIVERSHIPS IN SOCIAL HOUSING

32. CHF Canada consulted with Mr. Frank Bennett, who is recognized as the leading Canadian authority on receivership and related matters. He is the author of *Bennett on Receiverships* (Toronto, Carswell, 1999, 2nd Edition) and numerous other works in this and related areas including *Bennett on Bankruptcy* (Toronto, CCH, 2008, 10th edition), *Bennett on Creditors' and Debtors' Rights and Remedies* (Toronto, Carswell, 2006, 5th edition) and *Bennett on the Commercial List* (Toronto, Butterworths Lexis Nexis, 2006).

33. Mr. Bennett prepared a paper with his comments and recommendations on receivership under the SHRA. His paper is being presented at the same time as this paper.

34. Mr. Bennett emphasizes a basic error in the use of receivers under the SHRA, rather than managers. He explains that receivers are appointed to get in the assets of a debtor and dispose of them, while managers are appointed to carry on the management of a business. The basic difference in function naturally leads to a difference in the expertise, experience and skillset of the two types of appointees and no doubt of their recommendations.

DEVELOPMENT OF RECEIVERSHIPS FOR SOCIAL HOUSING IN ONTARIO

35. CHF Canada has observed that far more receivers have been appointed under the SHRA than under the Project Operating Agreements that governed prior to the SHRA or under the federal social housing programs. Therefore, I prepared an analysis of the development of receivership provisions in prior government regulation of co-ops. This appears as Attachment B to this paper. A summary of the main points follows.

36. **Emergency purpose of CMHC receiverships:** Receivership was first inserted in a social housing Operating Agreement in the 1989 Operating Agreement for the CMHC Index-Linked Mortgage (ILM) program (the last CMHC co-op program). It was designed to deal with a specific kind of emergency. I acted for CHF Canada at the time and I was told by counsel for CMHC that the provision was inserted solely because of CMHC's concern that it did not have sufficient authority to stop an unauthorized sale of a social housing project. This had apparently been done by a non-profit project (not a co-op) in Québec.

(a) This was resolved in 1992 by amendments inserting section 97 into the *National Housing Act.*

37. The emergency nature of the remedy was clear from the fact that a receiver appointed under a CMHC Operating Agreement had to be confirmed by the courts within only *eight days,* rather than the one year provided in the SHRA.

38. **1993 Ontario Project Operating Agreement**: There was no provincial legislation relating to sale of a social housing project in 1993 when the Ontario Project Operating Agreements were finalized. Therefore, it was appropriate for this potential issue to be controlled by a receivership provision. The eight-day private appointment was lengthened to sixty days. Although this period was longer, it was clear that receivers would still be used only in emergency situations.

39. **2000 SHRA:** The SHRA included sections 95 and 96, which controlled sale of housing projects using techniques similar to those in the amendments to the *National Housing Act.* Therefore, the original purpose of a receivership provision had disappeared.

40. However, drafters of the SHRA seemed to have revamped the default and remedies sections of the SHRA to make them more like typical commercial documents. In doing this private receivership was retained and the length of appointment was increased to one year. A requirement for an emergency or urgent situation was stated. One might comment that it looked very much like a remedy looking for a function.

41. However, in practice the new system and the approach of Service Managers has led to far more receiverships under the SHRA than under the prior systems. In CHF Canada's view, virtually none of these have actually met the SHRA requirements for a receivership. However, a procedural change has given Service Managers the ability to appoint receivers without any practical challenge.

42. In my view the crucial legal change that has permitted the great increase in receiverships is the extension of the period before judicial review is required. Although there are many other changes, the one that has the greatest effect is this extension.

(a) **1989 CMHC Operating Agreement:** Private appointment needed court confirmation within eight days.

(b) **1993 Ontario Project Operating Agreement:** Private appointment needed court confirmation within sixty days.

(c) **2000 SHRA:** Private appointment needs court confirmation only after one year.

43. There has been no practical method to challenge an appointment by a Service Manager until the one-year period elapsed, by which time the receivership has destroyed the co-op's internal governance, empowerment and community structure. In addition, the co-op is left without funds and without information to challenge the receivership. The successful challenge in the case of *Labourview Co-operative Homes Inc.* v *Chatham-Kent (Municipality)* [2007] O.J. No. 3166 (QL) (Div Ct) was only possible due to extraordinary efforts by CHF Canada, which efforts should not be necessary in any fairly constructed system.

44. **Power of sale:** Although the time period has been the most significant difference, it is important to also recognize that the systems are different with respect to a power of sale for a receiver.

(a) **1989 CMHC Operating Agreement:** No power of sale.

(b) **1993 Ontario Project Operating Agreement:** No power of sale.

(c) **2000 SHRA:** Power of sale unless Service Manager takes active steps to restrict the power.

45. **Reinstatement of co-op:** With respect to reinstating a co-op the three systems provided:

(a) **1989 CMHC Operating Agreement:** When receiver is no longer needed, the receivership will end and therefore project returned to co-op.

(b) **1993 Ontario Project Operating Agreement:** Co-op to be reinstated as a self-governing entity.

(c) **2000 SHRA:** No mention.

46. The above is a very generalized summary and Attachment B and the relevant documents should be referred to for the precise differences. They also show differences in a number of other areas.

47. **Conclusion:** CHF Canada's observation has been that the SHRA requirements for appointment of a receiver have almost never been met. The problem is not primarily those requirements, but the lack of a process to test the appointment. In the one court case where these issues were tested, there was a complete rejection of the

receivership by the Divisional Court.[13] I believe this would happen with most receiverships if they were reviewed at an earlier stage.

48. The one-year period prior to an outside review has effectively changed receivership from a seldom-used remedy for emergency situations to a routine technique to deal with issues that may or may not be defaults and that are seldom helped by the receivership.

49. Conversely I understand that Service Managers have seldom, if ever, used their powers under clause 116(1)(4) of the SHRA to appoint a manager of a housing provider.

SHRA RECEIVERSHIP PROCESS

STEPS IN THE PROCESS

50. In my view each of the steps involved in creating an ownership transfer remedy under the SHRA has involved an abuse or distortion of some of the provisions of the SHRA or other legal rules. The following is an outline of the main steps involved in the SHRA default and remedy system that create the loophole:

(a) Define legal category of default (triggering event).

(b) Give notice of default, usually with a requirement to provide a plan to correct the situation, even if it is impossible to correct.

(c) Determine which remedy is reasonable.

(d) In case of receivership remedy determine if special conditions exist.

(e) Make decision to appoint receiver. Obtain Minister's consent if project in difficulty. No participation of co-op.

(f) Appoint receiver for one year. Assurances to co-op that this process is benign.

(g) Court renewal and expansion of receivership prior to end of the year. Co-op discouraged from opposing this.

(h) Receiver recommends sale to the municipal housing company without normal sale process. Receiver's recommendation given deference in accordance with normal court practices although receiver has no expertise in co-op governance and similar matters. Co-op has limited opportunity to challenge.

(i) Obtain Service Manager's consent under section 95 of SHRA despite the obvious conflict of interest. No participation of co-op until recent court decision requiring it.[14]

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[13] *Labourview Co-operative Homes Inc.* v *Chatham-Kent (Municipality))* [2007] O.J. No. 3166 (QL) (Div Ct).

(j) Obtain court consent.

(k) Obtain consent of Minister to sale under section 95 of SHRA.

51. In conducting litigation relating to the SHRA, CHF Canada has retained various counsel. All counsel involved have come to the view that one or more of the above steps is not being implemented in accordance with law.

52. I will review some of these steps in this part of the paper to explain how they are supposed to work as well as what seems to happen in practice.

REASONS FOR SERVICE MANAGER INTERVENTION

53. However, before doing so, I would like to comment on the situations that give rise to use of the legal default system by Service Managers. My observation under the SHRA (and in other legal contexts) has been that people normally determine first that they want to do something about a perceived problem and then look to the legal rules governing the situation to determine what can be done about it.

54. Although the triggering events are described in terms of specific events that resemble events of default in typical commercial agreements, CHF Canada has repeatedly observed that decisions by a Service Manager on how to deal with a co-op do not turn on the existence of an event of default. Even though the accumulated deficit or physical condition of two co-ops could be similar, a Service Manager might provide additional subsidy to one and appoint a receiver of the other.[15]

55. It seems clear that a Service Manager's decision on the above choices is based on the degree of confidence it has in the present and long-term governance potential of the housing provider. I believe this statement would be commonly accepted by Service Managers.

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[14] *The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc* [2009] O.J. No. 696 (QL) (Div Ct).

[15] Although it is hard to obtain documentary evidence of this fact, it was commented on by the Divisional Court in *Labourview Co-operative Homes Inc.* v. *Chatham-Kent (Municipality***)** [2007] O.J. No. 3166 (QL) (Div Ct):

> **5** Chatham-Kent's social housing portfolio was devolved to Chatham-Kent in 2002. It is made up of Labourview and one other co-op, Clairvue, and 15 private non-profit housing developments.
>
> **6** It was obvious to us that from the point of view of Chatham-Kent, Labourview Co-op was a problem. The affidavits and reports of Chatham-Kent indicated the board of the co-op was not very active, the board committees were "dysfunctional", there were bookkeeping problems and operational problems, there were a number of vacancies in the co-op, and the co-op board did not seem to be anxious to follow the advice and later the directions of Chatham-Kent. …
>
> **11** . . . she [Shelley Wilkins, Director of Social Housing] confirms that the only comparison she made was of the housing providers "within her purview" which meant only one other co-op - Clairvue - which had a gross deficit that was considerably less than Labourview's. Affidavits and reports of experts referred to by the applicants indicated that deficits were referred to on a per unit basis, rather than a gross basis, that the deficit for Clairvue rose much more rapidly than that of Labourview in the 2004-2006 period, that no receiver was appointed for Clairvue . . .

56. These issues often come up at a time when significant capital investment is required in a housing project. I have observed that this is a time when co-ops are at risk of receivership. Naturally, when significant capital investment is required, a Service Manager must make a judgment that the additional funds will not be used for extraneous purposes. However, that is not the motivation for appointing receivers at that point in time.

(a) The normal controls on approval of plans and distribution of capital funds are sufficient to ensure that there is no abuse. Those controls are also relatively inexpensive.

(b) No ordinary businessperson or lender would suggest that receivers are a cost-effective way to administer a capital spending program.

57. What happens is that Service Manager staff evaluate the general competence of the governance and management of a housing provider before recommending the investment of significant new funds. The issue is not whether to invest the funds, since the need has been independently established through technical means, but whether to provide further funding to a group of people in which Service Manager staff does not have confidence.

58. The judgment about the basic competence of a non-profit housing co-op is to some extent subjective. CHF Canada has identified several factors that may influence Service Manager staff with respect to co-ops and I have observed many of these myself.

59. **Inadequate management:** An important issue that concerns Service Managers with respect to some co-ops is the quality of staffing and the degree of oversight of staff by the co-op board of directors. Oversight may be compromised by loyalty to such staff on the part of co-op members so that concerns raised by the Service Manager are not adequately dealt with. Quite possibly some form of Service Manager intervention would be appropriate in the case of a longstanding and significant problem that cannot be resolved through other means (such as co-op housing sector assistance).

60. **Co-op attitude:** Sometimes the general attitude of the members of a co-op towards the Service Manager and its staff is perceived as hostile and unco-operative. This can be very trying for Service Manager staff. However, CHF Canada's experience is that this situation should be met by understanding and support and an effort to resolve any underlying problems (including involving the co-op housing sector). It is in this situation that threatening or punitive measures by a Service Manager are most counter-productive.

61. **Co-op governance problems:** Sometimes co-ops experience governance difficulties because of such things as lack of training and experience, lack of adequate leadership from staff or personal animosities among members. Service Manager staff is often drawn into these problems although they often do not significantly affect the ability of the co-op to maintain the property and comply with the SHRA. In this situation, too, it is doubtful if Service Manager intervention is productive.

62. **Education and tolerance:** Unfortunately, difficulties dealing with individual and governance problems are very hard to solve and affect the Service Manager's confidence in the organization. However, those problems often do not affect the real performance of the co-op as housing provider. Service Managers should address these issues through co-op housing sector involvement and other educational measures and through tolerance if possible. It is not prudent to use the SHRA remedies system to deal with these matters.

63. **Divisional Court approach in *Labourview:*** The *Labourview Co-op* case is the only instance where the earlier stages of the receivership process were reviewed by the courts. The Divisional Court quashed the decision of the Regional Municipality of Chatham-Kent to appoint a receiver for Labourview Co-op and declared that a receiver or receiver and manager over Labourview was not justified under the SHRA.

64. This case contains important statements on the SHRA. CHF Canada totally supports the result. All the legal issues addressed in this paper were before the court, but it only dealt with the first one. This is because, once it decided that there had been no triggering event, there was no need to determine whether receivership was a remedy that could be legally used or had been implemented properly.

65. The following statement by the court expresses something that CHF Canada believes should guide Service Managers in dealing with co-ops:

> **[23]** … Housing programs are social programs, intended to generally assist society in the province, by providing financial and material assistance to the housing needs of the disadvantaged. The enforcement provisions of the SHRA must be interpreted so as to best ensure the objects of the Act. In the present case, it must also be remembered that the applicant is a non-profit housing co-operative, democratically operated by its members who, largely, are its tenants. It is not a mere agency of the municipality and its decisions must be given some deference by the municipality for this reason, a deference markedly absent from the evidence before us.[16]

TRIGGERING EVENTS

66. If a Service Manager wishes to use the default and remedy system in the SHRA, the first step is to determine which category of default is relevant under section 115 of the SHRA. Those categories are called triggering events and the Service Manager

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[16] *Labourview Co-operative Homes Inc.* v. *Chatham-Kent (Municipality***)** [2007] O.J. No. 3166 (QL) (Div Ct).
The actual "straw that broke the camel's back" for the Service Manager in that case was that the co-op's staffing problems were addressed by a request for proposals for property management services. The Region wished the co-op to retain the company that bid lowest, although it had no experience with co-ops. The co-op wished to retain a company which bid about $10,000 per year more, but was very experienced in managing co-ops and had done excellent work in resolving issues at a number of co-ops that were projects in difficulty.
The situation also illustrates the basic futility of using receivers. The cost of a receiver was bound to be many times higher than $10,000 per year to be charged by the management company that was experienced in managing co-ops.

must identify those that have been breached and give notice of the breach to the co-op and an opportunity to cure the breach.

67. The most common and most serious triggering events, as stated in section 115, are having an accumulated deficit and failure to operate the project properly. Operation in this context is used mainly to refer to maintenance and repair.

68. The basic problem of these triggering events is that they describe situations that can exist for reasons that are beyond the control of the housing provider. On reviewing a great number of triggering letters, receivership documentation and related materials, CHF Canada has observed that a substantial percentage of co-ops that have been considered in default under these clauses are in that position because:

(a) The original funding formulae did not provide adequate subsidization in certain market conditions and the benchmark system was not implemented until some co-ops had accumulated large deficits.

(b) Replacement reserve provisions were not adequate for most co-ops.

(c) A variety of other situations were bound to require additional funding. Examples are unrecoverable construction deficiencies and changed code requirements.

69. Although these situations sometimes involved management problems at co-ops, only a small part of any deficit or lack of repair, etc. could be traced to such problems. The bulk of repair problems arose through lack of funds. The bulk of the lack of funds has to do with economic conditions and the funding formulae.

70. CHF Canada believes that a large proportion of the receiverships under the SHRA were not justified because no triggering event had occurred as in the *Labourview* case.

OPPORTUNITY TO CORRECT

71. Section 117 of the SHRA requires a Service Manager to give details of a triggering event to a housing provider and state what must be done to cure the situation. Subsection 117(1)(1)(ii) states that a notice of triggering event must specify "the activities that the housing provider must carry out or refrain from carrying out or the course of action that the housing provider must take or refrain from taking in order to cure the situation".

72. It is appropriate for Service Managers to give details of what the problems are and how they are to be corrected. This is invaluable as a technique in dealing with

them.[17] There are some problems with Service Manager practices with respect to these notices, but I will comment only on the most serious.

73. Subsection 117(1) also contemplates a plan being submitted by the housing provider. Service Managers incorrectly treat the requirement for a plan as a substitute for their obligation to state how the situation may be cured. Instead of stating what must be done to cure the situation, Service Managers often bounce a difficult problem to the co-op by requiring a plan.

74. In my view this practice is an abuse of section 117. The requirement for a plan is typical of commercial instruments. It is intended to require details of a basic concept that is stated in the notice. For instance, if the notice requires certain building deficiencies to be corrected, it is reasonable to require the housing provider to retain appropriate consultants and develop a plan for designing, tendering and performing the work. The Service Manager could not state this level of detail in its notice.

75. However, the section is not intended to relieve the Service Manager of the obligation to tell the housing provider how to cure the situation.

76. Unfortunately, one of the difficult situations in which Service Managers use this technique is where there is an accumulated deficit and where the deficit cannot be traced to any specific actions or inactions of the housing provider, such as having housing charges or rents that are too low. In these cases the notice may state that the housing provider has an accumulated deficit of X and is required to submit a plan within 60 days to cure the deficit.

77. It may not be possible to cure the deficit since it may have arisen through external economic conditions. If the deficit might be cured by a change in management practices, then it might not be cured for many years. It might not be possible to provide a plan similar to the building deficiency situation.

78. Instead, housing providers are pressured to submit a plan which is unrealistic. When the plan cannot be met, the housing provider has effectively put itself into default because it did not fulfill obligations it assumed under its own plan.

REQUIREMENT TO USE REASONABLE REMEDIES

79. Section 116 of the SHRA lists the remedies available to a Service Manager. Receivership is among the remedies listed.

80. However, section 116 also states that any remedy the Service Manager uses "must be reasonable in the circumstances". In the context of receivership this brings up the issue of when use of a receiver is reasonable.

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[17] The Divisional Court commented on this in *Labourview Co-Operative Homes Inc.* v. *Chatham-Kent (Municipality)* [2007] O.J. No. 3166 (QL). It described the requirements of section 117 of the SHRA in paragraph 27 of the decision and then stated:

> **28** In our view, this is all consistent with the purpose of the Act - assisting and educating housing providers, rather than limiting or punishing them.

81. There is no guidance in the SHRA on what constitutes "reasonableness". The courts have not addressed the factors that bear on reasonableness in the context of an SHRA remedy.

82. Since what is "reasonable" will always have an element of subjectivity, it seems clear that the decision-making and review processes are of great importance with respect to SHRA remedies.

SPECIFIC REQUIREMENTS OF RECEIVERSHIP

83. In addition, section 120 (Appointment, etc., of receiver) of the SHRA lists three prerequisites for appointment of a receiver. At least one of them must be present for a Service Manager to have the authority to appoint a receiver or go to court to ask a judge to appoint a receiver. Therefore, appointment of a receiver must be a reasonable thing to do in one of the three circumstances listed in section 120.

84. The introductory language of section 120 directly forbids a Service Manager to appoint a receiver privately or to seek appointment through the courts unless one of the next three clauses applies. The three clauses all deal with situations that are emergencies or of an extremely urgent nature:

(a) **120(1)(a), Financial or other event:** A significant financial or other event must have occurred and, as a result of that event, the housing provider will be unable to pay its debts as they become due.

(b) This clause requires a significant financial or other *event.* It is not dealing with the situation of an accumulated deficit envisaged in subsection 115(10). In every case that CHF Canada knows of the deficit accumulated over a period of time.

(c) There is no specific guidance as to the type of event, but it would have to mean something like a major uninsured fire, a significant financial fraud or something like that.

(d) CHF Canada knows of no situation where any such event has ever occurred or been alleged.

(e) **120(1)(b), Significant physical deterioration or danger to health and safety:** The operation by the housing provider must have resulted in significant physical deterioration or significant danger to health and safety.

(f) This clause does not require a single event. However, the requirement for urgency is clear in the reference to danger to health and safety. In the context the reference to physical deterioration must refer to deterioration so significant that it is similar in seriousness to something that would cause danger to health and safety.

(g) In addition, the clause requires the situation to have been caused by operation by the housing provider. Thus something resulting from inherent defect, accident, depreciation or similar cause would not be within this clause.

(h) **Misuse of assets, including for personal gain:** This clause is the closest to the original purpose of receivership in the ILM and provincial Operating Agreements. It is dealing with wrongdoing that is presumably not prevented by sections 95 and 96.

(i) CHF Canada knows of no situation where this has even been alleged in the context of SHRA receiverships.

85. On reviewing the requirements for receivership and the situations I am aware of, the only one of the prerequisites that could be relevant would be the second relating to physical deterioration.

86. However, neither I nor CHF Canada know of any receivership where this requirement has actually been fulfilled.

87. I have reviewed engineers' reports on a number of housing projects in receivership or when receivership was being considered. None of these reports have shown that the deterioration was due to the faulty operation of the housing project. Although some of these reports pointed out areas where past operation of the physical plant could have been improved, in all cases the great bulk of issues resulted from factors other than mismanagement by the housing provider.

88. In addition, none of them have shown immediate danger. The danger is always long-term and always results from the lack of availability of capital or operating funds. Furthermore, the prediction of long-term deterioration is usually based on flawed financial analysis, such as failure to consider the ongoing replacement reserve contributions or the effect of the benchmark funding formula.

89. In my view Service Managers proceed on the basis of physical condition mainly because the issue arises in the context of further capital funding, not because of inadequate maintenance or repair by the co-op. The need for further capital funding is an extraneous factor that should have nothing to do with the remedy system in the SHRA. The original design of the housing programs did not provide subsidy to meet inevitable capital repair requirements at many projects and this has nothing to do with default or inadequate administration by a housing provider.

REASONABLENESS OF RECEIVERSHIP

90. As stated earlier, a receivership must be a reasonable remedy in the circumstances. It would seem clear that some of the circumstances listed in section 120 would be ones in which receivership would be reasonable. However, neither these nor other circumstances have been present in co-op receiverships.

91. **Immediacy:** In most commercial receivership situations a receiver is appointed quickly with minimal process in order to deal with an emergency situation or avoid dissipation of the assets of the debtor. That was the original intention of CMHC in the ILM Operating Agreement and MMAH in the provincial Project Operating Agreement. See Attachment B.

92. This is also a major element of the purpose of receivership contemplated in the SHRA, as can be seen from the conditions in section 120.

93. However, none of the co-op receiverships have shown any need for immediacy. Service Managers usually do not take any action for months after a trigger letter is issued and responded to. Any deficit has accumulated over years. Any mismanagement is typically alleged to be longstanding. The plan for repairs has been developed after extensive technical studies. In short there has been no need for an immediate unregulated takeover of any co-op through a receivership.

94. **Cost:** Another factor affecting reasonableness of any remedy would be cost. Experience under the SHRA has confirmed what every business person knows. Receiverships are exceedingly expensive. It is not possible to justify any of the co-op receiverships when the cost of the receivership is compared to the amount of money at issue.

95. CHF Canada does not have enough information to statistically review receivership costs. However, the general costliness of receivers may be illustrated by two statements by knowledgeable persons:

(a) A professional property manager who was retained by a receiver to manage a co-op told me that the presence of a receiver created additional work for his staff and that his company could perform all the receiver's functions for $10,000 a month, not the $50,000 a month that the receiver was charging.

(b) One of the municipal councillors in Simcoe County in explaining their position on a takeover of Matthew Co-op said "We've already spent close to $1 million and the bleeding continues…".[18] The bleeding he was referring to was largely the costs paid to the receiver.

96. Furthermore, CHF Canada's review of the financial results of receiverships has shown that they have not been very effective in improving a co-op's financial position, such as by reducing operating costs and filling vacancies. There is no evidence of significant deficit reduction, except through infusion of funds by the Service Manager. There is no evidence of significantly improved maintenance or performance of needed repairs unless funded by the Service Manager. (This is a limited review since CHF Canada has data in only a few situations.)

97. I am certain that, if the figures were available, they would show that most projects have been much worse off financially after a period of receivership when the receiver's performance and fees are taken into account.

98. **Expertise:** The main commercial reason for appointment of receivers is liquidation of a business. Even when a business is managed by a receiver for a time, the usual reason is an intent to preserve the value of the business pending disposition.

99. However, in no case has a receiver been appointed under the SHRA for the purpose of disposition of the housing project. In all cases the ostensible intention has been to

[18] http://www.simcoe.com/article/123363.

address whatever issues were perceived by the Service Manager and contiune the project as social housing, and until recently to return the project to the control of the original housing provider.

100. **Construction expertise:** As stated earlier in this paper, appointment of receivers may in some cases be associated with significant capital investment by a Service Manager. However, there is no reasonable basis for appointing a receiver to administer the process.

101. Housing providers are required to have architects, engineers, or other consultants to certify work completed. Choice of such consultants may be subject to the approval of the Service Manager by virtue of the funding agreement. Funds can be advanced directly by the Service Manager or through a solicitor to pay accounts approved by the consultants. The Service Manager can have whatever degree of input it considers appropriate.

102. These practices have always been used in the context of construction and renovation of social housing at all levels of government. They are essentially the same as those used by commercial lenders in construction loans.

103. In short there is no basis for inserting a receiver into the repair or renovation process.

104. **Governance expertise:** As stated earlier in this paper the underlying problem that leads Service Managers to appoint receivers generally relates to their perception of co-op governance. Therefore, a reasonable remedy, as required by the SHRA, would address co-op governance. It would do so in a way that would lead to improved governance and preserve the co-operative as successful social housing.

105. I doubt that anyone would suggest that the skills, expertise, and normal experience of receivers is in the area of governance of non-profit corporations, and particularly non-profit housing co-ops. Not only are receivers not experienced, but time has shown that they are ineffective in marshalling outside resources to improve governance.

106. In addition it is clear that the personnel employed by receivers are not attuned to recognize the situation and needs of persons involved in co-ops due to differences in experience, social class and education. Receivers approach co-operative boards as if they were, or ought to be, comprised of typical business people.

107. For instance, the receiver mandated by the court to return governance of Matthew Co-op to the residents recommended instead that ownership be transferred to the Service Manager. In its report to the Court it observed that board members (composed almost entirely of single mothers) often brought their children to meetings. It noted that board members sometimes missed meetings. It concluded that any board composed of Matthew Co-op members did not have the capability to govern the co-operative.

108. It might have said the same about any of the 550 successful co-ops in Ontario. A receiver's standards simply are not appropriate for non-profit housing co-ops.

Receivership is simply not able to foster processes that will remedy governance problems. Quite the contrary, governance processes are harmed or destroyed by receivership.

109. Effect on co-op: The following is a paraphrase of a statement to me by a co-op director about the threat of receivership. Clearly the actual appointment of a receiver would have disastrous effects on the motivation of this individual and others to participate in the co-op in any way.

> *I have been employed by a major company for 17 years. I have many opportunities to obtain overtime pay that I do not take because I have to attend co-op meetings. This is part of my contribution to society. The trigger letter is frightening and so is the continuing spoken and unspoken threat of receivership. I often find myself unable to sleep at night because of this. Many active co-op members wonder what the point is of continuing to try. Many other co-op members approach me constantly to find out what the board is doing about this.*

110. Therefore, it is little wonder that receivership is destructive of co-op processes and that after a period of receivership a co-op is less likely to be successful than if there had been no receivership. Receivership is simply not appropriate or reasonable for co-ops.

PRIVATE APPOINTMENT PROCESS

111. The decision-making process relating to appointment of a receiver is explained in Attachment B at paragraphs 33 to 36.

(a) **1989 CMHC Operating Agreement:** There is no special process making the decision to appoint a receiver. (The receivership of course only lasted for eight days.) In addition, it can be assumed that CMHC personnel were very experienced in regulating co-ops.

(b) **1993 Ontario Project Operating Agreement:** The Minister had to personally make the decision and it could not be delegated to any officer, employee or agent of the Ministry.

(c) **2000 SHRA:** There is no special decision-making process. In the one case where we have detailed information the Divisional Court explained that substantive decision to seek Ministerial consent and to appoint a receiver was made by a single employee. See Attachment C. Review by her superiors and the Ministry appears to have been perfunctory, since no-one apparently noticed a major mathematical error in the justification for the receivership. See the Divisional Court's comments reproduced in Attachment C.

112. Thus, the SHRA has created the peculiar situation that a private receivership appointment that lasts far longer than under the two prior regulatory systems is made following a process that appears far less significant. The example cited shows the virtue of a more careful appointment process simply to address a major factual

error. Clearly, the evaluative aspects of the appointment should also be subject to a more reasonable review process.

113. In addition, one would think that municipal decision-making that affects someone should in all fairness give them an opportunity to be heard and to participate. However, the receivership appointment process is conducted without co-op input and in secret from them both at the municipal and provincial levels.

114. If this were the type of receivership that were really dealing with urgency—such as if a debtor were about to dissipate the assets—such secrecy might be justified. However, as stated earlier, that has never been the case.

115. In fact, as far as CHF Canada can tell from the information available to it, the actual process for decision-making, including the submission to the Ministry where required, seems to take at least several months. There is no urgency here that should prevent a fair chance to the co-op to be involved in the decision.

CONDUCT OF RECEIVERSHIP

116. The administration of a co-op by a receiver naturally has the effect of disempowering the residents and alienating them from the process of administration of the housing project. However, certain aspects of operation by a receiver are quite disturbing and unnecessarily demeaning to co-op members and destructive of the co-op processes. This approach involves among other things:

(a) Telling co-op members that there is no legal standing for the board of directors, but relying on that legal standing for service of documents. (Att D.)

(b) Withholding all information about the operation of the project from the co-op members.

(c) Denial of access to common facilities for board and committee meetings and the like and providing no support services.

(d) Cancelling Directors' and Officers' Liability Insurance.

(e) Ignoring the role of the co-op board in evictions on some occasions and using it on others.[19]

117. To some extent both receiver and Service Manager personnel seem to take an approach that will discourage co-op members from "making trouble" for them, especially by enforcing the legal rights of the co-op.

[19] There is a serious denial of natural justice and procedural fairness with respect to certain co-op evictions by receivers. However, I will not deal with that in this paper since it will become academic when the proposed eviction law reform is implemented—hopefully in the near future.

118. This is not proper. A municipality or an officer of the court (the receiver) should not mislead people as to their legal rights and make it difficult for them to enforce their legal rights.[20]

CONFLICT OF INTEREST BY SERVICE MANAGER

119. The possibility of permanent ownership of a non-profit housing co-op's project by a Service Manager or a related body creates an irreconcilable conflict of interest. Whatever problems Service Manager staff perceive, they presume that "it can be done better" by themselves or their colleagues in the municipal housing company. No matter how hard they try, they cannot make a valid judgment that is not tainted by this conflict.

120. In February 2009 the process used for deciding on a transfer to the Region's housing company was severely criticized by the Divisional Court in *Co-operative Housing Federation of Canada and Thornhill Green Co-operative Homes Inc.* v. *The Regional Municipality of York and Housing York Inc.* [2009] O.J. No. 696 (QL).

121. It is important to understand that in this case the courts had erroneously been given the impression of urgency, of the impossibility of the co-op to continue and the unavailability of alternatives. Thus the Divisional Court refers to a report by the Region's Community Services and Housing Committee to the Regional Council:

> **[49]** … The Committee recommended that Council authorize a request be made to the Receiver to bring a motion to the Superior Court to sell the assets and liabilities of Thornhill Green to the Region's own housing company, HYI.
>
> **[50]** This was the only viable option, according to the authors of the report, because HYI was the only non-profit organization with the professional and technical expertise required to manage Thornhill Green's complex technical and operational issues. It would also have the happy result of keeping the facility within York Region's social housing portfolio.

122. The court did not comment on the fact that this "happy result" would also bring the Region the $5,000,000 in equity (according to the Region's appraisal) owned by Thornhill Green Co-op without any compensation for it.

123. The Divisional Court did not deal with conflict of interest in its decision since it was not reviewing the decision to purchase, but the decision to consent under section 95 of the SHRA. It focused on whether the decision was reviewable by the courts and whether procedural fairness was required on the part of the Region. It decided that the courts could review the decision-making process and that the Region had not been procedurally fair.

[20] See Attachment D for a detailed example of these practices in one case. See footnote 11 for the effect of failure to challenge a receivership appointment at an early stage.

124. Although conflict of interest was not before the Divisional Court, the above quotation surely indicates its view of the fact-finding process that gave the "happy result".

125. On reviewing the actual situation, it is very hard to understand how anyone would arrive at the opinion that the only possible "purchaser" was Housing York Incorporated.

(a) Even if the co-op were not capable of operating the project, the Region of York has approximately 20 other co-ops and 29 non-profits that might have had full capacity to operate the co-op.

(b) The Thornhill Green housing project is a townhouse development without any unusual or difficult technical problems.

(c) Financially, Thornhill Green has been one of the least subsidized projects under the provincial housing program. Because of the impact of the funding model under the SHRA, it received neither operating nor RGI subsidy for several years. The formula in fact eventually resulted in an amount payable by the co-op to York Region (negative subsidy). The co-op protested that this was illegal under the subsidy definitions in the Act, but the Province enacted OR 244/04 to allow the negative subsidy calculation.[21]

126. Of course, the above assumes that the project could not continue to be operated by the co-op. In fact, there is no objective reason for that. CHF Canada staff has been closely involved with that co-op and in our view there is a good mix of talent and motivation that is fully capable of operating the co-op just as there is in co-op communities across Ontario.

127. There is no reasonable explanation for the Region's conduct in this case other than that its solution was tainted by conflict of interest.

CONCLUSION

In my experience co-ops are a unique and valuable part of the provincial social housing system. Preserving co-ops is a value in itself, which should be fostered.

The great increase in receiverships under the SHRA has not resulted from increasing problems at co-ops but from issues that Service Managers themselves have in marshalling their resources to fulfill their responsibilities under the SHRA. Co-ops are different, and may be perceived as harder to work with. Service Managers are tempted to transfer responsibility for the problem to a receiver.

Service Managers are wrong to do so (both as a public policy and under the law embodied in the SHRA). Receiverships are too destructive and too expensive.

[21] Thornhill Green Co-op perceived this Regulation as being directed specifically at them and as, in effect, a penalty for good performance. This embittered their relationship with York Region and this may be a significant factor in the approach York Region has taken to the co-op.

The measures recommended by CHF Canada would have the effect of encouraging better ways of resolving problems, while protecting the rights of both Service Managers and co-ops in those cases where conflict arises.

Respectfully submitted,

Bruce Lewis

ATTACHMENT A

RECENT LITIGATION RELATING TO SHRA RECEIVERSHIPS

Labourview Co-Operative Homes Inc. v. Chatham-Kent (Municipality)

March 26, 2007	Counsel argue Jurisdiction Motion before the Superior Court – Commercial List - Court finds Application properly done for Judicial Review before Divisional Court.
May 28, 2007	Counsel argue Application for Judicial Review before the Divisional Court.
Aug. 13, 2007	Divisional Court releases decision on Application for Judicial Review: see [2007] O.J. No. 3166 (QL).
Nov. 14, 2008	Divisional Court releases decision on costs of Application (decision based on "lengthy submissions presented by both sides"): see [2008] O.J. No. 4644 (QL); 2008 CanLII 60166 (ON S.C.D.C.).

Thornhill Green Co-operative Homes Inc. and Co-operative Housing Federation of Canada v. Regional Municipality of York

Jul. 18, 2008	Counsel argue Application for an Interlocutory Injunction restraining sale pending Judicial Review at the Superior Court – Commercial List.
Aug 29, 2008	Superior Court – Commercial List (sitting as a judge of the Divisional Court) releases decision dismissing Injunction Application: see [2008] O.J. No. 3343 (QL).
Oct. 10, 2008	Dismissal of Injunction Motion appealed to Divisional Court; withdrawn on consent with Judicial Review scheduled for December 5, 2008.
Oct. 23, 2008 & Nov. 5, 2008	Counsel argue Motion to Sell Co-op, and Cross-Motion to Vary the Receiver/Manager's Powers of Sale at the Superior Court – Commercial List.
Dec. 5, 2008	Counsel argue Application for Judicial Review of the Region's decision to sell the Co-op before the Divisional Court.
Feb. 11, 2009	Divisional Court releases decision on Judicial Review: [2009] O.J. No. 696 (QL).

March, April 2009	Counsel provide further written submissions re Motion to Sell Co-op, and the Cross-Motion to Vary the Receiver/Manager's Powers of Sale at the Superior Court.
Jun. 19, 2009	Court of Appeal dismisses Application for Leave to Appeal the decision of the Divisional Court.
Jul. 16, 2009	Superior Court – Commercial List releases decision on the Motion for Sale, and the Cross-Motion to Vary the Receiver/Manager's Powers of Sale; Court grants Sale Motion but dismisses Cross-Motion: see [2009] O.J. No. 3036 (QL); 2009 CanLII 37907 (ON S.C.)
Jul. 16, 2009	Superior Court – Commercial List releases decision on costs of Application for an Interlocutory Injunction restraining sale of the Co-op: see [2009] O.J. No. 3035 (QL).
Jan. 12, 2010	Counsel argue Appeal of Motion for Sale at the Court of Appeal. *Decision is currently under reserve.*

The Corporation of the County of Simcoe v. Matthew Co-operative Housing Inc. and Co-operative Housing Federation of Canada

Apr. 3, 2007	Court extends receivership/management on an interim basis;
May 22, 2007	adjourns appointment motion to June 8, 2007.
Jun. 8, 2007	Superior Court appoints Receiver/Manager after contested hearing; Superior Court makes second order against the County.
Nov. 6, 2009	Counsel make uncontested Motion to add Co-operative Housing Federation of Canada on the Motion for Sale (granted).
Nov. 16, 2009	Counsel make uncontested Motion for Leave for Judicial Review and Motion for Leave to have Judicial Review heard before a single judge of the Superior Court (granted).
Apr. 15&16, 2010	*Scheduled to be heard:* Motion for Sale and Application for Judicial Review.

ATTACHMENT B

DEVELOPMENT OF RECEIVERSHIP PROVISIONS

IN CO-OP HOUSING REGULATION

1. The receivership provisions in the SHRA are rooted in receivership provisions in the Operating Agreement used by CMHC in 1989. These were reflected in the provincial Project Operating Agreements, and finally, found their way into the SHRA. However, as the receivership provisions made their way from federal agreement to provincial agreement to statute, the function of receiverships fundamentally changed.

2. Strange as it may seem, the fundamental change did not result from a revamping of the substantive provisions relating to receivership. It arose entirely from a procedural adjustment.

(a) Under the CMHC Operating Agreement a receiver that was appointed by CMHC had a term of *eight days* unless confirmed by court order.

(b) Under the provincial co-op Project Operating Agreement a receiver that was appointed by the Minister had a term of *sixty days* unless confirmed by court order.

(c) Under the SHRA a receiver that is appointed by a Service Manager has a term of *one year* before a court order is necessary.

3. A one-year private receivership appointment is quite different in character from an eight-day appointment and has created a different dynamic leading to far more receiverships, the use of receiverships for inappropriate purposes and therefore significant unjustified costs as well as significant damage to co-op operations from long-term receiverships.

4. For at least a one-year period co-ops lose their self-government. By the end of a year the existence of a receivership and the prevalent practices of receivers have effectively destroyed the co-op's community spirit and practices, its ethos and initiative and have severely limited its ability to govern itself.

REGULATORY TECHNIQUE

5. Non-profit housing co-operatives were developed under federal programmes administered by Canada Mortgage and Housing Corporation from the early 1970s until about 1992 and under Ontario provincial programs from 1986 until 1995.

6. **CMHC Operating Agreement:** The main regulatory instrument used by CMHC was the Operating Agreement signed between each housing provider and CMHC. When the Province of Ontario started to fund co-ops and other non-profit housing providers, it also used an Operating Agreement to define the responsibilities and

rights of both the housing provider and the province as represented by what is now the Ministry of Municipal Affairs and Housing.

7. **Ontario Project Operating Agreement:** A standard form of provincial Project Operating Agreement for co-ops was finalized in about May 1993 after consultation with the co-op housing sector. A standard form for non-profit housing providers that were not co-ops was completed about a year and a half later. The wording is different in many areas because of the differences in the treatment of the two types of housing under the programs and because of a very laudable process of redrafting the document using plain language. However, there was no major difference on any of the matters addressed in this paper.

8. **SHRA:** Starting in 2001 provincially funded co-ops were downloaded to municipalities under the SHRA. As of the time of download, the Operating Agreement applicable to each project ceased to be effective and the housing provider and project were then regulated under the SHRA.

DEVELOPMENT OF REGULATORY TECHNIQUES

9. As may be expected, the persons responsible for developing the Operating Agreements and the SHRA took account of past experience when they did their work. The statute and the agreements show the use of similar wording and techniques with respect to similar problems. The influence of the earlier document on the later one can be seen as can differences in the technique used to address various issues.

10. I had the good fortune to represent the Co-operative Housing Federation of Canada with respect to the development of the last CMHC Operating Agreement, the provincial co-op Operating Agreement and submissions on the Bill that led to the SHRA. Therefore, I can confirm some elements of the development of each system based on direct experience.

CMHC RECEIVERSHIP PROVISIONS

11. Prior to 1989, none of the federal program Operating Agreements used receivership as an element of social housing regulation. The technique was first inserted in the Operating Agreement used by CMHC for the Index-Linked Mortgage Program (ILM), which was the last federal co-operative housing program.

12. **Receivership to prevent unauthorized sale:** The receivership concept was inserted in the Operating Agreement by CMHC to deal with a perceived problem of selling the assets of a non-profit project before CMHC could intervene. CMHC's lawyer explained that they were concerned that CMHC might not have sufficient authority to stop an unauthorized sale of a social housing project. This had apparently been done by a non-profit project (not a co-op) in Québec and as I understand it CMHC was unable to stop it by invoking the Operating Agreement after the sale was completed. Presumably, if a receiver could be quickly appointed, then CMHC could get control of the situation before a sale actually took place.

13. **Eight days for court confirmation:** Because receivership appointment was solely an emergency measure, the CMHC ILM Operating Agreement provided that a

receivership had to be confirmed by the courts within *eight days.* Presumably within that time CMHC would have developed its legal case so as to stop any proposed sale with an appropriate court order.

14. **Long-term solution for federal projects:** Although CMHC felt that receivership appointment could provide assistance in an emergency, it was not satisfied that this adequately protected the public interest. Therefore, in 1992 the *National Housing Act* was amended to explicitly prevent resale without CMHC consent. This section is as follows:

> **Condition re sale, etc.**
>
> **97.** (1) It is a condition of every agreement respecting the operation of a housing project to which the Corporation is a party that the housing project or any part thereof must not, during the term of the agreement and any extension thereof, be
>
> (*a*) sold or otherwise disposed of,
>
> (*b*) leased for a term of more than three years, or
>
> (*c*) charged, in any manner whatever, for the purpose of securing payment of a debt or performance of any obligation,
>
> without the consent of the Corporation, except in such circumstances as are prescribed by regulation.
>
> **Other conditions allowed**
>
> (2) For greater certainty, the condition set out in subsection (1) is in addition to and not in derogation of any other condition required or permitted by this Act.
>
> **Registration of agreement**
>
> (3) Subject to the payment of any applicable fees, the Corporation may, in accordance with the ordinary procedure for registering documents that may affect land or interests in land, cause any agreement respecting the operation of a housing project to which the Corporation is a party to be registered on the title of the housing project.
>
> **Notice**
>
> (4) Registration of any agreement referred to in subsection (3) constitutes notice of the agreement to the same extent as does the registration of any other instrument that affects land or interests in land.

15. CMHC's lawyers were quite explicit in telling me that this amendment was because of their uncertainty about the effectiveness of the techniques for resale control in the ILM Operating Agreement and their absence from earlier Operating Agreements.

16. It is noteworthy that the *National Housing Act* does not directly require CMHC consent, but makes the requirement a deemed term of the Operating Agreement. I believe this is for constitutional reasons since the federal government does not have the same power over property rights as the provincial governments.

PROVINCIAL PROJECT OPERATING AGREEMENT RECEIVERSHIP PROVISIONS

17. **Sixty days for court confirmation:** In the provincial co-operative (and non-profit) Project Operating Agreements used by the Ministry of Municipal Affairs and Housing a receiver that was appointed by the Minister had a term of *sixty days* unless confirmed by court order.

18. The purpose of receivership was largely the same as in the ILM Operating Agreement. There was no applicable provincial legislation relating to sale of a co-op or non-profit project in 1993 when the Ontario Operating Agreements were finalized. The eight-day private appointment was lengthened to sixty days. Although this period was longer, it was clear that receivers would still be used only in emergency situations.

SHRA RECEIVERSHIP PROVISIONS

19. **One year for court confirmation**: According to the SHRA, a Service Manager may appoint a receiver for a term of *one year* before a court order is necessary. I am not aware of any public discussion of the policy basis of this extension of the time period, though the notion of an emergency is still present as a requirement for appointing a receiver under subsection 120(1) of the SHRA.

20. **Receivership not needed to prevent unauthorized sale:** Sections 95 and 96 of the SHRA deal directly with unauthorized sale of housing projects. The technique of requiring consent and registration of under the Land Registry system is the same as that used in section 97 of the *National Housing Act.* Since there is no constitutional issue, section 95 of the SHRA directly prohibits unauthorized sales, rather than making them a deemed term of an agreement. In a legal sense the wording of the SHRA and the constitutional position of the province solve any weakness there may be in enforcing the same policy under the *National Housing Act*.

21. **The purpose of receivership under the SHRA:** The original purpose for receiverships in social housing regulation has, therefore, disappeared from the SHRA, but the concept of receivership has remained and been strengthened by the one-year private appointment provision and by other provisions explained in this Attachment. This raises the questions of the purpose that the drafters of the SHRA had in mind for receivership and the actual use of receiverships under the SHRA.

22. The rules governing the private appointment of a receiver under the SHRA are to be covered in another part of CHF Canada's Paper so I will not address them in detail here. But it is very important to review the requirements of subsection 120(1) of the SHRA.

23. The introductory language directly forbids a Service Manager to appoint a receiver privately or to seek appointment through the courts unless one of the next three clauses applies. The three clauses all deal with situations that are emergencies or of an extremely urgent nature:

(a) **Financial or other event:** Some financial or other event has occurred and as a result the housing provider will be unable to pay its debts as they become due. There is no specific guidance as to the type of event, but it would have to mean something like a major uninsured fire, a significant financial fraud or something like that.

I know of no situation where any such event has ever occurred.

(b) **Significant physical deterioration or danger to health and safety:** This clause does not require a single event. However, the urgent nature of it is clear in the reference to danger to health and safety. In the context I think it is fair to say that the physical deterioration must be so significant that it is similar in seriousness to something that would cause danger to health and safety.

In addition the clause requires the situation to have been caused by operation by the housing provider. Thus something resulting from inherent defect, accident, depreciation or similar cause would not be within this clause.

(c) **Misuse of assets, including for personal gain:** This clause is the closest to the original purpose of receivership in the ILM and provincial Operating Agreements. It is dealing with wrongdoing that is presumably not prevented by sections 95 and 96.

24. Thus, it appears that with the original purpose for receivership gone, the drafters of the SHRA were striving for some analogous purpose that would justify retention of the receivership concept. They seemed to have considered a variety of possibly urgent situations and listed them in subsection 120(1). Whatever one may conclude about the list, it is important to note the existence of the list and therefore the basic approach that receivership is an extraordinary remedy to be used only in situations of great urgency.

25. **Use of receivership under the SHRA:** I have been advised that there have been far more receiverships under the SHRA than under the CMHC ILM or provincial Operating Agreements. I have personally reviewed available documentation on some of them and in some situations where receivership was being considered by a Service Manager. Based on this review and the information I have been given, I have come to the following conclusions:

(a) **Receiverships do not comply with SHRA:** All receiverships of which I have knowledge have failed to meet the requirements of subsection 120(1) of the SHRA.

(b) **Financial or other event:** An accumulated deficit has been involved in many receiverships. However, I have heard of no case where an accumulated deficit has been caused by a "financial event". Service Managers seem to ignore this requirement and focus instead on whether the housing provider can pay its debts as they become due without additional Service Manager support.

(c) It is not surprising that a significant number of projects require additional Service Manager support, but that does not justify appointment of a receiver under this subsection. In fact, Ontario Regulation 339/01, section 34, which prescribes possible terms of additional subsidy, suggests greater involvement of Service Managers in management of a housing project, but makes no suggestion of a receivership.

(d) **Significant physical deterioration or danger to health and safety:** This clause is involved in many receiverships. Apparently, there is a dynamic where the need to invest additional funds in the physical housing stock leads

Service Managers to review the governance of housing projects although general advancing systems would prevent any abuse of the monies that are invested.

(e) None of the engineers' reports or other materials I reviewed showed any significant danger to health and safety, except one case where I understand the Service Manager was not considering receivership.

(f) Many of these reports showed significant physical problems (which might be called deterioration), but I was struck by the fact that these problems never "resulted" from faulty operation of the housing project. Many of the reports evaluated the maintenance and operation of the building systems over the years and some of them were critical of aspects of that. However, it was clear that only a small proportion of the deterioration or the costs of renovation were attributable to faulty operation and also that some inadequacies in operation were inevitable.

(g) **Misuse of assets:** I have heard of no case where misuse of assets under clause 120(1)(c) has even been alleged.

26. **Lack of judicial consideration:** The legal analysis of subsection 120(1) of the SHRA has not been considered by the courts. Subsection 120(1) was quoted by the Divisional Court in *Labourview Co-operative Homes Inc.* v. *Chatham-Kent (Municipality***)** [2007] O.J. No. 3166 (QL) at paragraph 10 as background to the SHRA, but the Court did not make any decision on it since it found that there had been no triggering event and therefore it did not need to consider whether subsection 120(1) might have applied.

27. **Conclusion on subsection 120(1):** In my view the reason for the increase in receiverships under the SHRA does not arise from the expanded conditions for appointing a receiver, since even the limitations in subsection 120(1) have not been met. The reasons why Service Managers have more often resorted to receivership do not lie in the wording of this part of the SHRA.

EXPANDED RECEIVERSHIP

28. The SHRA system expands a receiver's powers beyond what was in the CMHC ILM Operating Agreement or the Ontario Project Operating Agreement. The most crucial element of this is in Ontario Regulation 368/01, so it did not receive even the same level of outside consultation as the SHRA itself.

29. **Power of sale:** Under the CMHC ILM Operating Agreement there is no power of sale.

(a) The specific powers of a receiver can be amplified by "such as CMHC may in good faith stipulate" (clause 21(3)(a)(v)).

30. Under the provincial co-op Project Operating Agreement there was no power of sale.

31. Subsection 18(4) of OR 368/01 to the SHRA contains a standard list of receivership powers. This list includes a power of sale.

(a) The receiver's powers can be subject to "conditions and restrictions" imposed by the Service Manager under subsection 18(5) of OR 368/01 and subsection 120(2) of the *SHRA*. In other words, the Service Manager would have to take a special initiative to restrict the power of sale and it is not clear if it could completely remove the power of sale.

32. I am not aware of any reason within the SHRA why the policy behind power of sale might have changed. I suspect it was more likely a response to routine lists in commercial agreements, which of course have a different purpose from the SHRA.

33. **Decision to appoint a receiver:** Under the CMHC ILM Operating Agreement there is no special process for CMHC making the decision to appoint a receiver. (The receivership of course only lasted for eight days.)

34. Under the provincial co-op Project Operating Agreements the appointment of a receiver required a decision of the Minister personally, which decision could not be delegated to any officer, employee or agent of the Ministry (clause 15.2(1)(j)).

(a) Such determination by the Ministry may have been within clause 2.3(2) of the Project Operating Agreement, in which case it would have to be reasonable, which would effectively make it subject to outside tests on a contractual basis.

35. The SHRA does not contain any special reference to decision-making about receivership by the Service Manager and the matter has not been directly addressed by the courts.

(a) The Divisional Court explained the decision-making process of one Service Manager in *Labourview Co-operative Homes Inc.* v. *Chatham-Kent (Municipality***)** [2007] O.J. No. 3166 (QL) at paragraph 7.[22] It was apparent that in that case the decision was made by one employee of the Service Manager with limited review by her superiors and the Ministry of Municipal Affairs and Housing, none of whom apparently noticed a major mathematical error in the factual background.

(b) The Divisional Court may have been questioning this process at the end of paragraph 7 where it said:

> In this application, no issue was raised as to the authority of Ms. Wilkins, so that we can take it, for the purposes here, that she was duly and properly authorized to do what she did.

36. A major policy change is involved in going from a decision by the Minister to a decision by a single employee of a municipality—particularly when the receivership can last far longer without outside review and when the consequences

[22] See Attachment C.

of the receivership can be far more severe due to the power of sale. I am not aware of any policy reason behind this change.

ENDING OF RECEIVERSHIP

37. The purpose of a receivership in normal commercial situations is to get in the assets of a debtor, sell them and distribute the proceeds to the creditors. It has never been suggested that this is the purpose of a receiver under the SHRA. I understand that a common feature of all receiverships has been that the housing project should continue to operate as social housing under the SHRA.

38. The analysis of subsection 120(1) earlier in this paper shows that the purpose of a receivership under the SHRA is to permit the Service Manager to deal with emergency or very urgent situations, although, as suggested earlier, it would appear to be unnecessary for this purpose and it has not been used for this purpose.

39. The power of sale, which is normally used to dispose of assets, has instead been suggested to permit takeover by the Service Manager without the normal sale process and without dealing with the debts of the housing provider other than by assumption.

40. Therefore, it seems clear that a purpose is being developed for receivership under the SHRA that amounts to termination of the housing provider and operation of the housing project by the municipality. In this scenario, the receivership would end when the housing provider's assets become the property of the Service Manager or a related body.

41. **CMHC ILM Operating Agreement:** The CMHC ILM Operating Agreement specifically contemplated that the receivership would end and the project would be turned back to member control (clause 21(3)(a)(vii)).

42. **Ontario Project Operating Agreement:** The Ontario Project Operating Agreement specifically stated "it is the intention of the Ministry to reinstate the Co-op whenever feasible, as determined by the Ministry, as a self-governed entity retaining substantial control of the management of the Project within sixty (60) days" (clause 15.2(4)(b)(ii)). Such determination by the Ministry would have to be reasonable under clause 2.3(2) of the Project Operating Agreement.

43. **Method of determination under SHRA:** The decision-making process on transfer of ownership of co-ops to Service Managers is to be covered in another part of CHF Canada's Paper so I will not address it in detail here. It is noteworthy, however, that the final decision is apparently to be made by the courts and that they will do this based on assessments and recommendations of receivers, which of course, normally advise the courts on sale issues.

44. Thus there has been a most peculiar development of the evaluation of co-op self-governance under provincial programs.

(a) Under the Project Operating Agreements such evaluation would have been done by experienced members of the staff of the Ministry of Municipal Affairs and Housing with probable involvement of the Minister.

(b) Under the SHRA and the developing court cases the evaluation is to be done by a receiver, although

(i) A receiver will have limited skill and experience in co-ops or community development,

(ii) A receiver's normal function is to arrange for sales of property,

(iii) A receiver will feel some need for self-justification after a couple of years of administering a project and in its own eyes being unsuccessful in restoring co-op governance capacity, and

(iv) A receiver will by such an evaluation create the "happy result"[23] that the Service Manager which appointed and paid it, and may appoint it in other situations, will have acquired the property.

CONCLUSION

45. Both the federal ILM Operating Agreement and the Ontario Project Operating Agreement contemplated receivership to deal with emergency situations involving sale of a housing project. This function is no longer needed under the SHRA, but the SHRA retained the receivership remedy.

46. The SHRA somewhat broadened the circumstances in which receivers could be used. The powers of a receiver have also been extended under the SHRA due to the inclusion of a power of sale and the omission of any explicit statement that the co-op is to be restored when appropriate.

47. The main change in receivership provisions has been in the process: the weakening of the internal review processes prior to appointment and the extension of the time required before there is a court review.

48. Thus, although the SHRA contains protections for housing providers, the process works against their using the protections until it is effectively too late. However, now that the consequences of failure of housing providers to aggressively defend their rights against Service Managers have become apparent, it may be expected that there will be more litigation dealing with the prerequisites for receivership appointment.

49. This may or may not lead to less use of receivership by Service Managers. Certainly, the current situation emphasizes the need for practices to be developed to deal with perceived problems that are less punitive than the use of receiverships.

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[23] (*Re The Regional Municipality of York* v. *Thornhill Green Co-operative Homes Inc.* [2009] O.J. No. 696 (QL) Divisional Court, paragraph 50).

ATTACHMENT C

MATHEMATICAL ERROR IN APPOINTMENT OF RECEIVER FOR LABOURVIEW CO-OPERATIVE HOMES

Note: The quotations below are from the Divisional Court decision reported as *Labourview Co-Operative Homes Inc.* v. *Chatham-Kent (Municipality***)** [2007] O.J. No. 3166 (QL). See Attachment A for other citations of the decision.

In the Labourview case the co-op successfully applied to the courts to quash a receivership appointment.

One of the elements in the decision was that the Divisional Court found that a substantial error had been made in connection with the receivership appointment:

> **12** Further, Ms. Wilkins referred to the deficit as the total of $163,222.00 plus the capital reserve deficiency of $146,881.00. In fact these two numbers are simply the two sides of a double-entry bookkeeping system so that the deficit would be only $163,222.00. In paragraph six of Ms. Wilkins' affidavit of April 4, 2007 (Tab 47, Applicants' Compendium) she admits that she simply made a mistake in that calculation.

On the Service Manager's decision-making process, the Divisional Court stated:

> **7** Ms. Wilkins was the decision-maker on behalf of Chatham-Kent re the appointment of a receiver. She had detailed in her cross-examination (Tab 32, Applicant's Compendium) that she had worked some 15 years for the municipality in various positions, and at the relevant time had the title of Director of Social Housing. That was regarded as a part of the Health and Family Services Department of the municipality and she reported to the general manager of that department. She had been appointed as an administrator under the *SHRA* by Chatham-Kent. When notices of triggering events were issued by Ms. Wilkins she indicated she had consulted with her supervisor and advised the municipal council, but in her mind the responsibility for the decisions rested with her, although subject to the approval of her manager, with municipal council being advised for information only. In this application, no issue was raised as to the authority of Ms. Wilkins, so that we can take it, for the purposes here, that she was duly and properly authorized to do what she did

Thus it is clear that a single person basically made the decision with limited review from other officials and elected representatives.

In this case Ms Wilkins made a mathematical or conceptual error. It is not possible to determine how significant this mistake was in the context of the decision to appoint a receiver.

It seems likely that the approval by the general manager of the Health and Family Services Department did not amount to checking the calculations. Probably the report to the municipal council for information did not lead to a check of the figures by any of the

councillors or their staffs. Also, in this case the approval of the Ministry of Municipal Affairs and Housing was obtained to the appointment. We do not know what information was given to the Ministry or what degree of checking it might have done on the calculations.

ATTACHMENT D

EXAMPLE OF IMPRUDENT RELIANCE ON

SERVICE MANAGER AND RECEIVER

Note: The quotations below are from an affidavit that is part of the record in *Thornhill Green Co-operative Homes Inc.* v. *Regional Municipality of York.* See Attachment A for citations.

This Attachment describes one of many examples of why it is not prudent for co-ops to rely on statements by a Service Manager or receiver and how their conduct as public officials and officers of the court betrays a very inappropriate attitude.

Misleading statements and practices appear to be the normal procedure on the part of receivers and Service Managers. In the case of Thornhill Green this behaviour is particularly well documented, but it is not unusual.

This excerpt shows the following all-too-common fact situations:

(a) Minimizing the character of legal steps taken by Service Manager or receiver so as to minimize the possibility of action by the co-op to protect its rights (paragraphs 55, 58 and 62).

(b) Withholding information from the co-op board or members (paragraphs 57 and 58).

(c) Incorrect statements about the co-op board's legal position (paragraph 58) when convenient, combined with relying on the board as having legal authority when that is convenient (paragraphs 54 and 55).

(d) No suggestion that legal advice was needed, but assurances to the contrary paragraphs 55 and 58).

(e) Actual management of the property by the same persons who had managed on behalf of the co-op, showing how little real contribution there was from the receiver and how little mismanagement could actually be shown against the co-op. (paragraph 57).

The following is quoted from the Affidavit of Susan F. J. Daniel, who was President of Thornhill Green Co-op at the time a receiver was appointed.

1. I am a teacher with a Masters in Education in psychology and sociology. I have taught drama and English for many years at the high school level, but have also been involved in many aspects of community and educational theatre. I served for fifteen years as Chair of the non-profit organization Prologue to the Performing Arts, which acts as a liaison between boards of education and over 30 arts education performance companies. I have served as Toronto Regional Co-ordinator for the Sears Ontario Drama Festival for five years. In 1999, I was named Ontario Teacher of the Year by OISE/Toronto Sun, and in 2001, Theatre Ontario awarded me its Michael Spence Award for

contributions to theatre in education. I am currently Academic Director of a private school in Thornhill. …

54. On about May 30, 2007, I was served with court materials from the Region's legal counsel regarding continuation of the Receivership beyond one year.

55. A day or so before I was served, I received a telephone call from the Region's Housing Director's office advising that I was going to be served with some routine court documents relating to the extension of the Receivership. When I received the materials I read the cover letter and was left with the impression that the documents were indeed a routine legal requirement.

56. I recalled the statements by Ms. Patterson [Director, Housing & Residential Services, Region of York] and the Receiver's representatives from the previous July that the Receivership would extend for two or three years, so receiving some form of legal documents for extension was not a surprise to me.

57. There was a short section which I didn't remember seeing in the original information given us the previous year, but the Board had not been provided with copies of that document to keep. I went to the Co-op's management office, where Precision (the Co-op's former management company) was now working under contract to the Receiver rather than to the Co-op and with the Board, and asked the Property Manager if there was a copy of the original that I could see, and explained why I wanted to see it.

58. I was told that there was no copy there, only with the Receiver and York Region, because it was a legal document between them, and that there were no real changes between the two as far as she knew. She said that I had received this information now as a legal formality which required no action from me or from the Board, which in any event had no legal standing anymore.

59. Although one of the sections I saw in the renewal application said that the Receiver had the right to buy or sell Co-op property or equipment, given the above, I had no way of knowing that this section was not in the original, and accepted the Property Manager's statements as factual.

60. I had no reason, given our previous relationship and discussions with the Receiver and Region representatives, the phone call from the York Region housing office, and the cover letter, to believe that this renewal in court could result in, or was meant to facilitate, the sale of the Co-op that is now before the Court. The thought of the sale of the Co-op did not even occur to me at that time.

61. After reviewing the materials, I continued to believe the assurance of Ms. Patterson and the MPL representatives at the July 19, 2006 meeting that the Receivership was for the good of the Co-op.

62. I accepted all the information I received to mean that the legal papers extending the Receivership (that is, asking for a court appointed receiver) were just a technicality, with no substantive change.

The statements in this part of the affidavit were not challenged by the receiver in the course of the litigation.

In particular, note the assurance by the receiver's personnel that nothing need be done in consequence of receiving service of the documents. In actuality, the fact that the co-op indeed did nothing in consequence of receiving service of these documents was seized upon by the receiver in the subsequent court proceedings. This fact was ultimately accepted by the judge as significantly limiting the co-op's rights.