COURT FILE NO.: 493/08
DATE: 20090211

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. MACDONALD, J. WILSON and BELLAMY JJ.

B E T W E E N:	)	
	)	
CO-OPERATIVE HOUSING FEDERATION OF CANADA AND THORNHILL GREEN CO-OPERATIVE HOMES INC.	)	*Murray Klippenstein, Basil Alexander* and *Frank Bennett,* for the Applicants
Applicants	)	
- and -	)	
THE REGIONAL MUNICIPALITY OF YORK AND HOUSING YORK INC.	)	*Douglas O. Smith* and *Roger Jaipargas,* for the Respondent, Regional Municipality of York
	)	*Dan Kuznyk,* for the Respondents, Housing York Inc.
Respondents	)	
MINTZ & PARTNERS LIMITED	)	
Receiver	)	*Mervyn Abramovitz,* for the Receiver

HEARD AT TORONTO:
December 5, 2008

REASONS FOR DECISION

THE COURT:

OVERVIEW

[1] Thornhill Green Co-operative Homes Inc. (Thornhill Green, the Property, the Co-operative or, for convenience, the Co-op) and the Co-operative Housing Federation of Canada (CHF Canada) seek to quash the decisions and actions of the Regional Municipality of York (the Region or the Service Manager) with respect to the proposed sale of the Co-op to Housing York Inc.(HYI), the Region's social housing arm.

[2] The Region, exercising its statutory role as a Service Manager under the *Social Housing Reform Act, 2000*, S.O. 2000, c. 27 (the SHRA or the Act), appointed a Receiver to oversee necessary renovations when the Co-op was experiencing financial difficulties. Later, this SHRA receivership was converted into an Appointment Order through the Superior Court of Justice, and continues today.

[3] Without notifying the Board of Directors of Thornhill Green or its members, the Region consented to the sale of Thornhill Green, obtained the consent of the Minister of Housing, and supported the Receiver's motion before the Superior Court of Justice seeking an Order to sell the Co-op. The first notice Thornhill Green ever received of any intention to sell the Co-op was the Receiver's application before the Superior Court requesting the sale.

[4] The applicants submit that the Region's decision to sell the Co-op and the process which resulted in that decision were undertaken without notice to either the Co-op, its members or its Board of Directors, in breach of the Region's duty of procedural fairness.

ISSUES

[5] Thornhill Green seeks judicial review of the Region's decision to "purchase and consent" to the sale of Thornhill Green's assets and liabilities pursuant to s. 95(1) of the SHRA which reads as follows:

> 95. (1) Subject to subsections (2) and (2.1), a housing provider shall not, without the prior written consent of the Service Manager and the Minister, transfer, lease or otherwise dispose of or offer, list, advertise or hold out for transfer, lease or other disposal, a housing project or any part of it, including any chattels in it.

[6] The following questions must be answered:

(i) is the Region's decision to consent to and recommend a sale of the Co-op reviewable by this Court pursuant to the *Judicial Review Procedures Act*, R.S.O. 1990, c. J.1 (JRPA) or the common law?

(ii) if so, was there a breach of procedural fairness when the Region provided no notice to the Co-op of its intentions nor any opportunity to respond?

(iii) if there is a breach, what is the appropriate remedy?

[7] The applicants seek an Order quashing and setting aside the decisions and actions of the Region which resulted in the Region attempting to acquire the assets of the Co-op. They also wish to be given a meaningful opportunity to preserve the future of Thornhill Green as a Co-op.

[8] This is not a judicial review of the Region's decision to appoint a Receiver under s. 116(1)5 of the SHRA, nor is it a judicial review of the appointment by Pepall J. of the Receiver pursuant to s. 116(1)6 of the SHRA and s.101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43.

THE PARTIES

[9] Thornhill Green is a corporation without share capital incorporated under the *Co-operative Corporations Act*, R.S.O. 1990, c. 35 (the CCA). As a non-profit housing co-operative, it is subject to specific provisions of the CCA. As a result of providing social housing, it is also designated as a "housing provider" under the SHRA and is governed by that statute. This Co-op is required to have a target of forty-one units, for which it charges lower rates tied to a household's lower income, commonly referred to as "rent-geared-to-income."

[10] CHF Canada is a federal non-profit co-operative whose objects include ensuring the growth, stability and independence of the non-profit co-operative housing movement in Canada. It has an advocacy function and a substantial member-support function which involves providing management advice regarding co-op operations, community concerns, legal issues, and training and education for co-ops and their staff, as well as providing specialized support and advice for co-ops in difficulty. Membership in CHF Canada is voluntary. Thornhill Green is a member of CHF Canada.

[11] Under the SHRA, the Regional Municipality of York is a Consolidated Municipal Service Manager and is responsible for funding and for administering prescribed social housing programs and projects pursuant to the SHRA.

[12] Housing York Inc. is a wholly-owned corporation of the Region and is the largest social housing provider in the Region, managing 2000 units in thirty separate buildings. Under the SHRA, it too is a "housing provider." While it is a respondent in this proceeding, it took no position on the matter.

POSITION OF THE PARTIES

[13] In February 2008, the Region consented pursuant to section 95(1) of the SHRA to sell the assets of the Co-op to its own wholly-owned corporation, HYI. According to the applicants, the decision of the Service Manager to consent to the sale was kept a secret. According to the Region, the decision to sell was dealt with confidentially. Whatever characterization one ascribes

to the process, what is clear is that the Region never provided any notice of its decision to the Board or to the Co-op members.

[14] Thornhill Green alleges that the Region improperly and with secrecy did not provide notice of the intended sale and did not either consult with or provide an opportunity to the members of Thornhill Green to address the issue of a sale.

[15] The Region's position is that there is nothing in either the SHRA or the Appointment Order of the Superior Court that would require notice of the proposed sale to be given to members of Thornhill Green before the service of the Receiver's motion, nor is there anything in that Order that would require the Region or the Receiver to consult with Thornhill Green members before the Receiver could bring a motion to approve the sale. Further, even if such an obligation were to exist, given that the Receiver is a court-appointed officer, any such obligation would be the Receiver's, not the Region's. Finally, the Region notes that Council's recommendation acknowledged that the court's approval is required for a sale, thereby necessitating a full hearing before the Superior Court of Justice where Thornhill Green residents would have an opportunity to file materials and make any submissions they deem appropriate.

FACTUAL BACKGROUND

Thornhill Green as a Co-op and housing provider

[16] Non-profit housing co-operatives in Ontario are entities governed by the *Co-operative Corporations Act*. Thornhill Green is also a "housing provider" under the SHRA. Co-ops are operated by their own members for their mutual benefit in accordance with the principles of co-operation. A board of directors is elected by and from among the membership. In almost all cases, the members reside in the housing units owned or leased by the Co-op. Each member is entitled to participate in members' meetings and is entitled to a vote with respect to directors, by-laws and other matters.

[17] Thornhill Green consists of 101 townhouses on 6.4 acres of land near Yonge Street in Thornhill, Ontario (the Property). The buildings, constructed in 1966, were initially operated as traditional rental properties. This Co-op is unique in York Region because, unlike most co-ops, it came into being by the purchase of existing buildings that were already twenty-six years old, rather than by construction of new facilities. The age of the property set the stage for the financial issues faced by the Co-op, due to the need to renovate and repair the older buildings.

[18] Thornhill Green purchased and converted the Property into a non-profit housing co-operative. The Property was acquired with public or borrowed funds provided by the province of Ontario, not with any funds of any of the occupants of Thornhill Green. The Property is the only major asset of the Co-op.

[19] The articles of incorporation specifically prohibit members from personally benefiting from any disposition of the assets of Thornhill Green. The Co-op is to have a charitable purpose and, upon dissolution, its assets are to be distributed to a charity or an organization with a charitable purpose. This is consistent with Ontario's requirement that non-profit housing co-operatives be corporations without share capital.

[20] As a result, none of the members of Thornhill Green own any shares or have other interest in the assets of the Co-op. Any equity accumulated through resident payments and capital appreciation is the property of the Co-operative corporation and is to be used for the benefit of all present and future members of the Co-operative.

Events leading to receivership

[21] Thornhill Green is required to comply with requirements of the SHRA and its Regulations. Section 7(1) of Ontario Regulation 339 requires a housing provider to "ensure that its housing projects are well-managed, are maintained in a satisfactory state of repair and are fit for occupancy."

[22] In late 2004, Thornhill Green advised the Region that its housing project required substantial capital repair. After undertaking independent evaluations to ascertain the extent of the work required, the Region determined that Thornhill Green required approximately $2.1 million to address the identified capital repair requirements.

[23] In July 2005, Thornhill Green advised the Region that it was experiencing financial difficulty. The Region met with the Co-op's property management company and made suggestions with respect to addressing some of the problems. In October 2005, the Region provided emergency funding of up to $148,000 to address Thornhill Green's health and safety requirements and made further suggestions with respect to operational issues that needed to be addressed.

[24] In early February 2006, the Ministry of Municipal Affairs and Housing (the Ministry) informed the Region that Thornhill Green's mortgage renewal was in jeopardy because the municipal property taxes had not been paid. To assist, the Region provided the Co-op with a subsidy advance of $32,249.60 to ensure payment of the outstanding 2005 property taxes, but on condition that Thornhill Green provide detailed financial statements to the Region.

[25] The financial statements, when provided, raised concerns with the Region. The Region gave notice to the Minister of Housing that Thornhill Green was a "project in difficulty" whose mortgage would once again be at risk because it could not pay its 2006 property tax installments. As required under the Act, a copy of this letter was provided to the Co-op as notification of its status as a project in difficulty.

[26] Under the SHRA, the Service Manager may exercise certain remedies if a triggering event occurs. On March 9, 2006, the Region provided Thornhill Green with a "notice of triggering events." The Region identified three specific triggering events and specified the remedial actions that Thornhill Green was required to make by May 12, 2006. The triggering events were as follows:

1. Thornhill Green, in its capacity as a housing provider, was unable to meet its obligations as they came due: SHRA, s. 115, 8. Reference was made to the problems with respect to the 2005 and 2006 property taxes.

2. Thornhill Green, in its capacity as a housing provider, had incurred an accumulated deficit that was material and excessive, having regard to normal practices of similar housing providers: SHRA, s. 115, 10. Reference was made to accumulated deficits indicated, and inconsistent and unreconciled financial statements.

3. Thornhill Green, in its capacity as a housing provider, had failed to operate the housing project properly having regard to the normal practices of similar housing providers: SHRA s. 115, 11. Reference was made to the Co-op's substantially lower housing charge revenues when compared to those of other social housing providers in the area, and to Thornhill Green having exhausted its capital reserve funds and having made some ill-advised spending decisions.

[27] Thornhill Green responded to the triggering notice but the Region found the response inadequate. As well, Thornhill Green's audited financial statements raised serious concerns with the Region, due to an accumulated deficit that had more than doubled in one year and the depletion of two separate funds (including the capital reserve fund) to fund operating costs, which was contrary to their intended use.

[28] As a result of its concerns, the Region recommended to the Ministry that a Receiver be appointed as permitted under s. 116(1)5 of the SHRA. The Act required the Region to first obtain the written consent of the Minister.

[29] On June 15, 2006, the Mayor of York Region met with senior representatives of the Ministry and later that month York Region's Regional Council authorized the appointment of a Receiver, subject to the consent of the Minister. On July 16, 2006, the Minister approved the appointment of a Receiver and Manager to administer Thornhill Green, and also provided consent for a loan pursuant to the SHRA.

[30] The Co-op board of directors and members were not informed of the Region's recommendations or the appointment of the Receiver until after the appointment had been made.

Appointment of a Receiver and Manager under the SHRA

[31] On July 19, 2006, the Region appointed Mintz & Partners Limited as Receiver and Manager of the housing project owned and operated by Thornhill Green, pursuant to s. 116(1)5 of the SHRA. It was not clear at that time just how long the receivership might last. As one can imagine, this created an element of uncertainty for the Co-op members who worried about the length of the receivership and its ultimate outcome. In Thornhill Green's Newsletter of September 2006, the Chair of the Board reported, among other things, the following to the members:

> NO ONE – not PPM, not members of any recent Boards, and not, at this point, Mintz or York Region either – knows how long this receivership will last, or what the development will look like at the end of it all, or how high the housing charges will be over the next few years, or whether we will return to being an independent co-op, be combined with some other York Region co-op for administrative and budget purposes (one of the possibilities floated at the meeting) or become just another non-profit housing development with no resident input.

[32] Mintz's appointment as Receiver meant that it was deemed to be the agent of Thornhill Green, pursuant to s. 120(4) of the SHRA. In accordance with the provisions of the SHRA and its agreement with the Region, the Receiver's mandate was to preserve and protect the property, assets, business and undertaking of Thornhill Green, and to control its receipts and disbursements.

[33] Regional Council had required the Receiver's appointment as a condition of the Region agreeing to make a substantial loan to Thornhill Green to complete the necessary capital repairs. After the appointment of Mintz, on December 20, 2006, York Region entered into a loan agreement with Thornhill Green, through Mintz, whereby a credit facility in the principal amount of up to $2.1 million was extended to Thornhill Green with very favourable repayment terms.

[34] Before the appointment of the Receiver, the Property had deteriorated substantially under the then Board of Directors of Thornhill Green. The Receiver was able to stabilize the financial situation at Thornhill Green and to oversee a large amount of capital work and repairs.

[35] Within the first nine months of its appointment, the Receiver had provided three extensive reports to the Region. These reports were not given to the Co-op board of directors or its members.

[36] In its third report, dated April 16, 2007, the Receiver advised the Region that, despite many successes, there were still numerous matters outstanding, and significant work yet to be done for the benefit of the residents.

[37] The Co-op members understood that the Receiver was acting on their behalf to supervise the renovations and the financial situation. The Board members had been told by the Region to use this receivership time as an opportunity to essentially "take a break." During this time period, Thornhill Green did not seek a judicial review of the appointment of the Receiver.

Appointment of Receiver under the *Courts of Justice Act*

[38] The appointment of a Receiver pursuant to the SHRA expires after one year unless the Superior Court of Justice orders otherwise. The supervision of the work on the Co-op was not yet completed. The Region therefore brought an application under s. 116(1)6 of the SHRA and s. 101 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 to the Superior Court to appoint Mintz as Receiver of Thornhill Green.

[39] The Region served Thornhill Green with its application record. Thornhill Green did not oppose the Appointment Order and did not appear on the date set for the application to be heard.

[40] On June 26, 2007, Pepall J. ordered the appointment of Mintz as Receiver pursuant to both statutes. This converted the receivership into a court-appointed receivership. By the terms of its appointment, the Receiver was also subject to the provisions of the SHRA.

[41] The Co-op did not challenge steps taken or the appointment of the Receiver until May 2008, almost a year later, when the Receiver brought a motion before the Superior Court of Justice requesting to sell the Property.

The Receiver asks for further funding

[42] By the fall of 2007 the Receiver had been able to stabilize the financial situation at Thornhill Green and had overseen a large amount of capital work**.** During the work, unanticipated items requiring the allocation of further funds became apparent. Asbestos was discovered, and there were problems with completing the termite remediation.

[43] The Receiver therefore identified certain additional urgent capital work and repairs to the Property which it concluded must be completed during the then current construction season, to avoid deterioration.

[44] In January 2008, the Receiver advised the Region that another $600,000 of additional funding was required to complete the capital repairs.

[45] To ensure that the work was completed, the Receiver proposed to the Region a number of alternatives. One of those was to return governance and responsibility for Thornhill Green to its members, either to the existing Board or to a newly-reconstituted Board of existing

members. A second was to continue the receivership indefinitely until such time as the work was done. A third was to transfer the Property to another entity capable of managing the property as social housing.

[46] The Region refused to facilitate the advance of a further sum of $600,000.00 and recommended to the Receiver that the Co-op be sold to Housing York Inc., the Region's social housing arm which is also a "housing provider" and a "local housing corporation" under the SHRA. If the Receiver were agreeable to this suggested solution, the Region would then provide the requested funding and would support such a sale.

[47] The affidavit material filed by the Region explains why it refused to advance this further sum. It alleges that the Co-op members seemed more concerned with their own individual issues rather than the collective interests and on-going management of Thornhill Green. There had been issues with respect to access to some of the Co-op units to conduct the necessary repairs, and some residents opposed the removal of wooden landscape features, in spite of the termite problems. It alleged that Thornhill Green had a poor track record with respect to management of its budget and rent increases. The Region had little confidence that a reconstituted Board would behave differently. The Region also concluded that Thornhill Green did not have the capacity to service any additional debt, let alone repay its mortgage or its existing $2.1 million debt to the Region.

[48] None of the Receiver's proposals or the Region's concerns regarding the Board were ever presented to the Board of Directors or the members of the Co-op.

Regional Council makes an *in camera* decision

[49] On February 13, 2008, the Community Services and Housing Committee prepared a report for Regional Council. That ten-page report was marked "PRIVATE" and was considered by Regional Council in an *in camera* session on February 21, 2008. 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.

[51] Regional Council approved the Committee's recommendations. The Region then obtained the approval of the Board of Directors of HYI and the Minister of Municipal Affairs and Housing, and it supported the Receiver's application to this Court to appoint to continue and expand upon the receivership under the SHRA.

“Confidential” or “Secret”?

[52] The Co-op categorizes this meeting as one shrouded in secrecy. The Region says it was a confidential meeting that was discussed *in camera* because the matter under discussion related to a court-appointed receivership, security of municipal property, and advice that was subject to solicitor-client privilege. The report refers to another reason for holding an *in camera* hearing:

> The SHRA is relatively new legislation and to date very little case law has been established. It appears that this Motion would be the first instance where the Court was asked to approve a sale of the assets of a Co-operative to an entity such as Housing York Inc. . . . In recent months, the Ontario branch of the Co-operative Housing Federation of Canada has supported two co-operatives in opposing the appointment of a Receiver by a municipality . . . the precedential value of this Motion, if the relief was granted, may be such that [CHF Canada] will feel obliged to oppose the sale of a co-operative to a non-profit housing provider. There is a strong business case to support the sale, but there is no guarantee of the Court’s approval.

[53] It is not necessary to determine whether the steps taken by the Region were properly confidential or whether they were improperly secret. The result is the same. All parties agree that the Region did not provide any notice of its proposed decisional process to Thornhill Green.

The Receiver applies to the Court for a sale

[54] On May 15 2008, almost a year after it had been appointed by the Superior Court of Justice, the Receiver brought its first of three reports to the Court, in support of an urgent motion to, among other things, approve the sale of Thornhill Green Co-operative Homes Inc. to Housing York Inc.

[55] The Receiver served this motion on the Board of Directors of Thornhill Green, the Region, the Ministry of Municipal Affairs and Housing, and creditors of the Co-op.

[56] This was the first notice to Thornhill Green of any intention to sell the Co-op.

[57] Shortly thereafter, Thornhill Green’s counsel filed responding materials and initiated this application for judicial review of the Region’s decision to sell the Co-op. Since then, there have been a plethora of motions and cross-motions between Thornhill Green, joined by CHF Canada, and the respondents.

ANALYSIS

Is the Region's consent to sell reviewable?

[58] We conclude that the Region's decision to consent to the sale of the assets of the Co-op is judicially reviewable either as a common law power to judicially review the acts of a public body where rights are affected, or alternatively, as a statutory power of decision pursuant to s. 1 of the *Judicial Review Procedures Act*.

[59] The applicants had requested an interim injunction before Morawetz J. In the course of denying their motion, he expressed the view in the context of his interim Order that the Region's decision to "purchase and consent" to the sale of Thornhill Green's assets and liabilities from the Receiver was not a reviewable decision because it was not a "statutory power of decision" for the purposes of the JRPA. He was not asked to consider whether the Region was exercising a common law power.

[60] The appeal to this Court from the decision of Morawetz J. was withdrawn during the hearing because the parties agreed to schedule this judicial review application. In the interim, the parties agreed that no sale of the Co-op would take place until completion of all court proceedings, including appeals. In withdrawing the appeal, it was agreed that the applicants were not conceding that the decision of the Region was not reviewable. The appeal was withdrawn to facilitate promptly proceeding with the judicial review application on its merits. In the interim, the parties agreed to terms that would make redundant the appeal from the Order of Morawetz J. refusing the interlocutory injunction.

[61] The issue is not *res judicata* as suggested by the Region. While the decision of Morawetz J. is persuasive, we are not bound by the *obiter* comments in his interlocutory Order. Furthermore, Morawetz, J. did not have the benefit of full argument on this issue.

The Common Law

[62] The power to judicially review a decision based on an alleged denial of procedural fairness is found in the common law. As the Supreme Court of Canada noted in *Martineau v. Matsqui Institution,* [1980] 1 S.C.R. 602 at 628:

> Certiorari is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

[63] Certiorari is available to provide relief against a wide range of decisions of a public nature. Whether a decision is sufficiently public is determined by considering a number of

factors such as the nature of the decision-maker, the source of the power exercised, and the purpose or function of the decision-making body: see Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 2008) at pp. 1-24.

[64] The power to grant certiorari has been codified in Ontario in the JRPA but the scope of the remedy is not limited to statutory decisions. The common law of prerogative writs determines their availability. Only declarations and injunctions require the exercise of a statutory power as provided by s. 2 of the JRPA:

> 2. (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:
>
> > 1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
> >
> > 2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

[65] There is no question that the Region is a public body. The Region, in its capacity of Service Manager under the SHRA, was exercising a power conferred upon it by statute. This was not a purely commercial decision, governed only by private law. The Region's ability to deal with the assets of the Co-op originated by virtue of the SHRA.

[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.

[67] We conclude that the actions of the Region, as part of the machinery of governmental decision-making which affects rights and interests, are subject to judicial review under the common law, and that the remedies of prohibition and certiorari are available to the applicants.

The Judicial Review Procedures Act

[68] In the alternative, we conclude that the Region's decision to consent to transfer the assets is a statutory power of decision in accordance with s. 1 of the JRPA, and is the root of its impugned provision of consent. Section 1 provides as follows:

> "statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,
>
> and includes the powers of an inferior court.

[69] First, as outlined above, the power to deal with the assets of the Co-op is derived from statute. This is not a situation, as in *Ainsworth Electric Co. Ltd. v. Exhibition Place* (1987), 58 O.R. (2d) 432 (Div. Ct.), in which the decision-maker is acting in a private capacity.

[70] The power to sell a housing project is provided by s. 5(1)(f) of the SHRA. The housing provider shall not transfer, or deal with the property as defined by section 95 (1) of the SHRA without the written consent of the Region (in its Service Manager capacity) and the Ministry. For ease of reference, we repeat the section:

> 95. (1) Subject to subsections (2) and (2.1), a housing provider shall not, without the prior written consent of the Service Manager and the Minister, transfer, lease or otherwise dispose of or offer, list, advertise or hold out for transfer, lease or other disposal, a housing project or any part of it, including any chattels in it.

[71] The Region argued that providing "consent" is not a decision, but is a preliminary step only, and, in essence, is merely a recommendation. It argues, therefore, that there is no statutory power of decision to review.

[72] This issue was raised before the Divisional Court in *Re Collins et al. and Pension Commission of Ontario et al.* (1986), 56 O.R. (2d) 274 (Div.Ct.). Reid J. held:

> In determining the issue of consent the commission was determining a right, in this case, granting one. While we heard much from the respondents to the effect that the giving of consent did not involve a decision, I confess that I have difficulty understanding how anyone can give a consent without deciding to do so.

[73] This comment applies with equal force here. Providing consent requires a decision to consent. This decision to consent to the transfer is not a mere recommendation. It is a critical element of this proposed sale, without which it could not proceed, pursuant to s. 95(1) of the SHRA. The Region's decision 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. The Region's decision to provide consent is admittedly one step in a sequence of steps, but for this and other reasons, it is a critical, pivotal one.

[74] The consent of the Service Manager leads in turn to requesting the consent from the Ministry. In this case, the Region provided detailed confidential written submissions to the Ministry. The Co-op had no input into these submissions and asserts that much of the information is untrue, or one-sided, an assertion which the Region disputes.

[75] Obtaining the consents occurred several months before the Receiver brought its motion to sell the assets of the Co-op. Any rights of the Co-op to make meaningful submissions in the context of the Receiver's motion to sell, armed with the s. 95 consents, may be too little too late. It appears clear that once the Co-op was notified on May 16, 2008 of the Receiver's intention to seek an order of the court for the sale of the Co-op, the Co-op and CHF Canada have been scrambling to catch up in various court proceedings on what is perceived by the Co-op as an unequal playing field, with the powers aligned and the wind blowing clearly in one direction.

[76] Finally, the provision of the consent affects "the legal rights, powers, privileges, immunities, duties or liabilities" of the members of the Co-op within the meaning of section 1(a) of the JRPA.

[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. For example, co-op 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, 2006,* 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. Members cannot be expelled except by resolution of the board of directors, and have the right to appeal such a decision to a general meeting of all members (s. 66).

[79] For these reasons, we conclude that the provision of the statutory consent required by section 95(1) of the *SHRA* by the Region for the sale of this Co-op is a reviewable decision pursuant to either the common law or s. 1(a) of the JRPA.

The Duty of Procedural Fairness

[80] We turn to consider the parameters of the duty of fairness owed by the Region to the Co-op, and whether this duty was breached.

[81] As LeDain J. said in *Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643 at 653, "…there is a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."

[82] The existence of a general duty to act fairly will depend on the consideration of three factors:

(i) the nature of the decision to be made by the administrative body;

(ii) the relationship existing between that body and the individual; and

(iii) the effect of that decision on the individual's rights.

[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.

[84] The scope of the duty of procedural fairness depends on the facts and circumstances of each case: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 21.

[85] The five factors to consider when determining the content of the duty of fairness were most recently set out in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village),* [2004] 2 S.C.R. 650 at para. 5:

(1) the nature of the decision,

(2) the nature of the legislative scheme,

(3) the importance of the decision to the individual affected,

(4) the legitimate expectations of the person challenging the statute, and

(5) the nature of the deference accorded to the body.

[86] The Region suggests that the obligations of procedural fairness are met in this case as the Board was served in May 2008 with a copy of the Receiver's motion material before this Court, requesting a sale of the Co-op. Further, Co-op's counsel has had the opportunity to make submissions before the Superior Court of Justice opposing this sale.

[87] We disagree that the obligations of procedural fairness have been met.

[88] From the materials before us, it is clear that the Region was uncertain about how to proceed in a case such as this, especially when a Receiver was in place. The SHRA is a relatively new statute and, to date, there has been little judicial interpretation of its provisions. It would be helpful to these parties, and others following, to have some judicial direction as to what the process should be.

[89] Section 95(1) is aimed primarily at ensuring that a housing provider does not sell its assets without first obtaining the consent of the Service Manager and the Minster. This makes sense. Often, as in this case, there is considerable public money invested in a housing provider such as a co-op. It would be unfair to the public for a co-op to dispose of its assets without obtaining the consent of the entity or entities that have provided much of that funding. In the case before us, the housing provider is the co-op, but the co-op is in receivership. That complicates matters, especially where, as here, the Receiver has been appointed by the Court. Even though the Appointment Order specifies that the SHRA applies, it also says that the Receiver is not required to consult with Thornhill Green and it permits the Receiver to sell the assets of Thornhill Green with the approval of this Court. This Receiver, standing in the shoes of the Co-op, has come to the Court with the necessary consents, but without notifying or consulting with the Co-op.

[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: *Labourview Co-operative Homes Inc. v. Chatham-Kent (Municipality)* (2007), 228 O.A.C. 65 (Div.Ct.). It was an error for the Region to treat this important feature as immaterial.

[91] In our view, when a Service Manager is considering, under s. 95 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.

[92] Given the differences in the size of housing providers and service managers in this province, we leave it to each municipality to determine what would constitute appropriate notice or consultation in that location. 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.

CONCLUSION AND REMEDY

[93] As we have concluded that the actions of the Region are reviewable by way of judicial review either as a statutory power of decision or pursuant to the common law, all prerogative remedies are available. We were not asked to review the rights and obligations of the Receiver and we make no comment on whether the Receiver owed a duty to the Co-op. We do conclude, though, that the Region owed a duty of procedural fairness to the Co-op, despite the receivership.

[94] The applicants seek an Order quashing and setting aside the decisions and actions of the Region which resulted in the Region attempting to acquire the assets of the Co-op. Such an Order would have the effect of preventing the immediate sale of the Co-op. They also wish to be given a meaningful opportunity to preserve the future of Thornhill Green as a co-op and to ensure that control of the Co-Op is returned to the members.

[95] The request to quash the decisions and actions of the Region, pursuant to s. 95 of the SHRA, which would result in the Region having to reconsider the issue of its consent, is not realistic given the urgent need to complete the costly necessary repairs, and the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver in the first place. The Co-op has ample opportunity to address all issues fully and fairly in the proceedings pending before Morawetz, J.

[96] We, therefore, dismiss the motion to quash the Region's consent to the sale of the Co-op under s.95 of the SHRA.

[97] Is there an alternative remedy which is appropriate, given the novel facts and circumstances of this case? In its submissions, the Co-Op made it clear that it wishes to have the opportunity to solve the outstanding problems and to continue to function as a co-op. This is not an issue that we can determine in this application for judicial review.

[98] However, as noted above there is an outstanding motion before the Commercial List requesting the sale of the Co-op. That motion was brought by the Receiver and has the support of the Region. Because of the novel circumstances of this case, while we make no order, it would have been preferable for the Receiver to have sought directions from the Court before the Region took steps to obtain the statutory consents. Again, while we make no order, we express the view that, having regard to the present circumstances, it would be desirable for the Commercial List to determine all issues raised, or to be raised, between the parties, as directed by the judicial team leader. All matters can then be decided in one forum.

[99] For the above reasons, the application to quash the s.95 consent is dismissed. The issues the Co-op wishes to raise with respect to the future viability of the Co-op, we suggest, should be

heard by the Commercial List where the Co-op will have ample opportunity to fully and fairly address all issues.

COSTS

[100] The submissions made by the parties with respect to costs assumed total success by one side or the other. The applicants have been largely successful with respect to the issues raised in the judicial review application, but we did not grant the specific remedy requested in the circumstances of the case.

[101] It is our preliminary view that in these circumstances there should be no order as to costs. If the parties, however, wish to make further submissions based on the result, they shall exchange those submissions and file three consolidated briefs with the Court within thirty days.

_____
J. Macdonald, J.

_____
J. Wilson, J.

_____
Bellamy, J.

COURT FILE NO.: 493/08
DATE: 20090211

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

J. MACDONALD, J. WILSON and BLLAMY JJ.

B E T W E E N:

CO-OPERATIVE HOUSING FEDERATION OF CANADA AND THORNHILL GREEN CO-OPERATIVE HOMES INC.

Applicants

- and -

THE REGIONAL MUNICIPALITY OF YORK AND HOUSING YORK INC.

Respondents

MINTZ & PARTNERS LIMITED

Receiver

REASONS FOR DECISION

RELEASED: February 11, 2009