

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 116(1) 6
OF THE *SOCIAL HOUSING REFORM ACT, 2000*, S.O. 2000, c. 27**

AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. 43

THE REGIONAL MUNICIPALITY OF YORK

Applicant

- and -

THORNHILL GREEN CO-OPERATIVE HOMES INC.

Respondent

**SUPPLEMENTARY FACTUM OF THE MOVING PARTY,
THE RECEIVER, MINTZ & PARTNERS LIMITED
(re: motion to transfer the Property to HYI)**

**KRONIS, ROTSZTAIN, MARGLES
CAPPEL**

Barristers and Solicitors
700 – 25 Sheppard Avenue West
Toronto, Ontario
M2N 6S6

Mervyn D. Abramowitz (LSUC# 28325R)
L. Viet Nguyen (LSUC# 46694K)

Tel: (416) 225-8750
Fax: (416) 225-3910

Solicitors for the Receiver,

TO: **KLIPPENSTEINS LLP**
160 John Street, Suite 300
Toronto, ON M5V 2E5

Murray Klippenstein
Basil Alexander

Tel: (416) 598-0288
Fax: (416) 598-9520

Solicitors for the Respondent

AND TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

ROGER JAIPARGAS
Direct Tel: 416-367-6266
Direct Fax: 416-361-7067

BRENDAN Y. B. WONG
Tel: (416) 367-6743
Fax: (416) 682-2824

Solicitors for The Regional Municipality of York

AND TO: **MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING**
777 Bay Street
2nd Floor
Toronto, ON M5G 2E5
Attention: Rosalind Lerman
Director - Housing Finance Branch

AND TO: RBC FINANCIAL GROUP
14TH Floor, North Tower
Royal Bank Plaza
200 Bay Street
Toronto, ON M5J 2J5

Attention: Elizabeth J. Herrema, Senior Counsel

AND TO: KUBOTA CANADA INC.
5900 14th Avenue
Markham, ON L3S 4K4

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 116(6)
OF THE *SOCIAL HOUSING REFORM ACT, 2000, S.O. 2000, c.27***

AND SECTION 101 OF THE *COURTS OF JUSTICE ACT, R.S.O. 1990, c.C.43*

B E T W E E N:

THE REGIONAL MUNICIPALITY OF YORK

Applicant

- and -

THORNHILL GREEN CO-OPERATIVE HOMES INC.

Respondent

**SUPPLEMENTARY FACTUM OF THE MOVING PARTY,
THE RECEIVER, MINTZ & PARTNERS LIMITED**

PART I: NATURE OF THE MOTION

1. This is the Supplementary Factum of Mintz & Partners Limited, the Court-appointed Receiver and Manager (the "Receiver") of Thornhill Green Co-operative Homes Inc. ("Thornhill Green" or the "Respondent") in respect of the Receiver's motion for approval by this Honourable Court of a transfer of the Respondent's housing assets located at 51-95 Inverlochy Boulevard, Markham, Ontario (the "Property") to Housing York Inc. ("HYI"). Subsequent to the filing of the initial Factum by the Receiver, the Respondent opposed the motion and delivered responding materials. The Receiver now delivers this Supplementary Factum to address matters raised in the Respondent's materials.

PART II: OVERVIEW

2. It is the Receiver's position that despite the delivery of four responding affidavits by the Respondent in this matter, the Respondent has failed to provide any compelling or persuasive reasons why the Property ought not to be transferred to HYI. Further, the Respondent has failed to propose to this Court any workable and sustainable alternatives to the solution proposed by the Receiver.

3. Further, the evidence provided by the Respondent in support of its positions is, for the most part, either irrelevant or inadmissible (as being either hearsay, for which a source has not been provided, opinion evidence, where the profferrer is not a qualified expert in the area, or purely speculative). In cases where admissible evidence is provided, it is nonetheless not the best evidence, as not being from persons having direct knowledge of the matters in issue, and therefore ought to be given little or no weight.

4. The Receiver's recommendation - that this Honourable Court ought to approve the transfer of the Property to HYI, as being the only realistic manner in which to ensure the proper management of the Property going forward and to preserve the Property as part of the social housing stock of The Regional Municipality of York (the "Region"), therefore remains unchanged.

PART III: THE FACTS

5. As previously noted in the Receiver's reports, it was more than two years ago that the Region first advised the Ministry of Municipal Affairs and Housing (the "Ministry") that Thornhill Green was a project in difficulty¹. Further, the Receiver has been in place, on site, now since July 2006.

The Respondent's Evidence – The First Gazzard Affidavit

6. In response to the Receiver's Motion Record, and pursuant to the timetable established by Justice Campbell in this matter, the Respondent delivered an affidavit of Nicholas Gazzard, affirmed June 11, 2008 (the "First Gazzard Affidavit") as its sole responding affidavit².

7. The deponent lives in the city of Ottawa, and is the Executive Director of Co-operative Housing Federation of Canada ("CHF"), a self-described umbrella organization for non-profit co-operative housing corporations³.

8. Mr. Gazzard has had no direct contact with the Receiver at any time during the two years since the Receiver's appointment, and has not actively participated in the Thornhill Green project at any time. Further, at no time prior to the Receiver's motion to transfer the Property did CHF oppose any aspect of the receivership⁴.

9. The First Gazzard Affidavit is 28 pages long, yet contains no direct evidence with respect to any matter in issue. It does, however, include Mr. Gazzard's personal opinions and

¹ Thornhill Green Chronology, being Appendix "A" to the Second Report to Court of the Receiver, dated June 27, 2008 (the "Second Report"), Supplementary Motion Record ("SMR"), Tab 1A, p. 21.

² Affidavit of Nicholas Gazzard, affirmed June 11, 2008, Cross-Motion Record of the Respondent ("CMR"), Tab 3, pp. 36-63.

³ First Gazzard Affidavit, CMR, Tab 3, pp. 36-37, paras. 1-2, p. 39, para. 11.

⁴ Second Report, SMR, Tab 1, p. 6, para. 13.

speculation and hearsay (without supporting information) with respect to the issues raised on the

Receiver's motion, including:

- (a) His interpretation of the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35 ("CCA") and his view that the sale of the Property by the Receiver contradicts the CCA (paragraphs 31-35)⁵;
- (b) Statements that the Co-op was surprised by the appointment of a receiver in July of 2006, that Thornhill Green's Board of Directors (the "Board") had an "impression" that the receivership would be temporary, and that the Receiver's motion "was a complete shock to the Board" (paragraphs 44-46), without setting out who at Thornhill Green advised him of this evidence⁶;
- (c) His view that the financial situation at Thornhill Green is not as poor as set out by the Receiver in its First Report, and that the accumulated deficit is due to an accounting anomaly (paragraphs 48-52), all without stating his qualifications for giving such opinions⁷;
- (d) HYI is receiving a windfall as there is approximately \$5.6 million in equity in the Property being transferred (paragraphs 64-66)⁸; and,
- (e) there are other alternatives available to Thornhill Green, including returning Thornhill Green to the Board or a new Board comprised of existing members, or transferring the Property to Colandco Co-operative Homes Inc. ("Colandco"), who would own the Property and leave control of Thornhill Green with the Board

⁵ First Gazzard Affidavit, CMR, Tab 3, pp. 43-44, paras. 31-35.

⁶ First Gazzard Affidavit, CMR, Tab 3, p. 47, paras. 44-46.

⁷ First Gazzard Affidavit, CMR, Tab 3, pp. 47-48, paras. 48-52.

⁸ First Gazzard Affidavit, CMR, Tab 3, pp. 51-52, paras. 64-66.

(paragraph 74). The Respondent included an unsigned letter of expression of interest from Colandco⁹.

The Receiver's Second Report

10. The Receiver delivered its Second Report to the Court, dated June 27, 2008 (the "Second Report") in response to the First Gazzard Affidavit. The Receiver noted in the Second Report that:

(a) the Respondent and CHF failed to appreciate that two particular facts informed the Receiver's decision and recommendations:

- i. there were no funds or alternative funding options available to finance the necessary and substantial capital work and maintenance repairs at the Property (the "Work"); and,
- ii. Thornhill Green is a social housing project that is subject to the *Social Housing Reform Act, 2000*, S.O. 2000, c. 27, as amended ("SHRA"). The Receiver carried out its mandate pursuant to the Order of Justice Pepall, dated June 26, 2007 (the "Appointment Order") and the SHRA, and while the Receiver took into account the particular nature of Thornhill Green as a co-operative corporation, there is no special treatment for co-operative housing projects in the SHRA¹⁰.

(b) The Receiver made its recommendations to this Honourable Court based on the particular facts of this case¹¹;

⁹ First Gazzard Affidavit, CMR, Tab 3, p. 54, para. 74; Letter from Colandco Co-operative Homes Inc., dated June 11, 2008, being Exhibit "F" to the First Gazzard Affidavit, CMR, Tab 3F, pp. 112-114.

¹⁰ Second Report, SMR, Tab 1, p. 3, para. 6.

¹¹ Second Report, SMR, Tab 1, p. 5, para. 9.

- (c) The governance issue raised by Mr. Gazzard is irrelevant to the Receiver's motion. Co-operatives are not dealt with any differently from non-profit housing corporations under the SHRA¹²;
- (d) Thornhill Green continues to face serious financial difficulties, which Mr. Gazzard and CHF do not appear to appreciate. Specifically:
- i. The Region has no obligation to fund capital repairs at the Property under the SHRA, and the Region is unwilling to fund any further capital repairs at the Property, unless the Property is transferred to HYI¹³;
 - ii. The Board failed to increase rents at Thornhill Green as required by the Ministry, which led to serious financial problems for Thornhill Green, including insufficient funds to pay operating expenses, the fact that the co-op's operating account was put into a deficit position, and ultimately the issuance of the Notice of Triggering Events by the Region¹⁴;
 - iii. Aggressive rent increases are needed going forward to improve Thornhill Green's financial situation¹⁵;
 - iv. The accumulated deficit remains significant, and contrary to the speculation in the First Gazzard Affidavit, the accumulated deficit was properly recorded and represented by Thornhill Green's auditor in its financial statements¹⁶;

¹² Second Report, SMR, Tab 1, p. 7, paras. 15-17.

¹³ Second Report, SMR, Tab 1, p. 8, paras. 19-20.

¹⁴ Second Report, SMR, Tab 1, pp. 10-11, paras. 26-31 and 33-34; Comparison Chart of Rent Increases, being Appendix "C" to the Second Report, SMR, Tab 1C, pp. 23-24.

¹⁵ Second Report, SMR, Tab 1, p. 11, para. 34.

¹⁶ Second Report, SMR, Tab 1, pp. 11-12, paras. 35-38.

(e) Contrary to the allegations in the First Gazzard Affidavit, there is no realizable equity in the Property such that HYI is receiving a windfall from the transfer of the Property. Rather:

- i. The SHRA does not allow the Receiver to sell the Property without the consent of the Ministry. The Ministry has already consented to the sale of the Property to HYI, so long as the Property is maintained as social housing¹⁷;
- ii. The Receiver cannot list the Property for sale on the open market as there would be no way to ensure into the future that the Property would be maintained as social housing, such that the continued occupancy by the residents receiving rent subsidies would be jeopardized¹⁸;
- iii. Even if the Property were sold on the open market, which would require the consent of the Ministry, the proceeds of sale would not belong to the members of Thornhill Green, and would have to be distributed to a charitable organization or non-profit housing co-operative¹⁹;
- iv. No one, including Thornhill Green and the Receiver, may encumber the Property without the consent of the Ministry, and therefore the so-called equity in the Property cannot be used to finance the completion of the Work²⁰; and,

¹⁷ Second Report, SMR, Tab 1, pp. 12-13, paras. 40-41.

¹⁸ Second Report, SMR, Tab 1, p. 13, paras. 42-44.

¹⁹ Second Report, SMR, Tab 1, pp. 13-14, paras. 45-46.

²⁰ Second Report, SMR, Tab 1, p. 14, paras. 47-48.

- v. HYI has agreed to maintain the Property as social housing and invest further funds to upgrade and maintain the 42-year old buildings on the Property²¹.
- (f) The proposed alternatives put forward in the First Gazzard Affidavit all involve returning control of Thornhill Green to the Board or a new Board comprised of existing members. These alternatives do not address the management problems faced by the Board in the past, or ensure that the same problems will not reoccur²²; and,
- (g) Representatives of CHF were aware of the issues involving Thornhill Green, they were involved with Thornhill Green throughout the receivership, they attended meetings convened by the Receiver and the Region, and at no time prior to the Receiver bringing this motion did CHF ever raise any concerns or object to the Receiver's activities or conduct²³.

The Cross-Motion Record and Further Affidavits

11. The Respondent has also now delivered a Cross-Motion Record, in which the Respondent seeks to discharge the Receiver. The Record includes three further Affidavits:

- (a) The Affidavit of Susan F.J. Daniel, affirmed July 1, 2008 (the "Daniel Affidavit");
- (b) A second Affidavit of Mr. Gazzard (the "Second Gazzard Affidavit"); and,
- (c) The Affidavit of Diane Miles, the Manager of Co-op Services for the Ontario Region of CHF (the "Miles Affidavit").

²¹ Second Report, SMR, Tab 1, p. 15, para. 52.

²² Second Report, SMR, Tab 1, p. 16, paras. 54-58.

²³ Second Report, SMR, Tab 1, pp. 17-18, paras. 60-62.

(a) The Daniel Affidavit

12. Ms. Daniel is a teacher with a Masters in Education. She is currently an Academic Director at a private school in Thornhill and was a resident of Thornhill Green and the President of the Board of Directors of Thornhill Green (the "Board") when the Region appointed the Receiver in July 2006²⁴.

13. Ms. Daniel admits in her Affidavit that:

- (a) On March 9, 2006, the Board received a Notice of Triggering Events from the Region (paragraph 24)²⁵;
- (b) She and the Board were at a members meeting on July 19, 2006 with representatives from the Region, the Receiver and CHF when the Receiver was appointed (paragraphs 31-37)²⁶;
- (c) She took no steps to dispute the receivership or to object to the Receiver's actions, based on alleged assurances she received from the Region and the Receiver at the members meeting that control of Thornhill Green would be handed back to the Board after two or three years (paragraph 52)²⁷;
- (d) On May 30, 2007, she was served with the Region's Application materials for a Court-appointed Receiver for Thornhill Green and was left with the impression from the cover letter that the Application was a "routine legal requirement" (paragraphs 54-55)²⁸;

²⁴ Daniel Affidavit, CMR, Tab 2, pp. 13-14, paras. 1-2 and 6.

²⁵ Daniel Affidavit, CMR, Tab 2, p. 17, para. 24.

²⁶ Daniel Affidavit, CMR, Tab 2, pp. 19-20, paras. 31-37.

²⁷ Daniel Affidavit, CMR, Tab 2, p. 23, para. 52.

²⁸ Daniel Affidavit, CMR, Tab 2, p. 23, paras. 54-55;

(e) She reviewed the Application materials and was aware that the powers of the Receiver included the power to sell the property of Thornhill Green (paragraphs 59 and 61)²⁹.

14. The Daniel Affidavit does not:

- (a) affirm or corroborate the evidence put forward in either of the Gazzard Affidavits or the Miles Affidavit;
- (b) provide any evidence that the Board objected to any of the Receiver's actions or conduct during the receivership, or that the Receiver's recommendation is improper; and,
- (c) put forward any realistic and concrete alternatives to the recommendation of the Receiver to sell the Property to HYI.

15. The Receiver is clear that it never gave any assurances to Ms. Daniel, the Board, or anyone else that the receivership would be for a fixed period of time, or that control of Thornhill Green would be returned to the Board³⁰.

16. Further, the Minutes from the July 20, 2006 members' meeting, referred to by Ms. Daniel in her Affidavit, clearly state that the members were advised that the Receiver was being put in place to accept the \$2.1 million loan for significant repairs and maintenance work at the Property, to coordinate that work and stabilize the operations of Thornhill Green. In response to questions raised at that meeting, the Receiver specifically advised the members that:

- (a) The Receiver will review current procedures in place;

²⁹ Daniel Affidavit, CMR, Tab 2, p. 24, paras. 59 and 61.

³⁰ Third Report to the Court of the Receiver, Motion Record of the Responding Party, the Receiver ("RMR"), Tab 1, p. 8, paras. 24-25.

- (b) It will take time to fully understand the operations at Thornhill Green;
- (c) The Receiver needs to assess the operations of Thornhill Green; and,
- (d) It is too soon to say if Thornhill Green will remain a co-op, however the social housing stock will always be maintained³¹.

17. Further, the cover letters sent to the Receiver and the Board to accompany the Application Record for the Region's Application for a Court-appointed Receiver and Manager refer only to the scheduling of the court hearings with respect to the Application itself³². Nothing in the cover letters indicated that the proceeding was "routine" as alleged in the Daniel Affidavit.

(b) The Second Gazzard Affidavit

18. The Second Gazzard Affidavit deals with the conduct of the Receiver and the Respondent's Cross-Motion to remove the Receiver and is not relevant to the Receiver's motion to transfer the Property.

19. Mr. Gazzard admits that he is not a lawyer and is not qualified to offer legal opinions³³. However, he goes on to provide his opinions and speculative views with respect to the conduct of the Receiver, based on his review of the Receiver's motion materials. In particular, he provides:

³¹ Third Report, RMR, Tab 1, pp. 8-9, paras. 26-27; Minutes of the Members' Meeting held July 20, 2006, SMR, Tab 1G, pp. 54-55.

³² Third Report, RMR, Tab 1, p. 10, paras. 31-34; Cover Letter from solicitors for the Region to the Receiver and the Board, dated May 30, 2007, being Appendix "A" to the Third Report, RMR, Tab 1A, pp. 13-14; Cover Letter from solicitors for the Region to the Receiver and the Board, dated June 11, 2007, being Appendix "B" to the Third Report, RMR, Tab 1B, pp. 15-17.

³³ Second Gazzard Affidavit, CMR, Tab 4, p. 147, para. 4.

- (a) His view and interpretation of *Bennett on Receiverships* and the duties owed by a court-appointed receiver and manager (paragraph 4)³⁴;
- (b) His opinion that the Board could obtain additional financing from elsewhere for the Work, without providing any examples or supporting information (paragraph 8)³⁵;
- (c) His argument that a decision of the Region to refuse to consent to the Board obtaining additional financing would be subject to judicial review (paragraph 8)³⁶;
- (d) Speculation on the conduct of the members of Thornhill Green during the receivership and their motivation for such conduct (paragraphs 10-13), without any supporting evidence for such speculative views³⁷; and,
- (e) His beliefs regarding the legal implications of the conduct of the Receiver and the rights of non-profit housing co-operatives (paragraph 25)³⁸.

(c) The Miles Affidavit

20. The Miles Affidavit contains evidence on two points: first, a dispute with the Region with respect to certain subsidy payments³⁹, that is not relevant to the Receiver's motion, and, second, Ms. Miles' attendance as a representative of CHF at the July 19, 2006 meeting following the appointment of the Receiver by the Region, and the July 20, 2006 members' meeting where the receivership was announced to the members⁴⁰.

³⁴ Second Gazzard Affidavit, CMR, Tab 4, p. 147, para. 4.

³⁵ Second Gazzard Affidavit, CMR, Tab 4, p. 148, para. 8.

³⁶ Second Gazzard Affidavit, CMR, Tab 4, p. 148, para. 8.

³⁷ Second Gazzard Affidavit, CMR, Tab 4, p. 149-150, paras. 10-13.

³⁸ Second Gazzard Affidavit, CMR, Tab 4, pp. 153-154, para. 25.

³⁹ Affidavit of Diane Miles, affirmed June 30, 2008 (the "Miles Affidavit"), CMR, Tab 5, p. 157, para. 7.

⁴⁰ Miles Affidavit, CMR, Tab 5, p. 159, paras. 18 and 20; Minutes of the Members' Meetings convened by the Receiver, being Appendix "G" to the Second Report, SMR, Tab 1G, p. 53.

21. The Miles Affidavit makes no reference to any opposition by CHF to the appointment of the Receiver, the receivership or to the actions of the Receiver, and does not challenge the Receiver's recommendation to transfer the Property to HYI.

The Third Report of the Receiver

22. The Receiver delivered its Third Report in response to the Respondent's Cross-Motion, including the three additional affidavits affirmed in support thereof. The Receiver addresses all three affidavits, and reiterates that after receipt and consideration of the responding materials herein, based on the particular facts facing Thornhill Green, the Receiver remains of the view that the transfer of the Property to HYI is the only viable option on a go forward basis⁴¹.

PART IV: ISSUES, THE LAW AND ARGUMENT

Issue #1 – Should the Court disregard parts of the evidence put forward by the Respondent?

Admissibility - Relevance

23. Many parts of the four affidavits delivered by the Respondent include matters that are not relevant to the Receiver's motion to transfer the Property to HYI, and accordingly are inadmissible. An Affidavit cannot contain evidence that would be inadmissible if the witness was testifying as a witness in Court⁴², and such evidence should be disregarded for the purposes of the Receiver's motion.

24. Specifically, the Court ought to disregard the irrelevant evidence put forward by the Respondent in the following paragraphs of the responding affidavits:

⁴¹ Third Report, RMR, p. 11, para. 38.

⁴² Subrule 4.06(2) of the Rules of Civil Procedure; *Bertucci v. Carelli*, 2003 CanLII 34502 (S.C.) at para. 6.

- (a) Paragraphs 12-22 of the Daniel Affidavit dealing with a dispute with the Region over subsidies;
- (b) Paragraphs 23, 26, and 29-33 of the Daniel Affidavit dealing with the Region's Notice of Triggering Events and the response from Thornhill Green;
- (c) Paragraphs 38-46 of the Daniel Affidavit dealing with the Region's appointment of the Receiver pursuant to the SHRA. That appointment has ended by operation of law and the Receiver's motion is brought pursuant to its powers as Court-appointed Receiver and Manager;
- (d) Paragraphs 11-17 of the First Gazzard Affidavit dealing with the history of CHF;
- (e) Paragraphs 21-30 of the First Gazzard Affidavit dealing with the benefits of cooperative housing;
- (f) Paragraphs 89-105 of the First Gazzard Affidavit dealing with the Region's appointment of the Receiver and the concerns of CHF regarding the initial appointment, which is no longer in effect;
- (g) Paragraphs 4-6 of the Miles Affidavit that deal with the Cross-Motion;
- (h) Paragraphs 7-16 of the Miles Affidavit dealing with the subsidy dispute between Thornhill Green and the Region; and,
- (i) Paragraphs 17-20 of the Miles Affidavit dealing with the Region's appointment of the Receiver in July 2006, which is no longer in effect.

Admissibility – Improper Opinion Evidence

25. Further, even where evidence set out in the responding affidavits can be said to be relevant to the Receiver's motion, the Court should disregard parts of that evidence as being unqualified and improper opinion evidence. It is not appropriate for an affiant to include opinions and make conclusions that must be drawn by the Court itself⁴³.

26. None of the affiants of the responding affidavits have been qualified as experts in any particular field. Despite that lack of qualification, and in the case of Mr. Gazzard, his admission at paragraph 4 of the Second Gazzard Affidavit that he is not qualified to give legal opinions, the responding affidavits contain numerous personal opinions without support or foundation, including:

- (a) Paragraphs 31-36 and 67-72 of the First Gazzard Affidavit dealing with his interpretation of the CCA and its applicability to the Receiver's motion;
- (b) Paragraphs 48-56 of the First Gazzard Affidavit dealing with his opinion that the accumulated deficit of Thornhill Green is an accounting anomaly;
- (c) Paragraphs 56-60 of the First Gazzard Affidavit dealing with his opinion on the viability of Thornhill Green's financial situation and the impact of the Receiver's deficit reduction plan;
- (d) Paragraphs 61 and 62 of the First Gazzard Affidavit dealing with the impact of rents charged at Thornhill Green and the state of the capital reserve fund on the Receiver's decision to transfer the Property; and,
- (e) Paragraphs 4-25 of the Second Gazzard Affidavit dealing with his interpretation of the duties of the Receiver, the rights of the residents of Thornhill Green under

⁴³ *Canadian Blood Services v. Freeman*, 2004 CanLII 35007 (S.C.) at para. 18.

the CCA, the SHRA, the *Tenant Protection Act*, the alleged unfair conduct of the Receiver and its applicability to the Receiver's motion.

Admissibility – No source of the information or fact of the belief

27. Pursuant to Rule 39.01(4) of the *Rules of Civil Procedure*, "An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit"⁴⁴.

28. An affidavit that fails to state the source of the information, the fact of the belief, or is made as if the affiant had personal knowledge of matters when he clearly does not, is not properly before the Court and should be disregarded⁴⁵.

29. Evidence based on information and belief is often hearsay evidence⁴⁶. Hearsay evidence is inadmissible if tendered as proof of its truth or as proof of assertions implicit therein⁴⁷.

30. The Court ought to disregard the following paragraphs of the responding affidavits:

- (a) Paragraphs 57-58 of the Daniel Affidavit where she does not identify the individual who provided the information to her, and is putting forward the hearsay evidence as proof that she was advised the Board did not need to respond to the Region's Application for a Court-appointed Receiver;

⁴⁴ Subrule 39.01(4) of the Rules of Civil Procedure.

⁴⁵ *Manulife Bank of Canada v. Planting*, [1996] O.J. No. 4594 (Gen Div.) at para. 17;
539618 Ontario Inc. v. Olympic Foods (Thunder Bay) Ltd., [1987] O.J. No. 864 (H.C.J.) at para. 15.

⁴⁶ *Newmarket (Town) v Halton Recycling Ltd.*, 2006 CanLII 18731 (S.C.) at para. 10.

⁴⁷ *The Law of Evidence in Canada*, Second Edition, p. 173.

- (b) Paragraphs 5, 35, 37-46, 51, and 59-62 of the First Gazzard Affidavit where Mr. Gazzard puts forward evidence regarding the beliefs, conduct and feelings of the Board and of Thornhill Green as a co-operative, without stating the source of such information or that he believes any of these statements to be true; and,
- (c) Paragraphs 11, 14, and 21-22 of the Second Gazzard Affidavit where Mr. Gazzard again puts forward evidence regarding the impression of the members, and matters involving Thornhill Green of which he has no personal knowledge and does not state the source of the information; and,
- (d) Paragraphs 7-15 of the Miles Affidavit dealing with the subsidy issue between Thornhill Green and the Region, where Ms. Miles does not state that she has personal knowledge of the issue or the source of her information.

Little or no weight – the Best Evidence Rule

31. Further, the “best evidence rule” requires a party to put forward its best evidence to the Court to establish its case⁴⁸, that is the “best that the nature of the case will admit”⁴⁹.

32. Where a party submits to the Court an affidavit that does not come from the individual with actual knowledge and is in breach of the best evidence rule, “such an affidavit is to be given so little weight as to be practically disregarded”⁵⁰.

⁴⁸ *Langford v. Royal Bank of Canada*, [1995] O.J. No. 1329, at para. 57.

⁴⁹ *The Law of Evidence in Canada*, Second Edition, p. 1005.

⁵⁰ *York Condominium Corp. No. 335 v. Cadillac Fairview Corp. Ltd.*, (1983) 42 O.R. (2d) 219 (S.C.) at 222; *539618 Ontario Inc.*, supra, at p. 14; *Manulife*, supra, at para. 17.

33. The Court may draw an adverse inference from the failure of a party to submit evidence from a material witness who would have been able to help the court by giving evidence on a material issue⁵¹.

34. The Respondent has failed to put forward its best evidence in response to the Receiver's motion and accordingly the Court should give little or no weight to:

(a) Paragraphs 35, 37-46, and 49-73 of the First Gazzard Affidavit where Mr. Gazzard speaks to matters directly involving Thornhill Green, when such matters ought to have been addressed by a member of Thornhill Green or a member of the Board with personal knowledge of these matters; and,

(b) Paragraphs 6-24 of the Second Gazzard Affidavit where Mr. Gazzard speaks to the alleged unfair conduct of the Receiver towards Thornhill Green, when such matters ought to have been addressed by a member of Thornhill Green or a member of the Board with personal knowledge of these matters.

35. The Court should draw an adverse inference from the failure of the Respondent to put forward its best evidence given that the Daniel Affidavit, the only affiant with personal knowledge and involvement as a member of the Board, does not contain any of the evidence from the Gazzard Affidavits or the Miles Affidavit, and does not affirm or corroborate those affidavits.

⁵¹ *Lurtz v. Duchesne*, 2003 CanLII 44945 (S.C.) at para. 23.

Little or no weight - Credibility

36. —The Court ought to give little or no weight to paragraphs 50-52, 56, and 60-62 of the Daniel Affidavit, which deal with the alleged assurances given by the Region and the Receiver as to the term of the receivership and that control of Thornhill Green would be returned to the Board.

37. The evidence contained in those paragraphs is not credible when placed in context with other evidence put forward in this matter⁵². It is clear from the Receiver's reports and the Minutes of the Members' Meeting dated July 20, 2006 that the Receiver never made any such assurances to Ms. Daniel, the Board, or to anyone.

38. Ms. Daniel's evidence at paragraphs 55 and 60 of the Daniel Affidavit that the cover letter attached to the Region's Application materials led her to believe the Application was only a "routine legal requirement" is also not credible and should be given little to no weight by the Court.

39. Both cover letters served on the Board contain no information or statements on the precise relief being sought on the Application, and nothing to suggest that the Region's Application is "routine".

40. Ms. Daniel is an educated individual and has admitted she reviewed all of the Application materials and was aware that the Appointment Order would grant the power to the Receiver to sell the Property. It is not credible for her to now say that she did not have any reason to believe the Receiver's power to sell the Property would never be exercised.

⁵² *Braithwaite Technology Consultants Inc. v. Blanketware Corporation*, 2004 CanLII 30089 (S.C.) at paras. 19-22.

Issue #2 – Based on the evidence, is there any reason not to grant the Receiver’s motion?

41. The Receiver exhaustively reviewed the available options, guided throughout by the two critical facts set out in its reports – that there was no further financing available to complete the Work, and the necessity of maintaining the Property as social housing.

42. Nowhere in the responding materials does the Respondent put forward a workable alternative given the clear circumstances facing the Receiver – that there is no funding for the Work and the Ministry requirement that the Property be continued as social housing.

43. The Receiver has carried out its mandate, and has now concluded that the only viable option is to sell the Property to HYI to ensure that the Work is funded and that the Property continues as social housing going forward.

44. Indeed, in light of the facts of this matter, it would be irresponsible of the Receiver to pursue any other alternative, such as returning the Property to the Board, or listing the Property for sale on the open market. Such alternatives would jeopardize the future of the project as social housing and the 40% of residents receiving rent subsidies.

Issue #3 – Are there any legal impediments to the transfer of the Property to HYI?

(i) The Appointment of the Receiver

45. The Respondent appears to take issue with the appointment of the Receiver. This is not an issue for the Receiver, other than to state that the Receiver was appointed by court order, which Order was never appealed, varied or modified in any way. As a result, the Receiver sees no impediment to its dealing with or transferring the Property.

(ii) The Authority of the Receiver to sell the Property

46. The authority of the Receiver to sell the property can be found in two places:
- a) the Appointment Order of Pepall, J. dated July 16, 2008 (para. 7(1)); and
 - b) the SHRA itself (s.18(4) of O.Reg. 368/01 dealing with the powers of a receiver appointed under the SHRA⁵³.

Thus, it appears clear that the Receiver is authorized to sell the Property, pursuant to both the Appointment Order and the SHRA.

iii) *The Co-operative Corporations Act*

47. The Respondent refers to provisions of the CCA as justification for their belief that the CCA somehow acts to prevent the sale of the Property. However, the CCA does no such thing. The provisions of the CCA cited in the First Gazzard Affidavit have no application to the case at bar, as the Receiver is not seeking to effect any of the sorts of transactions contemplated in those sections⁵⁴. In particular, the Receiver is not seeking to dissolve or amalgamate Thornhill Green with another co-operative, amend Thornhill Green's articles, transfer the co-operative to another jurisdiction or distribute funds from Thornhill Green.

48. Further, even if there was a conflict between the provisions of the SHRA and CCA, the SHRA is clear in stating that where there is any conflict between the SHRA and any other Act or regulation thereunder, it is the SHRA that is to prevail⁵⁵.

⁵³ SHRA, s. 18(4) of O. Reg 368/01.

⁵⁴ CCA, ss. 5(3), 151(5), 156(7), 159(4) and 171.

⁵⁵ SHRA, s. 156.

49. This of course makes sense because the SHRA is recent legislation specifically designed to address the needs of social housing. The policy underlying the SHRA is the proper and efficient management of and protection of social housing. To permit parties to try to use or interpret other legislation in a manner that would undermine the SHRA would be to permit the undermining of social housing in this province.

50. Further, the SHRA makes no distinction between social housing that is operated under a co-operative corporation under the CCA or a non-profit corporation under the OBCA. As noted by the Receiver in its Reports to the Court, the particular governance model is irrelevant when deciding what should be the appropriate outcome in this matter.

51. On the facts of this case, it would make no sense to require that the Property be returned to co-operative governance where that model has been shown not to work. To do so would also be to undermine the needs of social housing and the particular residents, simply because Thornhill Green was initially set up as a co-operative.

(iv) Occupancy Rights

52. It is important to note once again that the residents of Thornhill Green do not own the Property or their units. They are “members” in the co-operative. They occupy their respective units pursuant to occupancy agreements that are contracts. Without an occupancy agreement, a member has no right to occupy a particular unit.

53. The proposed sale to HYI will change that right in name only. The “member” in the co-operative will become a “tenant” with all of the protections afforded tenants in this province under the *Residential Tenancies Act*. Further, the tenant will have a lease agreement

with HYI (as HYI is required to have signed lease agreements with its tenants), similar in nature to the current occupancy agreements.

54. Further, none of the current members will be required to change or vacate their currently occupied units in connection with the transfer of the Property. In that way, all of the current rights enjoyed by the members with respect to occupancy will be continued and will not change in any meaningful way.

55. On the other hand, if the Property were to be sold on the open market, as suggested by the Respondent (assuming Ministry consent was obtained), there would be no way to ensure that the occupancy rights of members would be preserved, particularly for those members whose rents are geared to their incomes.

56. As HYI is a social housing corporation and is itself subject to the SHRA (like Thornhill Green), HYI will be able to ensure that occupancy rights are protected.

(v) Conclusion

57. In conclusion, the Receiver does not see any merit in the arguments raised by the Respondent in the various affidavits filed herein and in particular, those advanced in the First Gazzard Affidavit.

58. Rather, as noted, it appears that the Respondent and CHF have misapprehended the statutory and legal framework within which Thornhill Green and other social housing corporations exist and operate.

59. Thus, the Receiver sees no legal impediment to the transfer of the Property.

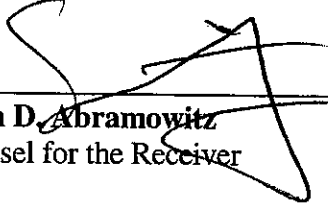
60. In the Receiver's view, the only way to preserve the social housing stock that is an integral part of Thornhill Green, on the facts of this case, is to permit the sale of the Property to HYI. Any other result would undermine the Property, undermine the social housing stock and would likely lead to the need for further intervention by the Region or the Ministry in the future.

PART V: ORDER SOUGHT

61. The Receiver respectfully submits that the relief sought in the Receiver's notice of motion be granted and the Approval and Vesting Order be issued.

July 16, 2008

ALL OF WHICH IS RESPECTFULLY
SUBMITTED BY



Mervyn D. Abramowitz
Of counsel for the Receiver

**KRONIS, ROTSZTAIN, MARGLES,
CAPPEL**

Barristers and Solicitors
700-25 Sheppard Avenue West
Toronto, Ontario, M2N 6S6
LSUC Number: 28325R
Tel. (416) 225-8750
Fax. (416) 225-3910

Solicitors for the Receiver,
Mintz & Partners Limited

SCHEDULE "A"

1. **Bertucci v. Carelli**, 2003 CanLII 34502 (S.C.)
2. **Canadian Blood Services v. Freeman**, 2004 CanLII 35007 (S.C.)
3. **Manulife Bank of Canada v. Planting**, [1996] O.J. No. 4594 (Gen. Div.)
4. **539618 Ontario Inc. v. Olympic Foods (Thunder Bay) Ltd.**, [1987] O.J. No. 864 (H.C.J.)
5. **Newmarket (Town) v Halton Recycling Ltd.**, 2006 CanLII 18731 (S.C.)
6. **Langford v. Royal Bank of Canada**, [1995] O.J. No. 1329
7. **York Condominium Corp. No. 335 v. Cadillac Fairview Corp. Ltd.**, (1983) 42 O.R. (2d) 219 (S.C.)
8. **Lurtz v. Duchesne**, 2003 CanLII 44945 (S.C.)
9. **Braithwaite Technology Consultants Inc. v. Blanketware Corporation**
2004 CanLII 30089 (S.C.)

SCHEDULE "B"

**Courts of Justice Act
R.R.O. 1990, REGULATION 194**

RULES OF CIVIL PROCEDURE

AFFIDAVITS

Contents

4.06(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 4.06 (2).

EVIDENCE BY AFFIDAVIT

Contents — Motions

39.01(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

**Social Housing Reform Act, 2000
S.O. 2000, CHAPTER 27**

Remedies

116. (1) If a triggering event occurs, the service manager may exercise one or more of the following remedies and the remedy must be reasonable in the circumstances:

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.

Period of receivership

(9) The period of time for which a receiver or receiver and manager is appointed under paragraph 5 of subsection 116 (1) for a housing project shall not exceed one year, and the receivership terminates one year after the date of the appointment unless the Superior Court of Justice orders otherwise on the application of the service manager made before the expiry of the one-year period. 2000, c. 27, s. 120 (9).

Conflicts

156. (1) This Act applies despite any general or special Act and despite any regulation made under any other Act. 2000, c. 27, s. 156 (1).

Same

(2) In the event of a conflict between this Act and another Act or a regulation made under another Act, this Act prevails except where otherwise provided in this Act. 2000, c. 27, s. 156 (2).

**THE REGIONAL MUNICIPALITY
OF YORK**

- and -

**THORNHILL GREEN CO-OPERATIVE
HOMES INC.**

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDINGS COMMENCED AT TORONTO

**SUPPLEMENTARY FACTUM OF THE MOVING
PARTY, THE RECEIVER, MINTZ & PARTNERS
LIMITED**

KRONIS, ROTSZTAIN, MARGLES, CAPPEL
Barristers and Solicitors
700-25 Sheppard Avenue West
Toronto, Ontario M2N 6S6

Mervyn D. Abramowitz (#28325R)
L. Viet Nguyen (#46694K)
Tel: (416) 225-8750
Fax: (416) 225-3910

Solicitors for the Receiver, Mintz & Partners Limited