

**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

**FACTUM OF THE RECEIVER,  
MINTZ & PARTNERS LIMITED**

May 23, 2008

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Attention: Galit Menahem  
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Attention: Rosalind Lerman  
Director - Housing Finance Branch

**AND TO: RBC FINANCIAL GROUP**

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Attention: Elizabeth J. Herrema, Senior Counsel

**AND TO: KUBOTA CANADA INC.**

5900 14<sup>th</sup> 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

**FACTUM OF THE MOVING PARTY,  
MINTZ & PARTNERS LIMITED, IN ITS CAPACITY AS  
RECEIVER AND MANAGER OF  
THORNHILL GREEN CO-OPERATIVE HOMES INC.**

**PART I: NATURE OF THE MOTION**

1. Mintz & Partners Limited (“MPL”), in its capacity as Court-appointed Receiver and Manager (the “Receiver”) of Thornhill Green Co-operative Homes Inc. (“Thornhill Green”), brings this motion for an Order:

- (a) authorizing and approving the transaction contemplated by the draft Agreement of Purchase and Sale (the “Agreement”) between the Receiver and Housing York Inc. (“HYI”);
- (b) authorizing the Receiver to take such steps as necessary to complete the transaction of purchase and sale;

(c) issuing a vesting order (the "Approval and Vesting Order") transferring the Purchased Assets, as defined in the Agreement, to HYI, free and clear of any and all claims, subject to certain assumed liabilities and permitted encumbrances as set out in the Agreement;

(d) approving the forms of lease agreements as set out in Schedules "E" and "F" to the draft Approval and Vesting Order;

(e) declaring that upon the filing of a certificate by the Receiver:

i. all occupancy agreements for the property located at 51-95 Inverlochy Boulevard, Markham, Ontario (the "Property") are hereby deemed to be terminated and are replaced by the leases approved by this Court;

ii. any lease agreements remaining to be executed between the tenants at the Property and HYI as the purchaser are deemed to be executed, valid and in full force and effect; and,

iii. the housing units (the "Units") at the Property are no longer part of any co-operative housing corporation,

and,

(f) approving the activities of the Receiver as set out in the Report to the Court of Receiver, dated May 14, 2008 (the "First Report").

**PART II: OVERVIEW**

2. This matter involves a rental housing project that is part of the social housing network in York Region in the GTA. The Region initially appointed the Receiver pursuant to the Social Housing Reform Act to take control of the Property following a determination by the Region that the board of directors of Thornhill Green had not fulfilled its responsibilities in respect of the Property and assets of Thornhill Green. The Receiver was directed by the Region to stabilize the finances of Thornhill Green and oversee a large amount (in excess of \$2 million) of capital work and repairs (the "Work") at the Property.

3. The Receiver was subsequently appointed by this Court to continue its mandate of stabilizing the finances of Thornhill Green and continue with the Work. Much has been done already, but the Work at the Property has not been completed and more is needed to protect and preserve the Property.

4. The Work must be completed during the current construction season, failing which the condition of the Property will deteriorate further over the winter, and additional work and repairs will be required, at an additional and higher cost. As a result, this matter is urgent.

5. The Region has advised the Receiver that, due to past problems with the financial management and operation of the Property by Thornhill Green's board of directors (the "Board"), the Region will not provide additional funds to the Board to complete the Work. The Region has further advised that, for various reasons, it would like the receivership to be terminated and will only provide funding to complete the Work, if the Property is transferred to HYI, the Region's social housing arm.

6. It is the Receiver's position that transferring the assets of Thornhill Green to HYI is the only viable option to ensure the rehabilitation of Thornhill Green and the Property. The Property requires funding, which funding will only come if the Property is transferred to HYI. Without proper funding, the Property will not be rehabilitated and will deteriorate further. The transfer to HYI will that Thornhill Green is properly funded and managed going forward as part of the Region's social housing stock, for the benefit of all of its residents.

### **PART III: THE FACTS**

#### **The Appointment of the Receiver**

7. On July 19, 2006, The Regional Municipality of York (the "Region"), the service manager for Thornhill Green, appointed MPL as receiver and manager of Thornhill Green pursuant to s. 116(1) of the *Social Housing Reform Act, 2000*, S.O. 2000, c. 2 ("SHRA")<sup>1</sup>.

8. The Region appointed the Receiver after the Board of Directors of Thornhill Green (the "Board") had failed to adequately respond to several concerns raised by the Region, including financial management issues and problems with the operation of the Property<sup>2</sup>. In particular, the Board:

- (a) failed to maintain adequate cost controls for expenditures;
- (b) failed to maintain monthly rent at comparable rates to other social housing providers, thereby limiting revenues and putting Thornhill Green in a deficit position;

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<sup>1</sup> First Report, MR, Tab 2, p. 12, para. 7.

<sup>2</sup> First Report, MR, Tab 2, p. 12, para. 7; Letter from the Region to the Board, dated July 19, 2006, being Appendix "A" to the First Report, MR, Tab 2A, pp. 41-42.

- (c) failed to pay municipal property taxes, which led to TD Canada Trust ("TD") not renewing Thornhill Green's mortgage and forcing the Ministry of Municipal Affairs and Housing (the "Ministry") to enter into a more costly mortgage with the Royal Bank of Canada ("RBC") for Thornhill Green;
- (d) required emergency funding from the Region on several occasions, first in the sum of \$148,000.00 in October 2005 to address urgent health and safety concerns, and second in January 2006 for the sum of \$32,249.60 to pay outstanding property taxes; and,
- (e) accumulated an operating deficit of over \$200,000.00 such that the Board paid certain operating costs of Thornhill Green out of its capital reserve funds and from the pool of last month's rent deposits paid by the members, thereby depleting those funds to almost nil.

9. Following its appointment, the Receiver:

- (a) took possession and control of the assets of Thornhill Green;
- (b) retained Precision Property Management Inc. ("Precision") to manage the day-to-day operations at the Property;
- (c) identified the needs of Thornhill Green for both capital work and repairs, as well as stabilizing and improving Thornhill Green's financial situation;
- (d) obtained a loan for \$2.1 million (the "Loan") from the Region to pay for the necessary capital work and repairs to the Property; and,

(e) met with the members of Thornhill Green to keep them informed as to the steps taken by the Receiver<sup>3</sup>.

10. On June 26, 2007, the Region sought and obtained an order of the Honourable Justice Pepall (the "Appointment Order") appointing the Receiver as Court-Appointed Receiver and Manager pursuant to s. 116(1) of the SHRA and s. 101 of the *Courts of Justice Act*<sup>4</sup>.

11. The Appointment Order provides, among other things, that the Receiver:

(a) is empowered and authorized to sell, convey, transfer, lease and assign the Property out of the ordinary course of its business, with the approval of the Court as necessary (paragraph 7(l));

(b) is empowered and authorized to negotiate such terms and conditions of sale as the Receiver in its discretion may deem appropriate (paragraph 7(k));

(c) is empowered and authorized to execute, assign, issue and endorse documents in respect of the Property and assets of Thornhill Green (paragraph 7(h));

(d) is empowered and authorized to apply for any vesting order or other orders necessary to convey the Property to a purchaser free and clear of any encumbrances thereon (paragraph 7(m)); and,

(e) is not required to consult with, or obtain the approval of Thornhill Green for anything done pursuant to the SHRA and the terms of its appointment during the receivership, and that Thornhill Green is deemed to approve and ratify the Receiver's actions (paragraph 5).

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<sup>3</sup> First Report, MR, Tab 2, p. 14, paras. 9-11.

<sup>4</sup> First Report, MR, Tab 2, p. 14, paras. 12-13; Order of the Honourable Justice Pepall, dated June 26, 2007 (the "Appointment Order"), being Appendix "B" to the First Report, MR, Tab 2B, pp. 43-59.

## The Property

12. The Property is the major asset of Thornhill Green. 40 of the Units are maintained as rent-geared-to-income housing units (the "RGI Units") and qualify for rent subsidies from the Region as part of its social housing stock. Occupants of the RGI Units pay rent according to their income, according to a formula set out in the SHRA. The other 61 units are rented out at market rates<sup>5</sup>.

13. The Units were built in 1966 and initially operated as traditional rental properties. In 1991, Thornhill Green was incorporated pursuant to the *Co-operative Corporations Act*, R.S.O. 1990, c. 35. The articles of incorporation and articles of amendment of Thornhill Green specify that the corporation is to provide and operate housing primarily for persons of low or modest income, to carry on business without the purpose of gain for its members, and that, upon dissolution, the assets of Thornhill Green are to be distributed to a charitable organization<sup>6</sup>.

14. The members of Thornhill Green did not fund the purchase of the Units and therefore have no direct financial interest in the Property. Thornhill Green purchased the Units with funding from the Province of Ontario as part of the Homes Now social housing program, and with additional funding secured by mortgages registered against title to the Property. Further, Thornhill Green's articles of incorporation specifically prohibit members from personally benefitting from the disposition of the assets of Thornhill Green<sup>7</sup>.

## The Secured Creditors

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<sup>5</sup> First Report, MR, Tab 2, pp. 15-16, para. 16.

<sup>6</sup> First Report, MR, Tab 2, p. 16, para. 17; Articles of incorporation of Thornhill Green, being Appendix "C" to the First Report, MR, Tab 2C, pp. 60-69; Articles of amendment of Thornhill Green, being Appendix "D" to the First Report, MR, Tab 2D, pp. 70-72.

<sup>7</sup> First Report, MR, Tab 2, p. 16, paras. 18-19.

15. There are currently two secured creditors with instruments registered on title to the Property:

- (a) RBC, with a mortgage registered in first position. As at December 1, 2007, the principal sum of \$6,779,861.42 remained outstanding on the RBC mortgage<sup>8</sup>; and,
- (b) The Region, with a secured loan registered in second position, for the Loan advanced to the Receiver to fund the capital work and repairs. The principal sum of \$2,100,000.00 remains outstanding on the Loan<sup>9</sup>.

16. The Ministry was forced to negotiate the RBC mortgage on behalf of Thornhill Green after Thornhill Green's former secured lender, TD, refused to extend its mortgage after the mortgage became due, as a result of the failure of the Board to pay municipal property taxes<sup>10</sup>.

17. The RBC mortgage is not part of the Ministry's shared mortgage pool for social housing providers, and accordingly the interest rate of 5.45% charged on the RBC mortgage is significantly higher than the interest rates of 4.6% to 4.9% that the Ministry could have negotiated through the shared pool. The higher cost of the mortgage has resulted in increased costs for Thornhill Green and in turn, the Region, as the Region is required under the SHRA to provide a mortgage subsidy to Thornhill Green based on the actual cost of the mortgage<sup>11</sup>.

18. With respect to the Loan, the Receiver deposited the Loan funds into an interest-bearing bank account and paid for the capital work and maintenance repairs as they were completed. The Receiver recently entered into an amending agreement with the Region such

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<sup>8</sup> First Report, MR, Tab 2, p. 18, paras. 25, 31-32; Parcel Register for the Property ("Parcel Register"), being Appendix "E" to the First Report, MR, Tab 2E, pp. 74-75 and 77-78.

<sup>9</sup> First Report, MR, Tab 2, pp. 19-20, paras. 34-35 and 37; Security documentation, being Appendix "I" to the First Report, MR, Tab 2I, pp. 113-131; Parcel Register, MR, Tab 2E, pp. 74-75 and 77-78.

<sup>10</sup> First Report, MR, Tab 2, p. 18, paras. 26-29.

<sup>11</sup> First Report, MR, Tab 2, p. 19, paras. 30.

that the interest earned on the deposited Loan funds would not be included in the Loan, and would therefore not need to be repaid to the Region. As at December 31, 2007, the interest accrued and owing on the Loan from the Region was \$68,465.75, and the Receiver was able to use the interest earned on the Loan funds to pay for expenses of Thornhill Green<sup>12</sup>.

19. There are three registrations against Thornhill Green under the *Personal Property Security Act*, being the security interests of RBC and the Region, and of Kubota, an equipment lessor with a registered security interest in respect of a tractor leased by Thornhill Green<sup>13</sup>.

### **The Current Financial Situation**

#### **The Deficit Reduction Plan**

20. Thornhill Green's audited financial statements show that the operating deficit rose from \$227,043.00 to \$571,626.00 over the period from January 31, 2006 to January 31, 2007<sup>14</sup>.

21. In 2007, the Receiver implemented a Deficit Reduction Plan ("DRP") for Thornhill Green to operate within a budget and generate surpluses of \$45,409.00 per year to pay down the operating deficit accumulated during the term of the Board's management<sup>15</sup>.

22. Following the commencement of the DRP, the accumulated deficit of Thornhill Green fell to its lowest point in three years - \$202,717.00 (after adjustments). According to the draft financial statements for the year ended January 31, 2008, the Receiver has paid down the

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<sup>12</sup> First Report, MR, Tab 2, pp. 19-20, paras. 33 and 36; Amending Agreement, dated March 18, 2008 and Letter from the Region, dated April 3, 2008, being Appendix "J" to the First Report, MR, Tab 2J, pp. 132-135.

<sup>13</sup> Enquiry Response Certificate, dated May 14, 2008, being Appendix "K" to the First Report, MR, Tab 2K, pp. 136-145.

<sup>14</sup> First Report, MR, Tab 2, p. 21, paras. 39-40; Audited financial statements for the fiscal years ended January 31, 2006, January 31, 2007 and draft audited financial statements for the fiscal year ended January 31, 2008, being Appendix "L" to the First Report, MR, Tab 2L, pp. 150-152, 164, 166, and 180-182.

<sup>15</sup> First Report, MR, Tab 2, p. 21, para. 41; Deficit Reduction Plan, being Appendix "M" to the First Report, MR, Tab 2M, pp. 192-199.

deficit by approximately \$154,624.00, and Thornhill Green is now on track to pay down the deficit within the five years projected by the DRP<sup>16</sup>.

### **The Capital Reserve Fund**

23. Prior to the appointment of the Receiver, the Board had ceased making the regular contributions to Thornhill Green's capital reserve fund required under the SHRA. Further, the Board had depleted the capital reserve fund to pay the operating costs of the Property such that by June 30, 2006, there was only \$570.52 in the capital reserve fund<sup>17</sup>.

24. The Receiver has corrected Thornhill Green's financial situation to the point that it is now able to make the required monthly contributions of \$4,375.00 towards the capital reserve fund. As at March 31, 2008, the capital reserve fund had increased significantly to \$91,062.49<sup>18</sup>.

### **The capital work and repairs**

25. In late 2005, the Board first identified the need for certain capital work and repairs to the Property, and approached the Region for additional funds. In early 2006, the Region confirmed through an independent consultant that \$2.1 million was required for immediate capital work and repairs to the Property<sup>19</sup>.

51. The Region recognized that the work was required and was prepared to fund the repairs via a loan to Thornhill Green. However, because the Region was of the view that it was

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<sup>16</sup> First Report, MR, Tab 2, p. 22, paras. 42-43.

<sup>17</sup> First Report, MR, Tab 2, p. 22, paras. 44-45.

<sup>18</sup> First Report, MR, Tab 2, pp. 22-23, paras. 46-47; Phillips, Hager & North Investment Account Statements, being Appendix 'N' to the First Report, MR, Tab 2N, pp. 201 and 225.

<sup>19</sup> First Report, MR, Tab 2, p. 26, para. 60.

the Board's mismanagement that resulted in the need for these repairs and the lack of funds to address them, the Region only agreed to fund the work if a receiver was placed in control of Thornhill Green. The Region then appointed the Receiver to administer the capital work and repairs<sup>20</sup>.

52. The Receiver separated the capital work and repairs into three phases, based on urgency and necessity. The Receiver has substantially completed Phase I work, including roof replacement and certain masonry work, and Phase II work, including mould remediation and termite chemical treatment, and has paid for this work out of the Loan funds<sup>21</sup>.

53. The Receiver does not have sufficient funds to complete the Work contemplated in Phase III, as a result of new items discovered during Phase II that required the Receiver's attention. During Phase II, the Receiver discovered asbestos in the Units, and, as the Board had not maintained an asbestos management program as required, the Receiver needed to develop and carry out an asbestos removal program as part of the overall work on the Property. This increased the time and cost of the mould remediation program as the asbestos removal was performed at the same time and on the same elements in the Units<sup>22</sup>.

54. The Receiver also moved the chemical treatment of the termite remediation program from Phase III to Phase II, as the Region and the Receiver agreed it was needed more urgently. The Board had also failed to properly address the termite issue that existed prior to the receivership, having permitted certain members to refuse the termite treatment, and permitted

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<sup>20</sup> First Report, MR, Tab 2, p. 26, paras. 61.

<sup>21</sup> First Report, MR, Tab 2, pp. 26-27, paras. 62-66, 71 and 75.

<sup>22</sup> First Report, MR, Tab 2, pp. 27-28, paras. 66-70.

certain members to modify their Units to add certain wood elements, all of which required repeated termite chemical treatments in 2003, 2007 and 2008<sup>23</sup>.

55. The Units have now all been chemically treated for termites. However, the Receiver now requires an additional \$600,000.00 to complete the Phase III Work, which includes the removal of wood landscaping elements and certain vegetation to eliminate termite habitats, installation of concrete curbing, paving and steps, asphalt paving, site grading of the Property, foundation repairs and underground garage repairs as needed<sup>24</sup>.

56. The Receiver has received three bids for the Phase III Work, but is unable to move forward with the Phase III Work without additional funding from the Region. The Region has advised that it will not fund the Phase III Work unless the Property is transferred to HYI<sup>25</sup>.

#### **The proposed transfer to HYI**

57. Based on the circumstances, the Receiver has identified three options available to ensure the Work is completed and the Property preserved and managed properly going forward:

- (a) Return governance and responsibility for Thornhill Green to its members, either to the existing Board or a new Board composed of different members;
- (b) Continue the receivership indefinitely until such time as the Work is done; or,
- (c) Transfer the Property to a new entity capable of completing the Work and managing the Property as social housing going forward<sup>26</sup>.

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<sup>23</sup> First Report, MR, Tab 2, pp. 28-29, paras. 71-73.

<sup>24</sup> First Report, MR, Tab 2, p. 29, paras. 74 and 76; Receiver's Construction Statement of Receipts and Disbursements for the period February 13, 2007 to April 30, 2008, being Appendix "Q" to the First Report, MR., Tab 2Q, pp. 234-243.

<sup>25</sup> First Report, MR, Tab 30, paras. 77-78; Letter from the Receiver to the Region, dated January 18, 2008, being Appendix "R" to the First Report, MR, Tab 2R, pp. 244-249.

58. The Receiver's position, having consulted with the Region, is that the only viable option for Thornhill Green and its stakeholders, particularly the residents, is to transfer the Property to HYI, as:

- (a) a newly elected Board would still require additional financing as Thornhill Green does not have sufficient funds to pay for the Phase III Work;
- (b) the Region has advised it will not provide funding to a new Board for the completion of the Work, as it does not have confidence in the Board or the members of Thornhill Green;
- (c) the Region has similarly advised that it will not approve the taking on of any additional debt by Thornhill Green, either via the existing Board, a new Board, or the Receiver;
- (d) the Region opposes the return of the Property to the Board, based on the Board's past failure to properly manage the finances of Thornhill Green and the Property;
- (e) the Board does not have specialized knowledge with construction and has not been involved with the construction at Thornhill Green to date;
- (f) HYI has technical expertise in respect of operating social housing projects such as Thornhill Green and the Region is prepared to provide funding to HYI; and,
- (g) continuing the receivership is not as cost effective or beneficial for residents in the long run<sup>27</sup>.

59. HYI was incorporated to streamline the management and administration of the Region's social housing portfolio and is a wholly owned subsidiary of the Region. HYI owns

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<sup>26</sup> First Report, MR, Tab 2, p. 24, para. 50.

<sup>27</sup> First Report, MR, Tab 2, pp. 24-25, paras. 51-58.

and manages approximately 2,000 units in 30 buildings. 85% of these units are RGI Units, with the balance being units rented at market rates. HYI administers an annual capital budget of approximately \$3 million, well in excess of any other social housing provider in the Region. Further, HYI is the only entity in the Region with the technical skills necessary to manage social housing projects like Thornhill Green<sup>28</sup>.

60. To facilitate the transfer of the Property to HYI:

- (a) The Regional Council for the Region has approved the transfer of the Property to HYI;
- (b) The Region has the additional funding of \$600,000.00 for HYI to complete the Phase III Work and a further \$135,000.00 to cover the cost of any land transfer taxes required to be paid on the transaction of purchase and sale and is prepared to provide this funding to HYI;
- (c) on April 11, 2008, the Ministry provided its consent to the proposed transaction of purchase and sale, such consent being required under the provisions of the SHRA as the Property is covered by and operated under the SHRA. One of the conditions for the Minister providing its consent is that the Property be maintained as part of the Region's social housing stock and operated in accordance with the SHRA;
- (d) HYI has advised the Region and the Receiver that it has agreed to acquire the Property and maintain the Property as part of the Region's social housing stock.

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<sup>28</sup> First Report, MR, Tab 2, pp. 30-31, paras. 80-82; Report of the Commissioner of Community Services and Housing and Commissioner of Corporate & Legal Services, dated June 27, 2002, being Appendix "S" to the First Report, MR, Tab 2S, pp. 250-256.

The interests of all the stakeholders, including the Region, the Ministry, the members and HYI will thus be satisfied and protected<sup>29</sup>.

### **The change in governance**

61. If HYI acquires the Property, the Property will no longer be operated under co-operative governance as HYI is a corporation incorporated under the OBCA. Governance will be provided by HYI's board of directors and management<sup>30</sup>.

62. In the Receiver's view, this change in governance is desirable as:

- (a) A significant amount of the Work required at the Property was the result of the Board failing to provide appropriate management, both financial and otherwise, and assure proper preventive maintenance and repair of the Property for the benefit of the entire Thornhill Green community;
- (b) The Region believes, based on past conduct, that the Board will not properly manage the Property in the future, if provided with another opportunity;
- (c) A new Board comprised of members of Thornhill Green will not provide the level of leadership and management required to operate a social housing project, as certain members of Thornhill Green have, at various times: opposed the receivership, prevented the Receiver from carrying out work in the Units, threatened to sue the Receiver if it removed wood elements from the Units that contributed to the termite issue, and used the member meetings with the Receiver to voice individual complaints and concerns. The members appear more

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<sup>29</sup> First Report, MR, Tab 2, pp. 31-32, paras. 83-87; Report of the Commissioner of Community and Health Services, dated February 13, 2008, being Appendix "T" to the First Report, MR, Tab 2T, pp. 257-266; Report of the General Manager of HYI, dated February 13, 2008, being Appendix "U" to the First Report, MR, Tab 2U, pp. 267-274; Ministerial Consent, dated April 11, 2008, being Appendix "V" to the First Report, MR, Tab 2V, pp. 275-277.

<sup>30</sup> First Report, MR, Tab 2, p. 33, para. 90.

concerned with their own individual self-interest rather than the collective benefit of the members of Thornhill Green;

- (d) it appears to the Receiver that the members have no desire to partake in the affairs or address the ongoing management of Thornhill Green. At no time have the members come forward and expressed any interest whatsoever in the management of the Property as a whole, and no members have volunteered to be part of any reconstituted board going forward;
- (e) there is some question as to whether the members are interested in continuing Thornhill Green as a social housing project, based on a past attempt in 1998 by the then Board and members to convert the Property to a condominium, thus appropriating the equity in the Property to themselves, despite the fact that they had no direct economic interest in the Property; and,
- (f) regardless of the intentions of the members, it appears doubtful that the members have sufficient experience and knowledge to operate the Property in a more efficient or successful fashion than HYI.

**The draft Agreement of Purchase and Sale**

63. The draft Agreement of Purchase and Sale ("APS") contemplates the transaction of purchase and sale being concluded on July 2, 2008. The APS provides that HYI will acquire the Property for consideration equal to the aggregate principal and accrued interest secured by the mortgages and the other security on the closing date. HYI will assume the RBC Mortgage and the Loan from the Region, and, subject to appropriate arrangements being made, continue to

make the regular payments to Kubota, Thornhill Green's other secured creditor, pursuant to the terms of the equipment lease agreement for the leased tractor at the Property<sup>31</sup>.

64. HYI normally requires all of its tenants to sign a lease agreement prior to the tenants being provided with keys and entering into possession of the units. In Thornhill Green's case, the members are already in possession of their units and will remain so. HYI therefore requires that the existing occupancy agreements be terminated, and all of the residents at Thornhill Green enter into lease agreements with HYI<sup>32</sup>.

65. The proposed form of lease agreements as set out in Schedules "E" and "F" of the draft form of Approval and Vesting Order. The draft lease agreements are similar in form to lease agreements used by HYI in its other properties and include express provisions for the calculation of subsidized rent, where applicable and specific references to the SHRA<sup>33</sup>.

66. To assist the members of Thornhill Green with the transition to HYI, the Receiver intends to:

- (a) send a notice to the members in the form attached as Schedule "G" to the draft Approval and Vesting Order explaining in plain language what will happen, and in particular that, despite the fact that the Property is being sold to HYI, that the residents of Thornhill Green will continue to occupy their same Units as they currently do and that they will continue to pay rent, only this time to HYI.

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<sup>31</sup> First Report, MR, Tab 2, pp. 36-37, paras. 103-105; draft Agreement of Purchase and Sale, being Appendix "X" to the First Report, MR, Tab 2X, pp. 280-373.

<sup>32</sup> First Report, MR, Tab 2, pp. 37-38, paras. 107-108

<sup>33</sup> First Report, MR, Tab 2, p. 38, para. 109; draft Lease Agreements, being Schedules "E" and "F" to the draft Approval and Vesting Order, MR, Tab 3, pp. 387-424.

- (b) Serve a copy of the Approval and Vesting Order on each member together with the Member Notice; and,
- (c) hold a meeting with HYI and the members on Thursday June 12, 2008 at 7:00 p.m. to explain the changes and provide further information<sup>34</sup>.

#### **PART IV: ISSUES, THE LAW AND ARGUMENT**

**Issue #1 – Should the Court approve the transaction of purchase and sale and issue the Approval and Vesting Order to transfer the Property and assets of Thornhill Green to HYI?**

##### **Review by the Court of the transaction of purchase and sale**

67. Where a court-appointed receiver seeks the approval of the Court to sell the assets of an insolvent party, the Court looks to the receiver for its expertise and opinion with respect to the transaction of purchase and sale. In *RBC v. Soundair*, the Court of Appeal for Ontario dealt with the appeal of an approval and vesting order for the sale by a receiver of an airline as a going concern. Galligan, J.A. (as he then was) wrote that:

“it is inescapable that [the Court] intends to rely upon the receiver’s expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. [The Court] should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is the (sic) conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court”<sup>35</sup>.

68. The Court will consider factors such as:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

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<sup>34</sup> First Report, MR, Tab 2, p. 38, para. 111; Notice to Members, being Schedule “G” to the draft Approval and Vesting Order, MR, Tab 3, pp. 425-427.

<sup>35</sup> *RBC v. Soundair*, 1991 CanLII 2727 (C.A.), at p. 3.

- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and,
- (d) whether there has been unfairness in the working out of the process<sup>36</sup>.

69. In *Crown Trust Co. v. Rosenberg* the Court held that it should not “sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached.”<sup>37</sup> The Court further noted that “It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of assets”<sup>38</sup>.

70. The Court will only reject the recommendation of its appointed receiver in the most exceptional of circumstances. In *Crown Trust Co.*, the Court approved the sale of certain properties by the receiver, even though the receiver did not accept the highest bid available. The Court held that “[The receiver’s] decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver’s function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them. If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver”<sup>39</sup>. These same principles were cited and followed in *RBC v. Soundair*<sup>40</sup>.

71. The Receiver, after reviewing all of the circumstances, has recommended the transfer of the assets and Property of Thornhill Green to HYI. The Receiver has identified

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<sup>36</sup> *Crown Trust Co. v. Rosenberg* (1986), 39 D.L.R. (4<sup>th</sup>) 526 (H.C.J.) at p. 531-533; followed in *RBC v. Soundair*, at p. 3.

<sup>37</sup> *Crown Trust Co.*, supra, at p. 548.

<sup>38</sup> *Crown Trust Co.*, supra, at p. 548.

<sup>39</sup> *Crown Trust Co.*, supra, at p. 551.

<sup>40</sup> *RBC v. Soundair*, supra, at p. 5.

urgent and necessary Work required for the Property and has requested additional funding from the Region to complete this work. The Region has refused to provide the necessary funding unless the Property is transferred to HYI.

72. As the Property is part of the Region's social housing stock, and the Ministry has required that it be operated as social housing going forward, the Receiver was unable to offer up the assets of Thornhill Green through a traditional commercial sale process. To do so would be contrary to the Receiver's mandate under the Appointment Order and the SHRA, as well as the instructions from the Region and the Ministry. The Receiver accordingly has negotiated a transaction of purchase and sale where the assets and Property are sold to an experienced social housing provider. However, the process has been, in the Receiver's view, fair and equitable to all stakeholders, taking into account the specialized circumstances of the social housing context.

73. The Receiver's recommendation weighs the interests of all the stakeholders of Thornhill Green, including the Region, the Ministry the secured creditors and the residents. The proposed transaction of purchase and sale satisfies the Region's requirements for the advance of further funding and preserves the Property as social housing. The transaction of purchase and sale also protects the interests of the secured creditors as HYI has agreed to assume the secured indebtedness of Thornhill Green, and benefits the residents by transferring the assets to an experienced social housing provider with the knowledge and expertise to improve Thornhill Green's financial situation and manage the Property properly.

74. The Receiver has worked with the Region and HYI to ensure that the transaction of purchase and sale, if approved, will provide for the completion of the Work during the summer construction season, thereby avoiding duplicating work and increased cost should the

matter linger through the winter. Further, the transfer of the Property ensures that the Work will be completed, which is to the benefit of all stakeholders.

75. The Receiver has acted fairly and diligently in carrying out its activities during its appointment, and in particular, the sale process. As set out in its report, the Receiver has reviewed all of the available options for the completion of the Work and the management of the Property going forward, including returning control of Thornhill Green to the Board, or a newly reconstituted Board, the continuation of the receivership, or the sale of the assets through a traditional commercial bidding process.

76. The Receiver's recommendation is made weighing all of the elements and circumstances available to it, and the Receiver submits that the Court ought to accept its recommendation to approve the transaction of purchase and sale with HYI.

#### **The authority to issue a vesting order**

77. Pursuant to section 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court has the power to grant a vesting order<sup>41</sup>. The Court of Appeal for Ontario held in *Re: Regal Constellation* that the vesting order is a discretionary order with equitable origins, allowing the Court to effect a change in title to property<sup>42</sup>. In that case, the Court of Appeal quashed an appeal of a vesting order obtained by a receiver for a bankrupt hotel, and upheld the sale of the assets of the hotel by the receiver.

78. The authority for the Receiver to sell the assets of Thornhill Green, and seek an approval and vesting order to that effect, is set out in the SHRA and the terms of the

<sup>41</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100.

<sup>42</sup> *Re: Regal Constellation Hotel Limited*, 2004 CanLII 206 (C.A.) at paras. 31-33.

Appointment Order. Pursuant to subsection 120(2) and subsection 18(4) of Ontario Regulation 368/01 of the SHRA, the Receiver may sell or otherwise dispose of the housing project and the assets of the housing provider, and may enter into contracts, sign documents or do anything incidental to the exercise of its other powers<sup>43</sup>.

79. Pursuant to the Order of the Honourable Justice Pepall, the Receiver is explicitly empowered and authorized to sell, convey and transfer the assets of Thornhill Green, with court approval as necessary, to seek an approval and vesting order to convey the assets of Thornhill Green to a purchaser, and to exercise any of the powers listed in subsection 18(4) of Ontario Regulation 368/01 of the SHRA<sup>44</sup>.

#### **Vesting orders for assets of social housing providers**

80. The Court has approved similar Approval and Vesting Orders for the sale of assets of social housing providers<sup>45</sup>. In *Her Majesty The Queen in Right of Ontario v. The International Relief Agency Incorporated*, the Court approved two transactions of purchase and sale to transfer the assets of IRAI, a corporation under receivership, including three separate buildings that provided social housing, and vested the assets in and to Toronto Housing Company Inc., the social housing arm of the City of Toronto.

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<sup>43</sup> *Social Housing Reform Act, 2000*, S.O. 2000, c. 27, subsection 120(2) and Ontario Regulation 368/01, subsection 18(4).

<sup>44</sup> *The Regional Municipality of York v. Thornhill Green Co-operative Homes Inc.*, Order of the Honourable Justice Pepall, dated June 26, 2007, paragraphs 7(1)(ii), (m) and (w).

<sup>45</sup> *Her Majesty in Right of Ontario v. The International Relief Agency Incorporated et al.*, Order of the Honourable Justice Spence, dated February 8, 2002; *IRAI*, supra., Order of the Honourable Justice Mesbur, dated January 20, 2006.

81. The social housing projects in the *IRAI* case were also subsidized by the Ministry, and the assets were acquired with public or borrowed funds, such that none of the shareholders, officers, directors or tenants of *IRAI* had any direct financial interest in the subject properties.

82. Further, in the *IRAI* case the Court accepted the Receiver's recommendation to transfer the properties to a suitable purchaser without the need for a commercial sale process. The purchaser, Toronto Housing Company Inc., similar to HYL, was a non-profit housing corporation with experience managing social housing communities and agreed to maintain the subject properties as part of the social housing stock.

83. As in *IRAI*, the Receiver's recommendation to transfer the assets and Property to HYL represents the most viable option for keeping the Property as part of the social housing stock, pursuant to the Receiver's mandate and instructions from the Region and the terms of the Ministry's consent.

84. The Receiver therefore respectfully submits that the Court accept its recommendation and approve the transaction of purchase and sale, and issue the Approval and Vesting Order to transfer the assets and Property to HYL.

**Issue #2 – Should the Court approve and order the necessary steps to transfer the assets of Thornhill Green to HYL, including a change from co-operative governance and the termination of occupancy agreements?**

85. The Receiver requests that this Honourable Court order that particular necessary steps be taken to effect the transfer of the assets and Property of Thornhill Green to HYL.

86. Thornhill Green is a co-operative corporation incorporated pursuant to the CCA. As noted by the Court in *Becker v. City Park Co-operative Apartments Inc.*, a housing co-operative is a democratic community, operating on the principle of “one member, one vote”. The *Becker* case dealt with the judicial review of a decision by a non-profit housing co-operative’s board of directors to terminate a member. The Court further noted that “Members of the Co-operative wear two hats. Individually the members are occupants, but collectively they are management.”<sup>46</sup>

87. Pursuant to the CCA, the members of a co-operative have voting rights on issues involving the co-operative, including the sale of all or substantially all of the property of a co-operative<sup>47</sup>.

88. However, the provisions of the SHRA, including those provisions dealing with the Receiver’s powers to sell the assets of a housing provider, are said to apply despite any Act or regulation to the contrary. Further, pursuant to s. 156 of the SHRA, where there is a conflict between any Act or regulation and the SHRA, it is the SHRA that prevails<sup>48</sup>.

89. Further, pursuant to the SHRA and the terms of the Appointment Order, Thornhill Green is deemed to ratify and confirm whatever the Receiver does in the course of the receivership, so long as it is done in accordance with the SHRA, and the terms of the

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<sup>46</sup> *Becker v. City Park Co-operative Apartments Inc.*, 2004 CanLII 48065 (Div. Ct.)

<sup>47</sup> *Co-operative Corporations Act*, R.S.O. 1990, c. C.35, subsection 68.1.

<sup>48</sup> SHRA, section 156.

Appointment Order. Under the terms of the Appointment Order, the Receiver is not required to obtain the approval of Thornhill Green or its members for any of the Receiver's actions<sup>49</sup>.

90. The Receiver submits that, in this specific situation, the co-operative governance model of Thornhill Green has not worked as envisioned. In addition to the problems identified with the finances of Thornhill Green and the failure of the Board to properly address those needs, the members of Thornhill Green have not demonstrated any willingness to carry out the object of Thornhill Green as set out in its Articles of Amendment – that is, to provide housing to persons of low and modest income, encourage and promote a better understanding of co-operative principles and to contribute to the betterment of the community at large.

91. Rather than work cooperatively, either together as members, or with the Receiver or the Region, to participate in the process of managing Thornhill Green, the members have been, at best, indifferent, and at worst, oppositional to the management and needs of Thornhill Green.

92. Certain members have indeed opposed the Receiver in carrying out its duties, and have refused the Receiver access to their Units to carry out required work, threatened to sue the Receiver, and have used member meetings to complain to the Receiver about their own Units, rather than discuss the overall status of the receivership and Thornhill Green, the purpose for such meetings.

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<sup>49</sup> Appointment Order, paragraph 5.

93. As such, in the view of the Receiver and the Region, the members of Thornhill Green have forsaken their role as managers of the co-operative, necessitating actions on the part of the Region, and the Receiver, to address the needs of Thornhill Green and the Property.

94. HYI has similar goals to the object of Thornhill Green – to provide social housing in an effective and efficient manner.

95. HYI is incorporated pursuant to the OBCA, and cannot operate a co-operative without being continued as a co-operative corporation under the CCA<sup>50</sup>. Such a change is not feasible as HYI was incorporated under the OBCA to own and operate the social housing stock of the Region, and maintain landlord-tenant relationships, not operate co-operative corporations.

96. In the view of the Receiver and the Region, the residents of Thornhill Green will benefit from the transfer to HYI and the change in governance. The residents will have rights as tenants of the Property, and will also have the benefit of HYI completing the Work and operating the Property in a proper manner.

97. The tenants' rights will be governed by the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, whose purposes include the protection of residential tenants and to balance the rights and responsibilities of residential landlords and tenants<sup>51</sup>. The tenants will be able to raise or address any concerns or issues regarding their Units and the Property to the management of HYI, just as they have been able to do with the Board.

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<sup>50</sup> *Business Corporations Act*, R.S.O. 1990, c. B.16, subsection 181.1(1).

<sup>51</sup> *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, section 1.

98. The Board, through its past conduct, and the members, through their conduct during the receivership, have not demonstrated an interest in, or sufficient knowledge and experience to handle, large scale issues such as the budgetary needs for Thornhill Green and the operation of the Property as a whole. The change in governance will still provide for management of the Property, but this time by dedicated professionals who are employed by HYI.

99. Therefore, the Receiver submits that the change from co-operative governance to the Units being owned and managed by HYI will ensure that the Property is managed for the express purpose of providing social housing.

#### **The Termination of the Occupancy Agreements**

100. Under its enabling legislation, HYI cannot take over the occupancy agreements currently in place between Thornhill Green and its members. HYI is required to have and does have lease agreements with the tenants of its properties, rather than occupancy agreements with members.

101. As a result, if HYI is to purchase the Property, it is appropriate that the Court order these occupancy agreements terminated and replaced by the draft lease agreements, copies of which are attached to the Approval and Vesting Order.

102. The lease agreements contain similar terms to the occupancy agreements for the Units, including terms regarding the calculation of rent, the services provided to the Unit and the rights of the landlord and the tenant.

103. As the residents of Thornhill Green are already in possession of their Units, and given that there is no intention to displace these residents from their Units, and that HYI requires executed lease agreements with its tenants, it is appropriate that this Court declare that, in the event that any resident fails or refuses to execute a lease agreement in respect of a particular Unit, the lease agreement shall be deemed to be executed. This will allow an orderly transfer of the tenancies to HYI.

104. Should this Honourable Court see fit to grant the relief sought, the Receiver will take steps to inform all residents of Thornhill Green of the transfer of the Property and what is encompassed as a result of that transfer. The notice will set out in clear, straightforward language what will change with respect to the occupancy of the Units, and what will not. The Receiver has prepared a Member Notice, being Schedule "G" to the Approval and Vesting Order, to be sent to all members. The Receiver will also provide a copy of the Approval and Vesting Order to all members and has scheduled a meeting for June 12, 2008 where representatives of HYI will be present to provide information and address any issues that the residents of Thornhill Green may have regarding this matter.

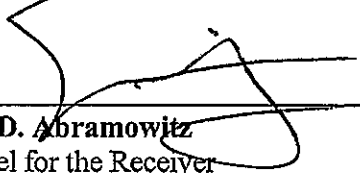
105. The Receiver therefore respectfully submits that, as it is in the interest of all stakeholders of Thornhill Green, this Honourable Court ought to approve the transaction of purchase and sale, as contemplated in the draft Agreement of Purchase and Sale that is in the motion record, and approve the steps required to transfer the assets and Property of Thornhill Green to HYI, as set out herein.

**PART V: ORDER SOUGHT**

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

May 23, 2008

ALL OF WHICH IS RESPECTFULLY  
SUBMITTED BY

  
\_\_\_\_\_  
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**SCHEDULE "A"**

1. RBC v. Soundair, 1991 CanLII 2727 (C.A.)
2. Crown Trust Co. v. Rosenberg (1986), 39 D.L.R. (4<sup>th</sup>) 526 (H.C.J.)
3. Re: Regal Constellation Hotel Limited, 2004 CanLII 206 (C.A.)
4. The Regional Municipality of York v. Thornhill Green Co-operative Homes Inc.
5. Her Majesty in Right of Ontario v. The International Relief Agency Incorporated
6. Becker v. City Park Co-operative Apartments Inc., 2004 CanLII 48065 (Div. Ct.)

**SCHEDULE "B"**

**Courts of Justice Act**  
R.S.O. 1990, CHAPTER C.43

**Vesting orders**

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

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

**Powers of receiver**

(2) A receiver or receiver and manager appointed under paragraph 5 of subsection 116 (1) has the prescribed powers, subject to the conditions and restrictions that are set out in the terms of the appointment. 2000, c. 27, s. 120 (2).

**SOCIAL HOUSING REFORM ACT, 2000**  
**ONTARIO REGULATION 368/01**

**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).

(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:

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.
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).

**Business Corporations Act**  
R.S.O. 1990, CHAPTER B.16

**Continuation as co-operative corporation**

**181.1 (1)** A corporation may, if it is authorized by the shareholders and the Director in accordance with this section, apply under the *Co-operative Corporations Act* to be continued as a co-operative corporation. 1994, c. 17, s. 30.

**Co-operative Corporations Act**  
R.S.O. 1990, CHAPTER C.35

**Sale of property**

**68.1** A sale, lease, exchange or other disposition of all or substantially all of the property of a co-operative must be authorized by a special resolution and by such additional authorization as the articles provide. 1994, c. 17, s. 21.