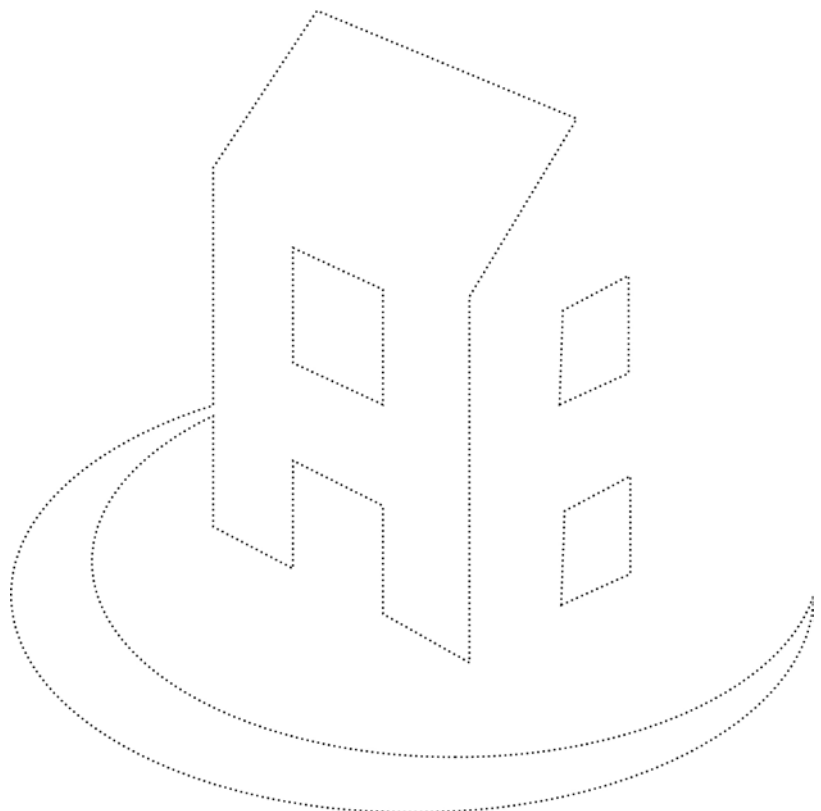


The
**CO-OPERATIVE
HOUSING
FEDERATION**
of Canada



**BRIEF TO STANDING COMMITTEE ON
JUSTICE POLICY ON
BILL 140: STRONG COMMUNITIES
THROUGH
AFFORDABLE HOUSING ACT, 2010**

March, 2011



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

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Oral Presentation, March 24, 2011

- Deputants:**
- Dale Reagan, Managing Director, CHF Canada, Ontario Region
 - Harvey Cooper, Manager, Government Relations, Ontario Region

My name is Dale Reagan. I am the Managing Director of CHF Canada's Ontario Region. With me today is Harvey Cooper, our Manager of Government Relations.

Thank you for this opportunity to make a deputation on Bill 140. We are here today speaking on behalf of more than 550 non-profit housing co-operatives, home to some 125,000 residents across Ontario.

Since the *Social Housing Reform Act* was passed over ten years ago, housing co-ops have struggled to succeed as member-controlled communities and have mounted a series of lobby campaigns to try to get the Province to restore community control. Buttons, banners and T-shirts have declared "We want our co-ops back: Fix the SHRA" and "Upload co-op housing".

Our lobby efforts have resulted in some limited improvements to the SHRA regulations but we have recognized that real change could only happen when the Act itself was opened up.

Bill 140 is the opportunity to restore balance between service managers' powers as regulator and housing co-ops' rights and authority as the owners of the housing. We have submitted to the Committee a detailed brief that recommends a number of amendments that we believe would help achieve this goal.

As you have heard this morning, the Ontario Non-Profit Housing Association is calling for many of the same changes.

In the short time we have today we will focus our remarks on our overriding concerns with the direction Bill 140 has taken and the key critical changes that are necessary.

We will review:

1. Re-balancing community and government control
2. Default and remedies system leaves co-ops more vulnerable
3. Sale or takeover of co-ops made easier
4. System for review of service manager decisions falls short.

1. The need to re-balance community and government control

In its Affordable Housing Strategy, the Ontario government said it would introduce new legislation to replace the *Social Housing Reform Act* that would “support a community-centred approach” to housing. A key concern identified in the Strategy is “protecting non-profit and co-operative housing” and maintaining “*community-based approaches to housing.*”

In Bill 140, the statement of Purpose says that the Act is intended to “provide flexibility” for housing providers as well as service managers. And the Bill says that there is a Provincial Interest in ensuring that the housing system includes “... *a role for non-profit corporations and co-operatives.*”

In these three places where the government sets out its policy intent concerning social housing it says that it is committed to a community-based model of housing, featuring independent co-operative and non-profit housing providers.

Unfortunately, for the most part, the actual provisions in Bill 140 fail to deliver on this commitment. Far from creating a better balance in the rights and authority of service managers and housing providers, the Bill tilts the balance towards much greater government control. There are a great many places where the Bill gives service managers more flexibility and authority than under the SHRA, but very few that give co-ops more protection or more latitude to run their affairs.

Here are some of the most obvious examples of how housing provider rights and protections have been eroded under Bill 140:

- Most significantly, the Bill removes the requirement for Ministerial Consent to a sale or transfer of a housing project.
- In many places, the requirements that the service manager act “reasonably” when making its decisions and that a breach by a provider must be “material” or “substantial” have been removed.
- The rules in the Bill make it a “triggering event” (breach) for a provider to incur an operating deficit in any year. Under the SHRA, a breach occurred only if there was an “*accumulated* deficit”.

2. Default and remedies system leaves co-ops more vulnerable

A major concern of housing co-ops is that the default and remedies sections in the SHRA make it relatively easy for a service manager to move from an identified breach by a co-op (of whatever magnitude) to receivership, and potential sale, with very limited opportunity for the co-op to protect itself, unless it has the means and determination to go to court.

CHF Canada has funded several court challenges by co-ops of service manager decisions and we have been largely successful. The courts have ruled that co-ops have a

right to fair treatment that they were being denied. This new case law has given co-ops some protections and rights that the SHRA itself does not provide.

We have urged the government to ensure that co-ops receive the fair treatment that the courts have called for. Unfortunately, for the most part, the Bill does the opposite, significantly reducing provider rights and protections compared to the SHRA. As drafted, the legislation will make it easier for service managers to put providers into receivership and take them over. Unless amended, it will create an even more adversarial and litigious environment than now exists.

It needs to be noted that the Bill does introduce an important new remedy called “supervisory management” designed to reduce the number of receiverships. Service managers would in some cases be required to use supervisory management before resorting to receivership, but they can easily avoid the remedy if they so choose. Unfortunately the approach in the legislation is poorly conceived and it amounts to just another form of receivership.

Our suggested amendments would make sure that the remedy works as a constructive alternative to receivership and that limits are placed on a service manager’s ability to skip this step. We also recommend various amendments to restore protections for providers to ensure that they are treated more fairly when a service manager is imposing a remedy.

3. Sale or takeover of co-ops made easier

Under the *Social Housing Reform Act*, the consent of the Minister is required for any sale or transfer of a co-op. This requirement has been dropped from Bill 140.

Ministerial Consent is a major protection that has been included in the SHRA to ensure balance in the system and provide a check on inappropriate decisions by a service

manager. The Consent of the Minister offers co-ops a fundamental protection in case of conflicts with the municipal authority. This helps to ensure protection of the public interest in the co-op's assets and the fair treatment of all parties involved.

This was recognized in the unanimous decision of three Divisional Court judges in the Thornhill Green Co-op case where the ruling stated:

[73] ... The Legislature has given two separate governmental entities, the Region and the Minister, the power to control whether a proposed sale will take place. This ensures that the public interest in social housing and its availability will be taken into account in any proposed disposition of a "housing project," as defined in the SHRA.

The Ontario system of community-based provision of non-profit housing works only if there is a reasonable balance between the rights and responsibilities of the government regulator and the provider that owns the housing and is legally accountable for its successful operation. We feel that the omission of the requirement for Ministerial Consent from Bill 140 will fundamentally erode the protections of community providers and therefore of the public interest.

Without this protection, there is much greater risk that municipalities could opt to privatize parts of the housing stock or "rationalize" the portfolio of housing under their administration by converting housing co-ops and community non-profits to municipal housing.

We are also very concerned that, for the first time under any social housing legislation or project operating agreement, the *Housing Services Act* legitimates the forced sale or transfer of community housing. This becomes effectively a remedy under the Act to deal with operational issues whereas previously sale existed only as a standard power of a receiver to recover debt.

We recommended that the requirement for the Consent of the Minister for any sale or transfer of a housing project be restored in Bill 140 and appropriate and strict limits on when use of this extreme remedy is warranted.

4. System for review of service manager decisions falls short

Housing co-ops have long been concerned that a fundamental gap in the SHRA is the lack of any mechanism for co-ops to seek an independent review of a service manager decision. The only option open to them has been expensive and time-consuming litigation. This is clearly not a fair system.

During the Affordable Housing Strategy consultations, co-ops told the Minister that there is the compelling need to put in place a cost-effective and efficient system that housing providers can use to seek a review of a service manager decision. ONPHA has made this case as well.

We were pleased to see that Bill 140 included a system for review of service manager decisions. Unfortunately we have serious concerns with the model used in the Bill.

Together with ONPHA, we have used the services of Raj Anand, a senior administrative law and human rights lawyer to review the approach proposed in Bill 140. His view is that “the protections provided by these sections are inadequate, indeed probably inferior to what presently exists under the common law and the *SHRA*”. The model in the Bill he says:

- lacks independence
- lacks procedural safeguards
- lacks substantive protection, and
- reduces housing providers’ current remedies.

He advises that:

“A much less intrusive, while at the same time more independent, system can easily be achieved by providing for an ad hoc or standing board of independent arbitrators to adjudicate disputes as they arise. . . . The key is that the decision-makers must have the perception and reality of impartiality.”

We recommend that Bill 140 be amended to introduce an arbitration system for review of service manager decisions. Our Brief sets out the details of how the system would work.

Closing remarks

Co-operative housing in Ontario is a well-documented success story. For over four decades, co-ops have provided good-quality, affordable housing owned and managed by the community members who live there. We are very anxious that the Bill will erode the community control and commitment that underpin the success of the co-op model.

Most critically, Bill 140 needs to be amended to:

- redefine the supervisory management remedy so that it works as a constructive alternative to receivership that rebuilds a housing provider’s capacity to govern itself
- make numerous changes to the default and remedies system to add protections for providers to ensure they are treated more fairly
- restore the requirement for Ministerial Consent for any sale or transfer of a housing project, and
- introduce an arbitration system for review of service manager decisions.

Again, we want to thank the members of the Committee for giving us the opportunity to express our views today. We would be pleased to answer any questions

Recommended Amendments to Bill 140: Balancing Community and Government Control

1. Introduction

1.1 Who we are

The Ontario Region of CHF Canada speaks on behalf of some 550 housing co-ops across the Province and the 125,000 residents who are proud to call co-operative housing their home.

Co-ops are the only form of resident-controlled social housing in Ontario. They are governed by the *Co-operatives Corporations Act* (not the *Residential Tenancies Act*) and residents are members of their co-ops, not tenants. Co-op members elect the board of directors annually from the membership and contribute to the operation and life of the community through a range of volunteer activities. This involvement gives them a unique role in the governance of their housing and makes them direct stakeholders in its successful operation:

1.2 The need to re-balance community and government control in Bill 140

Since the *Social Housing Reform Act* (SHRA) was passed in 2000, housing co-ops have struggled to succeed as member-controlled businesses and communities and have mounted a series of lobby campaigns to try to get the Province to restore community control. Buttons, banners and T-shirts have declared “We want our co-ops back: Fix the SHRA” and “Upload co-op housing”.

The SHRA downloaded the cost and administration of provincially funded social housing to municipalities, cancelled existing operating agreements between housing providers and the Ontario government and put in place new program rules. These rules gave municipal government unprecedented powers, as regulator, to dictate how co-ops and non-profits should run their affairs, and to take control of the housing if they decided that this was the best thing to do. The effect of the SHRA was to fundamentally shift the balance of power from the community to government compared to the program framework in the project operating agreements that the SHRA replaced.

Our worst fears about the SHRA have played out in several cases of co-op receivership and two cases where the service manager wanted to take over a co-op and transfer its property to its municipal housing company. The rules in the Act make it relatively easy for the service manager to move from an identified breach

by a co-op (of whatever magnitude) to receivership, to sale/transfer with very limited opportunity for the co-op to protect itself unless it has the means and determination to go to court.

CHF Canada has funded several court challenges by co-ops of service manager decisions and we have been largely successful, with the courts ruling that co-ops have a right to fair treatment that they were being denied. This new case law has given co-ops some protections and rights that the SHRA itself does not expressly provide.

But going to court is enormously expensive and time-consuming and sets up a fundamentally adversarial dynamic between the co-op and service manager because co-ops must act quickly and decisively when the service manager imposes a remedy if they are to protect their legal rights. What is needed are amendments to the SHRA to put in place an accountability framework that creates a better balance between service managers' powers as regulator and housing co-ops' rights and authority as the owners of the housing.

Our lobby efforts have resulted in some limited but important improvements to the regulations over the years but we have recognized that real change can only happen when the Act itself is opened up. That opportunity doesn't come around often but it has come around now.

Bill 140 is the opportunity to restore balance between community and government control of municipally administered community housing and create an operating environment where housing co-ops can thrive.

There are parts of Bill 140 that are clearly meant to give housing providers added rights and protections and we commend the government for including them:

- The statement of Purpose of the Act says that the HSA is intended to “provide flexibility” for housing providers as well as service managers.
- The statement of Provincial Interest says that the Province has an interest in ensuring there is “a role for non-profit corporations and co-operatives”.
- A new “supervisory management” remedy has been introduced as a mandatory first step before the service manager resorts to the more extreme remedy of receivership.
- A new system to allow providers to seek a review of certain service manager decisions has been added.
- New rules require a supervisory manager and receiver to report to the provider quarterly on its plans and progress.

Unfortunately, the model for supervisory management and the proposed system for review of service manager decisions are badly flawed and, as conceived won't accomplish the intended purpose. In fact, in certain respects, they could make things worse for providers than they were under SHRA rules.

And the Bill fails to include any measures to deliver on the promise of more flexibility for providers set out in the statement of Purpose. There are a great many places where the HSA rules give service managers more flexibility than under the SHRA but we cannot identify any new rules giving providers more latitude to run their affairs.

Far from creating better balance in the rights and authority of service managers and housing providers, Bill 140 tilts the balance towards much greater government control. Here are some of the most obvious examples:

- Most significantly, the Bill removes the requirement for Ministerial Consent to a sale or transfer of a housing project. In a landmark ruling, Ontario Superior Court Justices commented that the requirement for the Consent of the Minister, as well as of the service manager, “*ensures that the public interest in social housing and its availability will be taken into account in any proposed disposition of a ‘housing project’.*” This protection is now gone and there is much greater risk that municipal governments could opt to privatize parts of the housing stock or “rationalize” the portfolio of housing under their administration by converting housing co-ops and community non-profits to municipal housing.
- In many places, the requirements that the service manager act “reasonably” when making its decisions and that a breach by a provider must be a material” or “substantial” have been removed, giving the service manager much greater powers to intervene.
- The HSA rules make it a “triggering event” (breach) for a provider to incur an operating deficit in any year. Under the SHRA, a breach occurred only if there was an “accumulated deficit”. There are many reasons for a deficit in a single year, including an unexpected expenditure near the end of the year or a decision to draw on an accumulated surplus to pay for some necessary work. In particular circumstances, incurring an operating deficit will be a prudent business decision.
- For the first time under social housing legislation or any social housing project operating agreement, the HSA legitimates the forced transfer of housing projects.

Our recommendations that follow focus mainly on changes to Bill 140 to create a more appropriate balance between the power of the municipal program regulator

and the rights and authority of independent housing providers operating within a community-based model of social housing.

2. Our Key Concerns and Recommendations

Key concern #1: Supervisory management

Outline of issues

It is clear that in some sections of Bill 140 the Ontario government has tried to respond to CHF Canada's concerns about the vulnerability of housing co-ops to takeover by service managers under the SHRA. One of the main ways it has done this is by introducing a new "supervisory management" remedy as a constructive alternative to receivership. This is something that CHF Canada recommended.

Unfortunately, the way this alternative approach is conceived in the Bill is very different, and in fact at odds with, the system that we have advocated. It will compound the problem rather than helping to fix it. We outline our concerns with this section of the Bill below and then recommend amendments.

We feel the basic principles of supervisory management as a constructive alternative to receivership should be:

- 1. Nature of supervisory management:** A supervisory management arrangement is an enhanced form of property management that includes responsibility for addressing the problems identified by the service manager (a "turnaround" service). It is a constructive remedy that rebuilds the co-op's capacity to govern itself. Certain targeted areas of authority are taken out of the co-op's hands but otherwise the board and membership continue to function.

The property manager is not the equivalent of the "manager" in the phrase "receiver and manager". The "supervisory" element refers to increased supervision by the service manager.

- 2. Statement of purpose:** A statement of the purpose of a supervisory management arrangement should be included, in addition to the three purposes listed in s. 95 (11) (Use of powers). The purpose is to correct governance and other problems so that the housing provider will eventually be able to operate normally.
- 3. Reporting:** The property manager reports to both the housing provider and to the service manager.

This would include all normal monthly and other property management reports as well as the special type of quarterly report envisaged in the Bill.

- 4. Decision-making:** The board and members of the housing provider will have power to make management decisions in consultation with the property manager, subject to limitations imposed by the service manager.

- (a) The scope of any limitations will be set out in regulations. The limitations can include such things as the requirement for service manager approval for certain decisions, changes in procedures, such as cheque signing by the property manager, and others.
 - (b) The service manager can vary the limitations during a supervisory management arrangement depending on performance.
- 5. **Liability protection:** There should be provisions to protect the service manager from liability with respect to its involvement in operational matters relating to a housing provider under supervisory management.
- 6. **Length of term:** In some cases, one year of supervisory management will not be long enough to deal with the problems that led to use of the remedy. Our approach contemplates that the one-year period of supervisory management can be extended at any time by agreement between the service manager and the housing provider.
- 7. **Voluntary supervisory management:** Supervisory management can also be instituted by agreement between the housing provider and the service manager at any time, whether or not a service manager has issued a triggering event letter.
 - (a) The liability limitation and other provisions of the HSA would apply to such agreements.
 - (b) We anticipate that such agreements could include provision for consensual appointment of outside directors.
- 8. **Choice of property manager:** The property manager under a supervisory management arrangement would be chosen by the service manager with input from the board of the housing provider if the service manager considers it appropriate.
- 9. **Property manager's fees:** The property manager's fees would be competitive with fees normally paid to property managers of similar housing projects with an appropriate premium for the additional functions such as the "turnaround" services. These fees would be far less than fees paid to a receiver and manager.
- 10. **Non-profit housing co-ops:** In the case of co-ops the property manager and its staff that will work on and at the co-op will have to be both knowledgeable about and experienced in working with co-ops. The management company could contract with other organizations or consultants with this expertise in order to meet this requirement.
- 11. **No conflict of interest:** A property manager under a supervisory management arrangement (or any related party or company) cannot subsequently be appointed as a receiver and manager. This is essential in order to avoid the conflict of interest that would arise if the supervisory manager could stand to benefit by a contract extension as receiver/manager.

Recommended changes to supervisory management provisions

Set out below are recommended amendments to parts of Bill 140 to implement the approach to supervisory management outlined above.

CHF Canada recommends using the term “property manager under a supervisory management arrangement” rather than “supervisory manager”. This more accurately expresses our concept that a supervisory management arrangement is an enhanced form of property management rather than a limited form of receivership (as in the phrase “receiver and manager”).

This change requires amendments to several subsections that we consider satisfactory in other respects.

1. Section 87(5): Suggested changes:

The service manager may appoint a *property manager for the housing provider under a supervisory management arrangement*. ~~a supervisory manager for the housing provider.~~

***Comment:** This adjusts the wording to express the concept recommended by CHF Canada. The manager is not the supervisor. The manager will have some additional authority, responsibilities, and reporting requirements beyond a normal property manager, but the supervisor is the service manager through its own staff and the on-site property manager.*

2. 95(1): Suggested changes:

Supervisory management managers

95. (1) This section applies with respect to the exercise of the remedy to appoint a *property manager under a supervisory management arrangement* ~~supervisory manager~~ under paragraph 5 of section 87.

***Comment:** This adjusts the wording to express the concept recommended by CHF Canada.*

3. 95 (2): We suggest a new subsection be inserted to state the purpose of supervisory management:

Purpose of supervisory management

(2) *The purpose of supervisory management is to correct governance and other problems of the housing provider so that the housing provider will in due course be able to operate independently consistent with the normal practices of similar housing providers.*

Comment: We feel it is important to explicitly state the purpose in order to guide property managers and service managers and to reassure housing providers. To some extent this is addressed in subsection 95(11) of the second reading Bill, but we feel it should be directly expressed in a statement of the basic purpose.

4. 95(3): Suggested changes:

Restriction on appointment

(3)~~(2)~~ A property ~~supervisory~~ manager may be appointed *under a supervisory management arrangement* only if one of the following requirements is satisfied:

Comment: This adjusts the wording to express the concept recommended by CHF Canada.

5. 95(3), paragraphs 1 to 5: Suggested changes:

1. Any of the requirements for appointing a receiver or receiver and manager under paragraphs 1 to 5 of subsection 2 of section 96.
2. The housing provider has failed to operate a designated housing project properly, having regard to the normal practices of similar housing providers.
3. A requirement prescribed for the purpose of this paragraph.

Comment: The original version (not reproduced here) repeated the wording in section 96 with slight changes. These were intended to enlarge the scope for supervisory management beyond situations that justified receivership.

Whether the scope of supervisory management should be enlarged depends on the nature of supervisory management. Under the system in the second reading Bill, supervisory management was the equivalent of a “manager” in the phrase “receiver and manager”. In that case the situations for using the remedy should have been limited to the same as those for receivership.

Under CHF Canada’s concept the appointment is of a property manager with enhanced supervision from the service manager and with the goal of correcting the governance and other problems. This is applicable in more situations, all of which seem to be encapsulated in the triggering event of failing to operate the project properly.

6. 95(4): Suggested changes:

Requirement for non-profit housing co-operatives ~~co-operative corporations~~

(4 ~~(3)~~) A service manager shall not appoint a person as a *property manager under a supervisory management arrangement* ~~supervisory manager~~ ~~manager~~ for a housing provider that is a non-profit housing co-operative ~~co-operative corporation~~ unless the service manager is of the opinion that,

- (a) the person is knowledgeable about the structure and operation of *non-profit housing co-operatives* ~~co-operative corporations~~ and experienced in the management of non-profit housing co-operative housing projects; or
- (b) if the person is not an individual, the staff of the person who will be engaged at and with the housing provider and who will supervise such staff are knowledgeable about the structure and operation of non-profit housing co-operatives and experienced in the management of non-profit housing co-operative housing projects ~~co-operative corporations~~.

Comment: The Bill refers to “co-operative corporations”. However, the defined term in the Co-operative Corporations Act is “non-profit housing co-operative”, which is also used in the Residential Tenancies Act and a number of other places. It would be better to use that term here.

This wording emphasizes being experienced with non-profit housing co-ops, as well as knowledgeable about them. Clause (b) also refers to the staff who will actually be working at the co-op. If supervisory management is really to succeed at turning things around at a co-op, this type of experience will be vital.

7. 95(5): Suggested changes:

Time limit

- (5) ~~(4)~~ The maximum period during which there may be a *property manager under a supervisory management arrangement* ~~supervisory manager~~ is one year unless the service manager and housing provider enter into an agreement for the arrangement to continue for a longer period under subsection 26.

Comment: One year is an appropriate maximum term for compulsory supervisory management, but it will often be desirable for enhanced supervision to continue for a longer period—potentially much longer. The changes permit this to be done on a voluntary basis by agreement between a housing provider and the service manager. Housing providers may well accept this (as they have in the past) if they view the arrangement as positive.

8. 95(6): Suggested changes:

Qualification on time limit

(6) ~~(5)~~—Subsection (5) ~~(4)~~ does not limit the appointment of a *property manager under a supervisory management arrangement* ~~supervisory manager~~ in respect of a different occurrence of a triggering event.

Comment: This adjusts the wording to express the concept recommended by CHF Canada. It also adjusts the numbering.

9. 95(7): Suggested changes:

Appointment by agreement

(7) ~~(6)~~—The *property manager under a supervisory management arrangement* ~~supervisory manager~~ shall be appointed under an agreement between the service manager and the *property manager* ~~supervisory manager~~. *At the option of the service manager the housing provider may also be a party to the agreement.*

Comment: This adjusts the wording to express the concept recommended by CHF Canada. It also gives the service manager the option of adding the housing provider to the agreement. Service managers may find that doing this is helpful in some circumstances so as to reassure the housing provider prior to the start of the new system.

10. 95(8): Suggested changes:

Termination, etc.

(8) ~~(7)~~—Despite anything to the contrary in the agreement appointing the *property manager under a supervisory management arrangement* ~~supervisory manager~~, the service manager may, without the consent of the *property manager* ~~supervisory manager~~, terminate or shorten the appointment at any time.

Comment: This adjusts the wording to express the concept recommended by CHF Canada.

11. 95(9): Suggested changes:

Return of normal control

(9) ~~(8)~~—When it is appropriate, in the *reasonable* opinion of the service manager, to return *normal* control to the housing provider, the service manager shall

terminate the appointment of the property manager under the supervisory management agreement ~~supervisory manager~~.

Comment: The word “normal” has been inserted before “control” to clarify that during supervisory management a housing provider has some level of control over the housing project—the degree varying depending on the judgment of the service manager.

The word “reasonable” has been inserted before “opinion” to indicate that there is an element of objectivity in the decision to end supervisory management.

12. 95(10): Suggested changes:

Copy of agreement to housing provider

(10) ~~(9)~~ The service manager shall give the housing provider a copy of the agreement appointing the *property manager under a supervisory management arrangement* ~~supervisory manager~~ and any amendment to the agreement. *The agreement shall be delivered prior to the commencement of the duties of the property manager and shall be accompanied by the notice referred to in subsection (11).*

Comment: This adjusts the wording and inserts notice provisions to express the concept recommended by CHF Canada.

13. 95(11) to (14): We suggest new subsections be inserted to delineate the duties of the housing provider and the property manager:

Duties and powers of housing provider

(11) *While a property manager is serving under a supervisory management arrangement, the housing provider shall remain responsible for the continued operation of the housing project subject to such limits as are contained in a notice delivered to the housing provider by the service manager prior to the commencement of the duties of the property manager. The limits on the responsibility and authority of the housing provider must be consistent with requirements prescribed for the purpose of this subsection. The property manager shall ensure that all normal facilities are made available to the board of directors, membership and any committees of the housing provider during a supervisory management arrangement.*

Duties and powers of property manager

(12) *A property manager under a supervisory management arrangement shall have such duties and powers as are stated in the agreement appointing the property manager subject to any limits that may be prescribed. This will include the normal property management and other management functions*

for similar non-profit housing projects or similar non-profit housing co-operative housing projects; unless the service manager determines that any of such duties are to continue to be performed by other employees or contractors of the housing provider.

Use of powers

(13) The powers of a property manager under a supervisory management arrangement ~~supervisory manager~~ may be used only for the following purposes:

1. To carry on the business of the housing provider.
2. To improve the governance of the housing provider.
3. To stabilize or improve the financial situation of the housing provider.

Priority

(14) The limits on the authority of a housing provider as stated in a notice given under subsection (11) shall be effective despite anything in the letters patent, articles of incorporation, by-laws or policies of the housing provider.

Change in duties

(15) While there is a property manager under a supervisory management arrangement for a housing provider, the service manager may on notice to the housing provider and the property manager vary the limits on the responsibility and authority of a housing provider and may vary the duties and powers of the property manager consistent with the requirements and limits prescribed for the purpose of subsections (11) and (12).

~~Powers~~

~~(10) The supervisory manager has the prescribed powers, subject to any limits in the agreement appointing the supervisory manager.~~

~~Powers are exclusive~~

~~(12) The powers of the property manager are exclusive and no other person may exercise those powers during the property manager's appointment.~~

Comment: *Proposed subsection 11 makes it explicit that the housing provider remains responsible but that there will be limits as considered appropriate by the service manager and subject to regulations. Subsection 12 deals with the duties of the property manager. It is important to emphasize that under this system the party appointed will be the actual manager and not merely a separate authority that hires a manager. Subsection 14 reconciles the limits on the housing provider's authority with its other documents. Subsection 15 permits adjustments during the term of a supervisory management arrangement.*

These subsections replace subsections (10) and (12) of the second reading Bill.

14. 95(15): Suggested changes:

Remuneration

(15) ~~(13)~~ The remuneration of the *property manager under a supervisory management arrangement* ~~supervisory manager~~ shall be determined under the agreement appointing the *property manager* ~~supervisory manager~~ and shall be reasonably competitive with remuneration normally paid to property managers of similar housing projects together with a reasonable increase for the additional duties under the supervisory management arrangement. The remuneration shall be paid out of the funds of the housing provider.

Comment: *This adjusts the wording to express the concept recommended by CHF Canada. It also states the basis for compensation consistent with the role of the property manager under a supervisory management arrangement.*

15. 95(16): Suggested changes:

Relationship to service manager

(16) ~~(14)~~ The *property manager under a supervisory management arrangement* ~~supervisory manager~~ is not the agent of the service manager and the service manager is not responsible for the acts and omissions of the property manager ~~supervisory manager~~.

Comment: *This adjusts the wording to express the concept recommended by CHF Canada.*

16. 95(17) and (18): Suggested changes:

Duty to co-operate

(17) ~~(15)~~ The housing provider shall co-operate with the *property manager under a supervisory management arrangement* ~~supervisory manager~~ and give the *property manager* ~~supervisory manager~~ full access to the housing provider's books and records.

(18) *Subsection (16) does not override any solicitor-client privilege.*

Comment: *This adjusts the wording to express the concept recommended by CHF Canada. It also protects privileged communications using the same wording as subsection 73(4) of the second reading Bill.*

17. 95(19) and (20): Suggested changes:

Ratification of acts of ~~supervisory manager~~

(19) ~~(16)~~ The housing provider is deemed to ratify and confirm what the *service manager and the property manager under a supervisory management arrangement* ~~supervisory manager~~ *do does* during the *property manager's* ~~supervisory manager's~~ appointment, but this subsection applies only to things done in accordance with this Act, the regulations, *the notice given under subsection (11)* and the agreement appointing the *property manager* ~~supervisory manager~~.

Release of ~~supervisory manager~~

(20) ~~(17)~~ The housing provider is deemed to release and discharge the *service manager and the property manager under a supervisory management arrangement* ~~supervisory manager~~ and every person for whom *either of them* ~~the supervisory manager~~ is responsible from every claim of any nature arising by reason of any act or omission done or omitted during the *property manager's* ~~supervisory manager's~~ appointment, other than the following claims:

1. A claim for an accounting of the money and other property received by the *service manager or the property manager under a supervisory management arrangement* ~~supervisory manager~~ or another person for whom either of them is responsible.
2. A claim arising from negligence or dishonesty by the *property manager under a supervisory management arrangement* ~~supervisory manager~~ or by another person for whom the *property manager* ~~supervisory manager~~ is responsible.
3. A claim arising from gross negligence or dishonesty by the *service manager or by another person for whom the service manager is responsible*.

Comment: This protects the service manager in view of its role under the concept recommended by CHF Canada.

18. 95(21): Suggested changes:

Reports by *property manager*

(21) ~~(18)~~ The *property manager under a supervisory management arrangement* shall provide written reports to the housing provider on such matters as are normally contained in *property managers' reports for similar housing projects*. The *property manager* shall at the same time provide a copy of such reports to the *service manager*. The *property manager* shall

provide such additional oral or written reports to the housing provider and the service manager as are appropriate or as may be required by the supervisory management agreement. In addition, every three months the property manager ~~supervisory manager~~ shall give the housing provider and the service manager a written report on progress in addressing the problems that gave rise to the supervisory management arrangement including, ~~that~~ ~~includes~~

- (a) a summary of what the *property manager* ~~supervisory manager~~ has done during the period covered by the report;
- (b) a summary of what the *property manager* ~~supervisory manager~~ proposes to do in the future;
- (c) a summary of the operations of the housing provider during the period covered by the report; and
- (d) a general description of the financial situation of the housing provider.

Comment: *This clarifies that the report mentioned in the second reading Bill is an additional report beyond those that are normally made by property managers. It also clarifies that the service manager is to receive copies of such reports.*

19. 95(22): Suggested changes:

Not bound by proposed actions

(22) ~~(19)~~ *The property manager under a supervisory management arrangement ~~supervisory manager~~ is not required to do anything or prevented from doing anything that is required because of a change in circumstances only because it was included or not included in a report under clause (21)(b) ~~(18)(b)~~.*

Comment: *This clarifies that things that are not in a report may only be done in case of a change in circumstances, i.e. reports must be complete. It also adjusts the wording to express the concept recommended by CHF Canada.*

20. 95(23): Suggested changes:

Reports to cover entire appointment period

(23) ~~(20)~~ *The property manager under a supervisory management arrangement ~~supervisory manager~~ shall make reports under subsection (21) ~~(18)~~ covering the entire period of the property manager's ~~supervisory manager's~~ ~~supervisory manager's~~ appointment even if that requires a report to be made after the end of the property manager's ~~supervisory manager's~~ appointment.*

Comment: This adjusts the wording to express the concept recommended by CHF Canada.

21. 95(24): Suggested changes:

Limit on report requirements

(24) (~~21~~) Subsection 21 (~~18~~) does not require the disclosure of information to the housing provider that, in the opinion of the *property manager under a supervisory management arrangement* ~~supervisory manager~~, may relate to fraud or other criminal activity by a director, member or employee of the housing provider *if the service manager does not consider such disclosure appropriate.*

Comment: This clarifies that any dishonesty must be reported to the service manager, who will decide on the degree of disclosure to the housing provider.

22. 95(25): We suggest a new subsection to avoid conflicts of interest:

No appointment as receiver or receiver and manager

(25) *No person who has acted as property manager under a supervisory management arrangement, nor any of their employees, agents or contractors, nor any related party, shall act as a receiver or receiver and manager of the same housing project or housing provider.*

Comment: This will avoid the appearance and actuality of conflict of interest in relation to the goals and actions of the conduct of a property manager under a supervisory management arrangement.

23. 95(26): We suggest a new subsection to permit voluntary supervisory management or extended supervisory management:

Voluntary supervisory management

(26) *A housing provider and a service manager may enter into an agreement for supervisory management under this section or for an extension of a supervisory management arrangement instituted by the service manager under this section. All the provisions of this section shall apply except as varied by the agreement.*

Comment: This authorizes voluntary supervisory management and ensures that the provisions of this section will apply to voluntary supervisory management except as otherwise agreed. The same applies to an extension of a pre-existing supervisory management arrangement.

Key concern #2: Other default and remedies provisions

Outline of issues

Bill 140 introduces supervisory management as a new remedy to deal with problems at a housing provider. Our concerns with the proposed remedy are outlined above.

Other aspects of the default and remedies system in Bill 140 also cause us considerable concern. We feel that the system in the Bill significantly lessens provider rights and protections compared to the rules in the SHRA and will contribute to an increased atmosphere of distrust on the part of housing providers and service managers. We outline our concerns with this section below and then recommend amendments.

The comments below have been prepared on the assumption that the suggestions above on implementation of the supervisory management concept are substantially accepted.

Basic principles

We feel the basic principles governing the system of default and remedies should be:

1. **Reasonable balance:** There should be a reasonable balance between operation by independent, non-profits (co-ops and others) and regulatory bodies, primarily service managers. Section 1 (Purpose of the Act) refers to providing “flexibility for service managers **and housing providers**”. Far from enhancing this balance, compared to the SHRA, however, these sections lessen it.
2. **Identify and treat problem situations:** For historical reasons, the Bill and the SHRA treat the identification of problems as specifying defaults, although called “triggering events”. Both then treat dealing with the problems in ways similar to commercial defaults.

Within this framework Bill 140 takes a number of positive steps that emphasize addressing problems constructively, as opposed to exercising traditional commercial remedies:

- (a) contemplating assistance by the service manager prior to a triggering event; although this may simply be codifying what many service managers do at present, it is appropriate to state this explicitly
- (b) instituting supervisory management as a new, constructive remedy to deal with problems; we feel this will be of great assistance if changed as outlined above
- (c) explicitly contemplating return of full control to the housing provider when the situation has been corrected and this becomes appropriate. (Note: we have asked that the goal of restoring provider control be stated explicitly with respect to both supervisory management and receivership).

3. **Limit legalisms left over from commercial agreement enforcement systems:** Unfortunately, Bill 140 moves the focus to *rectification* of problems only in a limited way and in some cases actually moves the system closer to commercial enforcement and farther from an approach appropriate under public regulation. The issues this raises are detailed below.
4. **Use a single default and remedies system:** Most housing providers and service managers have or will enter into separate agreements with separate enforcement systems. These include additional subsidy agreements, forgivable loan agreements under various programs, and agreements to retain the service manager's half of an annual surplus, among others. The first mortgage is in the same category. Housing providers will have these agreements regardless of whether they have a good or bad performance history.
 - (a) The system for identifying and treating problems for a provider operating under the HSA should be the same, whether or not the problem is under the HSA or any of these additional documents. Otherwise, it is likely that some service managers will use these agreements, which will be required by most providers over time, to introduce rights to take action, including sale, that wouldn't be permitted under the HSA system. This possibility will require co-ops and other housing providers to consider legal action or legal processes at many stages of their relationship with a service manager that should be approached in a more co-operative fashion.
 - (b) The Bill integrates the first mortgage with the remedies system, but does it in an inappropriate way that puts the co-op at risk. On the one hand, a first mortgage default effectively wipes away all of the requirements and protections under the HSA system. On the other hand, the Bill ignores the requirements of the mortgage document and the *Mortgages Act*.
 - (c) Instead, the triggering event, notice and supervisory management systems should be integrated with the mortgage remedies. The one without the other is unconscionable.

Changes needed

5. **Single year deficit:** Because the consequences to a social housing provider are so significant it is vital that the system be **fair and reasonable**. The most significant change from the SHRA in section 85 is in paragraph 10, which makes a single year's deficit a potential event of default. This is completely unreasonable and unacceptable.

The negotiated provision of the Project Operating Agreement for provincial program housing providers that was subsequently embodied in the SHRA was that there must be an "accumulated deficit". A deficit in a single year could be caused by an unexpected expense, a policy to incur a deficit to use up past surpluses, or for many other reasons. The housing provider should not be subject to the remedies of the Act unless its total accumulated deficit meets the tests of the section.

6. **Triggering events:** Because many of the triggering events listed in section 85 of Bill 140 are based on commercial “events of default”, they need to be reviewed and adjusted so that they are no more severe than is consistent with normal commercial practice.
7. **Request for assistance not to be admission:** In past litigation requests similar to those contemplated in section 86 have been used as adverse evidence. It is better to get this type of request out of a legal context entirely in an effort to deal with the real problem.
8. **Scope of remedies:** We disagree with the direction of section 88. As noted above, we feel that the SHRA remedies system should govern over the system in any other agreements between a service manager and a housing provider as stated in our Brief to the Ministry of April 12, 2010.
9. **Reduction of SHRA protections:** Certain protections for housing providers that were present in the SHRA have been removed. We do not see any justification for this based on experience or principle.
10. **Receivership remedy:** Unfortunately our recommendation for removing private receivership from the SHRA has not been accepted. If the concept is to remain, it needs to be consistent with other parts of the Bill and with experience to date:
 - (a) The relationship between the results of the supervisory management and the continuance of triggering events and use of receivership needs to be made clearer.
 - (b) The circumstances for appointing a receiver have been broadened for reasons that are not clear to us. This needs to be corrected.
 - (c) Judgments are needed in a variety of circumstances. The Bill should state that the judgments **must be reasonable**. This is especially important in view of the inherent conflict of interest in the possibility of the service manager acquiring title to a housing project.
11. **Transfer to service manager:** Bill 140 not only legitimates the transfer of a housing project to a service manager, but effectively makes the **desire to transfer** a ground for receivership. Our view is that such transfers should only be permitted in very exceptional circumstances. If a transfer to a service manager is to be allowed, it should be based on normal systems for sale and disposition of equity.
 - (a) As written, the system targets co-ops far more than non-profits, since under section 96(3)(2) a non-profit need never be transferred. A new board can always be appointed. However, a permanent outside board for a co-op may be viewed as inappropriate, and therefore municipal takeover may follow.
 - (b) Section 96(3)(2) is the most glaring example of the circularity of the system. A service manager can reduce subsidy. This can force a housing provider into default. The service manager can then become owner. This is not sound public policy.

12. See the remarks of Justice Lauwers in the Matthew Co-op receivership case, which would apply equally here:

[83] ... Simcoe County has, however, taken the position that it is not prepared to advance the additional \$1.55 million that the Receiver estimates would be required to complete future capital repairs.

[84] I am troubled by this position, which is taken by the County and proffered by the Receiver as justification for the sale recommendation. It is intended to manufacture urgency. A cynic might see it as a threat calculated to encourage the court, on the one hand, not to scrutinize too closely the fairness complaints of Matthew Co-op, and, on the other hand, to accept the Receiver's recommendation of the sale because a sale is inevitable if the County as service manager refuses to continue to fund the Co-op.

[85] The court must be leery of such a position since it is one that any service manager intent on rationalizing governance over the housing providers for which it is responsible under the SHRA could take; perhaps the democratic nature of housing co-ops makes them less tractable and requires more management energy on the part of service providers than they wish to give. The debate about their future is for another forum than the court.

13. **Bill 140 is the forum where this should be addressed.** It is distressing to find that the solution contemplated by the government to this important public policy issue highlighted by Justice Lauwers is to make it **even easier** than under the SHRA for a service manager to take over a project, based almost entirely on their conclusion that it would be preferable to own and operate the housing themselves.

The effective public policy in these sections is that co-ops can be taken over if the service manager so chooses—this despite the reference in section 6 of the Bill to there being a Provincial Interest in co-ops and non-profits being part of the housing system. The system in Bill 140 leaves co-ops so insecure that frequent legal action will be needed at many stages of the relationship between co-ops and service managers and this will not lead to constructive resolution of problems.

The redrafted sections below include some suggestions on improving the proposed system so that it will be somewhat fairer and provide at least some checks and balances.

14. **Reasonableness of judgments by service managers:** The default and enforcement system turns on many factual judgments by service managers. In some places the HSA indicates that these must be reasonable, but in other cases this qualifier is not present, and in fact has been removed from the SHRA.

All factual judgments of a service manager relating to default and remedies should meet the test of “reasonableness”.

- (a) This is needed to ensure that judgments are objective in view of the inherent conflict of interest in the possibility of the service manager acquiring title to a housing project.

- (b) In addition, the one court case in which this was addressed showed a very significant error in a basic factual judgment about a triggering event by a service manager's staff (doubling the accumulated deficit that in fact existed). It is critical that a reasonableness criterion apply so that factual judgments can be tested.

Recommended changes to default and remedies provisions

Set out below are recommended changes to Bill 140 to deal with the issues outlined above.

1. Section 85, paragraph (10): Suggested changes:

10. The housing provider incurs ~~a deficit or~~ an accumulated deficit if the ~~deficit or~~ accumulated deficit is substantial and excessive, having regard to the normal practices of similar housing providers.

Comment: The most significant change in section 85 from the SHRA is in paragraph 10. Bill 140 provides that a deficit in a single year can be a triggering event.

There is no justification for increasing the scope of paragraph 10 beyond the "accumulated deficit", which was the negotiated standard in the Project Operating Agreement for provincial-program housing providers and was used in the SHRA. There can be many reasons for a deficit in a single year, such as an unexpected expense, a policy to incur a deficit to use up past surpluses while gradually increasing rents, and many others. The housing provider should not be subject to the remedies unless the total accumulated deficit meets the tests in the paragraph.

2. Paragraph (1): Suggested changes:

1. The housing provider contravenes this Act or the regulations *in a way that is substantial and excessive, having regard to the normal practices of similar housing providers.*

Comment: Since the remedies are very significant, there should be a significance qualifier on the general breach provision. That is common for commercial events of default.

3. Paragraph (3): Suggested changes:

3. *The housing provider takes steps or commences proceedings to dissolve or wind up the housing provider or any other person takes such steps or commences such proceedings unless such steps or proceedings by another person are rejected or set aside within a reasonable time and before taking effect. ~~Steps are taken or proceedings are commenced by any person to dissolve or wind up the housing provider.~~*

Comment: *The formulation in Bill 140 is far more severe than is ever found in a normal commercial agreement. As written, if one disgruntled member of a housing provider brings an application to wind it up, the full HSA remedies become available.*

4. Paragraph (5): Suggested changes:

5. A trustee, receiver, receiver and manager or similar person is appointed with respect to the business or assets of the housing provider *unless such appointment is by or at the instance of the service manager or unless such appointment is set aside within a reasonable time and before taking effect.*

Comment: *The formulation in Bill 140 is more severe than the normal commercial agreement. There should be a provision for setting aside the appointment. Also, the duplication involved in the service manager appointing the receiver under some other instrument should be excluded.*

5. Paragraph (7): Suggested changes:

7. Any *substantial* assets of the housing provider are seized under execution or attachment *unless such seizure or attachment is set aside within a reasonable time.*

Comment: *There could be a dispute over a minor acquisition, such as a photocopier machine. If the supplier seizes the asset, that could be the best solution for the housing provider. If a seizure is more substantial, there should be a provision for setting it aside.*

6. Paragraph (8): Suggested changes:

8. The housing provider is unable to fulfil its obligations *as they come due.*

Comment: *This restores the wording from the SHRA, which is also the normal commercial wording. The time frame is important, since otherwise the remedies could be exercised based on long-term projections which involve many assumptions and are not a reasonable basis for exercising remedies.*

7. Paragraph (12): Suggested changes:

12. The housing provider contravenes a lease under which it has a leasehold interest in a designated housing project or in land where a designated housing project is located *in a substantial way that is not corrected within a reasonable time or within the time specified in the lease.*

Comment: *If the breach is corrected under the lease, then it should not be considered an HSA breach. Since the HSA remedies are very significant, there should be a significance qualifier on the breach provision. In case of default under leases or other third-party*

obligations, the normal issue is the significance of the breach under that obligation. The above is common for commercial events of default.

8. Section 86: Suggested additional subsection:

No admission

(4) A notice by a housing provider under subsection (1) does not itself constitute a triggering event, nor can the notice, or anything stated on behalf of the housing provider in connection with it, be used as evidence of a triggering event.

Comment: *The mechanism in section 86 should be encouraged as a way of constructively dealing with problems. However, in past litigation, requests of this nature have been used as adverse evidence. It would be better to encourage efforts like this to solve problems without creating potential legal problems or a need for extensive legal input.*

9. Subsection 88(1): Suggested changes:

Other remedies ~~not~~ limited

88. *(1) The remedies stated in this Part are the only remedies that may be exercised by a service manager in respect of any breach of this Act or any breach of any agreement or security instrument between a housing provider and a service manager or local municipality or any related body. ~~Nothing in sections 86 to 100 limits the exercise of any remedy the service manager may have other than under section 87.~~*

Section 88, Other remedies: *We disagree with the direction of this section. As noted above and stated in our Brief to the Ministry of April 12, 2010, we feel that the SHRA remedies system should govern over the system in any other agreement between a service manager and a housing provider.*

10. Subsection 88(2): Suggested changes:

Exception

(2) *Subsection (1) does not apply with respect to the appointment by the service manager, or a local municipality, or any related body or by the court, of a receiver or receiver and manager for a housing provider and a service manager, or local municipality may not make or seek such an appointment other than under paragraph 6 or paragraph 7 of section 87.*

Comment: *The original subsection dealt only with a court appointment. However, it is equally important that direct appointment of a receiver only take place under the HSA.*

11. Paragraph 92(4)(b): Suggested changes:

- (b) *there is an emergency situation and complying with subsection (1) may materially worsen the situation; ~~the situation that gave rise to the occurrence of the triggering event may substantially worsen before the deadline that would be required under clause (2) (d);~~ or*

Comment: *This change restores the wording from the SHRA. It is vital that due notice be given except in the case of a demonstrable emergency. Otherwise, the possibility of abuse or mistake is far too great.*

12. Subsection 93(2): Suggested changes:

- (2) ~~If a notice is required under subsection 92 (1), clause 92 (1) (b) does not prevent the exercise of the remedy before the deadline specified in the notice~~
A service manager shall not exercise the remedy unless ~~if~~ *the triggering event is material and substantial and the service manager is reasonably of the opinion that the housing provider has not proceeded diligently to comply with the notice.*

Comment: *This change restores the system from the SHRA. Discontinuing subsidy can be used as a means of putting a housing provider into default under many of its obligations through lack of adequate funds. The SHRA recognized this and indicated it could only be used in cases that met the test of “material and substantial”. Bill 140 removes the limitation. Under Bill 140 it could be used for any triggering event.*

In addition, Bill 140 also states that the service manager need not wait until the end of the notice period. There is no basis for this. All remedies should be suspended for the notice period except in case of emergency. This is universal commercial and governmental practice. It is the only system that is reasonably fair.

13. Subsection 94(2): Suggested changes:

Records and information from housing provider

- (2) A service manager that intends to exercise the remedy may request the housing provider to give the service manager any records or information relevant to the exercise of the remedy and the housing provider shall comply with such a request *except with respect to records or information that are subject to solicitor-client privilege.*

Comment: *This adjusts the wording to protect privileged communications. This is similar to subsection 73(4) of Bill 140.*

14. Subsection 96(1)(a): Suggested change:

- (a) a property manager under a supervisory management arrangement ~~supervisory manager~~ appointed under paragraph 5 of section 87 has been acting for a total of at least six months during the preceding 12 months, subject to subsection (3); and

Comment: This adjusts the wording to express the concept of supervisory management outlined above and recommended by CHF Canada.

15. Subsection 96(1): Suggested insert between the present paragraphs (a) and (b):

- (b) the property manager under the supervisory management agreement and the service manager have exercised reasonable efforts to rectify the triggering events during supervisory management, but
- (i) significant progress has not been made due to failure of the housing provider to co-operate; or
- (ii) a longer period is reasonably necessary before normal control is returned to the housing provider, but the housing provider is not prepared to consent to an extension of supervisory management under subsection 95(26) on reasonable terms; and

Comment: This relates the start of receivership to the realities of what happens during supervisory management.

16. Paragraph 96(2)(1): Suggested change:

1. Due to a significant financial or other event the housing provider is unable, or, in the reasonable opinion of the service manager, is likely within six months to become unable, to pay its debts as they become due.

Comment: This change restores the system from the SHRA. The reference to a significant event is important because otherwise ordinary operations could be used to justify a receivership and sale due to problems with the subsidy system or other continuing issues.

This also indicates that the opinion must be “reasonable”. This is needed to ensure that it is an objective decision, particularly in view of the inherent conflict of interest in the possibility of the service manager acquiring title to a housing project.

17. Paragraph 96(2)(2): Suggested change:

2. The housing provider has operated a designated housing project in a way that has resulted in, or, in the reasonable opinion of the service manager, is likely to result in,

- i. significant physical deterioration of the housing project or its contents, or
- ii. *significant* danger to the health or safety of the residents of the housing project.

Comment: *This change restores the system from the SHRA. The reference to a significant danger is important because otherwise ordinary operations could be used to justify a receivership and sale due to building problems that are essentially routine. For instance, all asbestos poses a health problem. However, many codes permit it to remain if suitably contained or in certain kinds of location.*

This also indicates that the opinion must be “reasonable”. This is needed to ensure that it is an objective decision, particularly in view of the conflict of interest in the possibility of the service manager acquiring title to a housing project.

18. Paragraph 96(2)(3): Suggested change:

3. *in the reasonable opinion of the service manager, ~~is of the opinion~~ there is, ~~has been~~ or is likely to be, a misuse of the assets of the housing provider, including a misuse for personal gain by a director, employee, member or agent of the housing provider.*

Comment: *This change restores the system from the SHRA. It is important to do so because it emphasized present or future misuse, not past misuse. As an example, in the situation where an employee has been defrauding the housing provider, if the misuse has been dealt with by termination of employment, it should no longer be grounds for a receiver.*

It is also important to restore the examples, since they address the type of misuse that this section is intended for.

This also indicates that the opinion must be “reasonable” for the same reasons as stated above.

19. Paragraph 96(2)(4), First mortgage default: This paragraph should be deleted. All mortgages contain their own remedies and those remedies are regulated by the terms of the mortgage and the *Mortgages Act*. It is not reasonable to wipe away that system to provide an optional additional remedy which can be more severe than those that already exist.

In the alternative, if our suggestion is accepted that the HSA remedies system be used for all defaults, including those under these mortgages, then the level of default under the mortgage should be integrated with the triggering events under the HSA. Very trivial matters can be events of default under mortgages. The remedy of receivership should not be automatically available regardless of the seriousness of the default.

In addition, if this element is to remain, then it should be integrated with the notice provisions. As the Bill is presently written, a housing provider might have no knowledge of the default until a receiver is appointed and there need be no notice because of subsection 96(3). This is both unfair and totally contrary to mortgage law, where notice is a fundamental principle.

- 20. Paragraph 96(2)(5), service manager can't find outside directors:** We feel that this paragraph is artificial and should be deleted. If there were difficulty in finding outside directors, the service manager could designate its staff to serve as directors. In addition, in view of the service manager's conflict of interest in the possibility of acquiring the property, it would be hard for it to make a dispassionate judgment on this point.

In addition, in view of the possibility of supervisory management, this is not needed.

If something like this is to stay in the Bill and the project is a non-profit housing co-op, then the service manager should be obliged to consult CHF Canada.

The opinion of the service manager in the last phrase should be the "reasonable opinion".

- 21. Paragraph 96(2)(6), Additional options by regulation:** This paragraph should be deleted. There are too many alternatives in the section already. There is no need to add more by regulation.

- 22. Subsection 96(3), General, Receiver without supervisory management:** We believe this subsection should be deleted. We see no credible reason to forego supervisory management. A manager under supervisory management can have virtually the same immediate powers as a receiver. However, the direction of the concept is on saving the project not disposing of it.

If it were not possible to find a property manager with the specialized skills and experience necessary to provide the "turnaround" services that will be needed to rebuild capacity in the co-op, the co-op, management company or service manager could contract or sub-contract separately for these services with a co-op sector organization that has the necessary qualifications.

If the subsection is to remain in the Bill, the following are the minimum correctives it requires, though this will still not make it a fair and reasonable system:

Suggested change Subsection 96(3), Opening clause::

Exceptions — no need for supervisory management ~~no suitable supervisory manager~~

- (3) The requirement under clause (1) (a) does not apply *if a service manager seeks the appointment by the Superior Court of Justice of a receiver or receiver and manager* in any of the following circumstances:

Comment: The original heading is misleading, since the subsection deals with several alternatives and its main purport is that supervisory management is not needed.

Limiting the exception to a court application for a receiver is the only way to give the system an appearance of justice and fairness to the housing provider. The service manager would actually have to establish the circumstances to the satisfaction of the court.

- 23. Paragraph 96(3)(1): Service manager can't find supervisory manager:** We believe that this paragraph should be deleted. As explained above, supervisory management is an enhanced form of property management. There can be a vast variation in the degree of authority of the manager. We believe it would always be possible for a property manager to be found if the service manager is attempting to find one and establish an appropriate relationship with them.

If something like this is to stay in the Bill and the project is a non-profit housing co-op, then the service manager should be obliged to consult CHF Canada respecting selection of a property manager under a supervisory management arrangement.

- 24. Paragraph 96(3)(2): Suggested change:**

2. The service manager is *reasonably* of the opinion that *an application must be made to the court for sale or transfer of a designated housing project* ~~must be transferred~~ *as the only way to rectify one of the following situations which has arisen from the way the housing provider has operated the housing project:*

- i. significant physical deterioration of the housing project or its contents, or
- ii. *significant* danger to the health or safety of the residents of the housing project.

Comment: This change is commensurate with the importance of the step being taken. Corresponding language is used in paragraph 96(2)(2) as grounds for a receivership. However, in this paragraph it is being used as grounds for a receivership without supervisory management and with a view to a transfer without further significant attempts to preserve the housing provider. Therefore, it is necessary to be clear that this is the only step that is possible.

We have added the reference to "sale" for reasons stated later in this paper.

*The reference to a **significant** danger is important for the same reasons as stated earlier, only more so, since a much graver situation will result for the housing provider.*

This also indicates that the opinion must be “reasonable”. This is needed to at least provide some indication that it is an objective decision, though in view of the conflict of interest in the possibility of the service manager acquiring title to a housing project, this is artificial, but is the best that can be done if this section is to remain.

- 25. Paragraph 96(3)(3), First mortgage default:** This paragraph should be deleted for the reasons stated above.

In addition, using this factor as a reason not to have supervisory management, effectively end runs all the protections of the mortgage and the *Mortgages Act*. Surely fairness requires that importing remedies for the first mortgage into the HSA should not materially reduce the protections available to any mortgagee in Ontario.

- 26. Paragraph 96(3)(4), Additional options by regulation:** This paragraph should be deleted. Too many rights are removed by this section already. There is no need to remove more by regulation.

- 27. Subsection 97(2):** Suggested additional subsection concerning the goal of receivership:

(2) The purpose of appointing a receiver or receiver and manager is to correct governance and other problems of the housing provider so that, if possible, the housing provider will in due course be able to operate independently consistent with the normal practices of similar housing providers.

Comment: *The basic purpose of receivership should be stated to guide the receiver, the service manager and the courts. The purpose should be to restore independence to the housing provider if possible. This purpose was stated in the provincial Project Operating Agreements that were superseded by the SHRA. It should be to solve problems, not to punish.*

- 28. Subsection 97(2):** Suggested change:

Time limit

(3) ~~(2)~~ The maximum period during which there may be a receiver or receiver and manager under paragraph 6 of section 87 is 60 days ~~one year~~.

Comment: *The original wording of the section is somewhat confusing, since the maximum is not the period stated, but the period stated plus any extension granted by the court. This wording corrects that.*

More important is the length of the private appointment. That is the period during which a receiver may continue without giving the housing provider an opportunity to challenge its actions. Experience has shown that one year is too long. That is a sufficient period to destroy the self-governance capacity of the housing provider—destruction that historically receivers have not been able to avoid or correct.

*In our view there is no need for any private appointment. Emergency situations can be dealt with through a court application for an injunction or appointment of a receiver. However, if there is to be such a power, it should be reviewed by the court within a short time, which we suggest is 60 days. Please note that under the last CMHC Operating Agreement the review period was **eight days**.*

If a receiver is necessary, then 60 days will not be enough to permit it to complete its work. However, the issue is not how long it takes to complete, but how long before an outside judicial review. Two months is ample to get control of the situation in any circumstances and prepare and bring a sensible application to the court.

29. Subsection 97(7): Suggested changes:

Return of control

- (7) When it is appropriate, in the *reasonable* opinion of the service manager, to return control to the housing provider, the service manager shall terminate the appointment of the receiver or receiver and manager.

Comment: *The word “reasonable” has been inserted before “opinion” to indicate that there is an element of objectivity in the decision to end the receivership. This is very important in view of the conflict of interest that can lead to a service manager becoming owner of the housing project.*

30. Subsection 97(9): Suggested changes:

Powers

- (9) The receiver or receiver and manager has the prescribed powers, subject to any limits in the agreement appointing the receiver or receiver and manager. *The receiver or receiver and manager shall exercise such powers and perform its function in an even-handed manner with due regard to the interests of the housing provider as well as the service manager.*

Comment: *A receiver under a private appointment has limited obligations to the owners of the assets in receivership. Its goal is to protect or realize on the (usually financial) interest of the party that appointed it.*

It is not appropriate for a receiver appointed by a municipality under a public statute to deal with issues which are seldom entirely financial and which involve only public interest organizations (housing providers). The standard should be similar to that for a court-appointed receiver, who is an “officer of the court” and owes a duty to all affected parties.

Justice Lauwers reviewed the conduct of the receiver in the Matthew Case (2010 ONSC 4047 (CanLII) at paragraphs 57 to 71) and made a number of criticisms of the Receiver including at paragraph 67:

The Receiver's actions appear to be contrary to the fiduciary duties that a receiver owes to act in a fair and even-handed manner to ensure that all parties (including Matthew Co-Op) have the same information.

31. Subsection 97(11): Suggested insert:

Board of directors of housing provider

(11) The board of directors of the housing provider may continue to meet and consider matters relevant to the housing provider and communicate with the members of the housing provider and retain counsel to advise them and to represent the housing provider with respect to any court proceedings related to or arising out of the receivership or receiver and managership. The receiver or receiver and manager shall afford the board of directors reasonable facilities to perform its functions and shall pay the reasonable costs of counsel out of the funds of the housing provider.

Comment: *This insert is consistent with recent court decisions. The interests of all parties must be before the courts in order for it to make the best decisions and that can only be done if the housing provider has the ability to formulate and advocate its point of view.*

As important is that totally disempowering the board and members of a non-profit housing co-op and certain non-profits will completely destroy their governance capacity. Experience is that the effect of receiverships has been entirely negative and failure of the organization is a self-fulfilling prophecy resulting from the receivership. An appropriate degree of continuing involvement should be required in order to counteract this.

32. Subsection 97(13): Suggested insert after subsection 97(13):

(14) Subsection (13) does not override any solicitor-client privilege.

Comment: *This protects privileged communications using the same wording as subsection 73(4) of the second reading Bill.*

33. Subsection 97(16): Suggested changes:

(16) Every three months, the receiver or receiver and manager shall give the housing provider a written report on progress in addressing the problems that gave rise to the appointment of the receiver or receiver and manager including, ~~that includes~~

Comment: *The quarterly report should focus on steps taken to correct the problems that gave rise to the situation but should also include more routine reporting on financial and other operational matters.*

34. Subsection 97(19): Suggested changes:

Limit on report requirements

(19) Subsection 16 does not require the disclosure of information that, in the opinion of the receiver or receiver and manager, may relate to fraud or other criminal activity by a director, member or employee of the housing provider *if the service manager does not consider such disclosure appropriate.*

Comment: This clarifies that any dishonesty must be reported to the service manager, who will decide on the degree of disclosure to the housing provider.

35. Subsection 98(1): Suggested changes:

Court appointed receiver, etc.

98. (1) This section applies with respect to the exercise *by a service manager* of the remedy to seek the appointment of a receiver or receiver and manager *of a housing provider or a designated housing project* under paragraph 7 of section 87 *or under any provision of the Courts of Justice Act or to seek or appoint a receiver or receiver and manager or manager in any other way that a receiver or receiver and manager or manager may be appointed.*

Comment: The same basic principles should apply regardless of the source of the receivership authority. The history of receiverships under the SHRA has shown that technicalities are important. Therefore, there should be an explicit statement that the HSA principles apply to any receivership.

This is all the more important because of the introduction of first mortgage defaults into the system by Bill 140.

36. Subsection 98(2): Suggested changes:

Return of control

(2) When it is appropriate, in the *reasonable* opinion of the service manager, to return control to the housing provider, the service manager shall seek the termination by the court of the appointment of the receiver or receiver and manager.

Comment: The word “reasonable” has been inserted before “opinion” to indicate that there is an element of objectivity in the decision to end the receivership. This is very important in view of the conflict of interest that can lead to a service manager becoming owner of the housing project.

37. Subsection 98(3): Suggested insert:

Application of section 97 provisions

(3) *Subsections (2), (11), (13), (14), (16), (17), (18) and (19) of section 97 apply to a receiver or receiver or receiver and manager referred to in subsection (1).*

Note: *numbers in bold refer to subsections that we suggested be added to section 97. The other subsections are in the existing Bill.*

Comment: *A receiver can be a court-approved extension of the private appointment or a court appointment. This should not affect certain fundamental elements of how the receiver must carry out its functions, particularly in relation to the housing provider.*

We assume that section 98 was originally so brief, because it was expected that the court order appointing the receiver would address all the matters that are dealt with in section 97. However, experience under the SHRA has not borne this out. A social housing receivership is very novel and the standard forms used by the courts do not deal with it. Thus in two cases before the courts there were somewhat different orders (virtually by accident) and this was a significant point considered in the question about transferring the housing project to the service manager.

38. Section 99, Sales and transfers: For the first time under any social housing program in Ontario, the Bill legitimates forced transfer of housing projects. In our view forced sales/transfers are almost never justified in the case of a non-profit housing co-op, since society will always be better served by some level of continuing empowerment of the residents of the co-op.

However, if this is to be an option, then it needs to be regulated to ensure that it is consistent with appropriate principles of fairness and as free from the taint of conflict of interest as possible.

With due respect to those involved, a review of the court decisions and submissions on the two such cases that were proposed under the SHRA indicates that all parties were struggling with the criteria to apply, since they are partly similar to commercial situations (and are using a commercial mechanism) and are partly related to social policy evaluations and goals, with which receivers and courts are less familiar, and since there are no defined criteria or reasonable way of developing them as part of the process.

The suggestions below are addressed at a transfer system that would be more positive, as well as fairer.

39. Subsection 99(1): Suggested changes:

Limits on receivers, etc., appointed by service manager or court

99 (1) This section applies with respect to a receiver or receiver and manager appointed under paragraph 6 or 7 of section 87 *or a receiver or receiver and manager of a housing provider or a designated housing project appointed under any provision of the Courts of Justice Act or in any other way that a receiver or receiver and manager may be appointed and to any sale or transfer of a designated housing project in any other way except by the housing provider.*

Comment: *The original wording only referred to an HSA receivership sale. However, other kinds of receiverships are possible and they should also be covered. In addition, sales are possible without a receiver and without any judicial intervention. The Bill introduces first mortgage default into the factors that are relevant under the HSA. Remedies under the mortgage should also be integrated with the transfer system.*

*Whether it is non-performance under a mortgage or some other breach of the HSA, if there is a possibility of acquisition by a service manager, then it should be regulated under this section. **There is a history of using technicalities in the relevant legal proceedings. It is important that all situations are covered by the section.***

40. Subsection 99(3): Suggested replacement for subsection 99(3):

Restriction on transfer to service manager, etc.

(3) A designated housing project shall not be transferred without the consent of the housing provider unless the court determines that the goal of returning control to the housing provider as stated in section 99(7) is not possible and the housing provider will not voluntarily agree to a transfer and authorizes a transfer process and subsequently approves the transfer.

Comment: *It is important to state that court approval is required for any transfer. **While court approvals are common, especially in the case of large transfers, they are not a legal requirement unless stated in a receivership order.** In addition, there is a possibility that they would not be used in case of non-arm's length transfers, such as to a service manager, where the transferee might not be too worried about legal challenges at a later date.*

The above sets up a two-stage system. This is frequent in commercial circumstances. First, the court approves the concept of a transfer by determining that the appropriate circumstances exist. At the same time the court determines the process for implementing the transfer. This will ensure that all parties have an opportunity to oppose the concept and to propose an appropriate methodology. After the process of seeking a transferee has taken place, the court approves the actual proposed transaction.

41. **Subsection 99(3)(a):** Additional subsections are suggested below. They deal with some of the matters stated in the original paragraph 99(3)(a) to provide reasonable detail and protections in the transfer process.
42. **Subsection 99(3)(b), Receiver does not think open process needed:** Paragraph 99(3)(b) should be deleted since the opinion of the receiver on whether to use such a process may not be reliable. The receiver may be influenced by the views of the service manager. The service manager has a conflict of interest. As noted earlier, Justice Lauwers said in the Matthew case:

[84] I am troubled by this position, which is taken by the County and proffered by the Receiver as justification for the sale recommendation. It is intended to manufacture urgency. A cynic might see it as a threat calculated to encourage the court, on the one hand, not to scrutinize too closely the fairness complaints of Matthew Co-Op, and, on the other hand, to accept the Receiver's recommendation of the sale because a sale is inevitable if the County as service manager refuses to continue to fund the Co-op.

[57] The Receiver's actions appear to be contrary to the fiduciary duties that a receiver owes to act in a fair and even-handed manner to ensure that all parties (including Matthew Co-op) have the same information.

The sense of inevitability and service manager priority may lead a receiver to feel that there is no need for a competitive process. However, everyone involved in real estate knows that unexpected things happen when a property is put on the market. There may be a proposal or offer that the service manager or the receiver did not expect. The only way to tell is to employ an open and competitive process.

In addition, the only way for a housing provider to argue against the position that an open process is not necessary is to produce alternatives. But that cannot reasonably be done until after the process.

43. **Subsection 99(4):** Suggested insert:

(4) Prior to any transfer there will be an open and competitive process to select a transferee that would continue to operate the project under the transferred housing program administered by the service manager. Full particulars of the designated housing project shall be prepared and circulated to parties that might be interested in a transfer. Such particulars shall be provided to the housing provider so that it may also seek transferees. If the designated housing project is a non-profit housing co-operative, the particulars shall also be provided to the Co-operative Housing Federation of Canada or its successor.

Comment: *The two court cases on receivership are remarkable in that there was no attempt to seek alternative housing providers. This was not appropriate as other housing providers were available who might have wished to take over the project on the same basis as the municipal housing corporation by assuming the liabilities. A suggestion of a*

co-op housing sector body acquiring the co-op in one case does not appear to have been seriously considered. There seems to have been a pre-judgment that the Region's housing company was the proper body.

There is no reason to limit the transferee in this way. Therefore, there should be an open and competitive process as stated in Bill 140. However, the original formulation in the Bill is not detailed enough. Any receiver appointed by a service manager may be influenced by the service manager's desire to acquire the property. Therefore a limited process might be used. The process should be defined in the Act.

44. Subsection 99(5): Suggested insert:

- (5) Alternative proposals arising in connection with the process shall be reviewed and presented to the court although they may not involve a transfer.*

Comment: *Unexpected alternatives may develop, such as amalgamations. Even though the service manager or others may have thought of such possibilities before, the sale process will force them to be crystallized.*

45. Subsections 99(6) and (7): Suggested insert:

- (6) Offers or proposals shall indicate how the designated housing project will be dealt with when it is no longer subject to the Act and how compensation for any equity of the housing provider will be calculated and paid.*
- (7) Any application for approval of a transfer shall be accompanied by a copy of the particulars, all offers and proposals and any recommendations and at least one appraisal of the designated housing project by a qualified appraiser, which shall include a reasonable valuation of the equity of the housing provider.*

Comment: *A remarkable aspect of the Thornhill Green Co-op case was the lack of compensation for the present value of the equity of the co-op in the project. It is totally contrary to any principle of law in any other situation. Of course, in the case of Thornhill Green Co-op, one could argue that the equity was created solely by the government housing program. We do not accept this, but can see the argument. However, there are many housing providers (mainly non-profits) where equity has been contributed by the housing provider itself or by third parties and the value of government financial support is only a small part of the total value. It would be unreasonable to simply expropriate that value without compensation.*

The suggested section would allow a number of alternatives. The property could be returned after the original 35 years. There could be compensation for the equity. In the case of a co-op that compensation could be distributed in accordance with the Co-operative Corporations Act. The point of the above is to indicate that the factor should be dealt with by the eventual court order.

Proposed subsection (7) is intended to ensure that the court has all reasonable information to make its decision.

46. Subsection 99(8): Suggested insert:

(8) The party bringing the application for authorization of a transfer process and approval of a transfer may be cross-examined.

Comment: *Receivers are given wide authority for practical reasons, since a judge cannot itself conduct the detailed business involved in a receivership. Part of this is that receivers may not be cross-examined. This can lead to inadequate information before the court. As Justice Lauwers said in the Matthew Co-op case*

[58] While the Receiver is an expert whose expertise ought to be respected by the court, I am reluctant to specify the weight to be given to that opinion a priori. In this case there are public policy issues that are relatively new for the Receiver and that are not within its customary commercial expertise, as was acknowledged by Morawetz J. in Thornhill Green 2 at paragraph 29, and by the Court of Appeal at paras. 27-28.

We feel that a housing provider can only properly represent itself and a judge can only have complete information if the receiver can be subject to the normal information-gathering technique involved in cross-examination.

47. Subsection 99(9): Suggested insert:

(9) The court may make such orders respecting a transfer as it deems appropriate and such orders may be registered against the title to the designated housing project.

Comment: *This is designed to give the court enough scope. The reference to registration would allow for long-term orders, which could have an effect at the end of the original 35-year program.*

48. Subsection 99(10): Suggested insert:

(10) The board of directors of the housing provider may retain counsel to advise it and to represent the housing provider with respect to any application for authorization of a transfer process and approval of a transfer. The reasonable costs of counsel shall be paid out of the funds of the housing provider or the proceeds of sale.

Comment: *Fairness requires reasonable representation, but this can only be done if there is authority to do so and a source of funding. Although the position stated in this insert has been endorsed by the courts, it has met with continued resistance from receivers. It is better to state it explicitly.*

49. Subsection 100(4): Suggested changes:

Return of control

(4) When it is appropriate, in the *reasonable* opinion of the service manager, to return control to a board of directors that does not include directors appointed under paragraph 9 of section 87, the service manager shall terminate the appointment of those appointed directors.

Comment: *The opinion of the service manager must be objective.*

50. Subsection 100(7), Service manager consent to all directors: This subsection should be deleted. In the case of a co-op, the members should have the right to elect whomever they wish for positions not filled by the service manager.

While there have been cases in the past where, under the equivalent of a supervisory management arrangement, co-ops have agreed that certain members could not be directors, or have agreed to obtain pre-approval, the key point is that that was done by agreement and this limited the damage that such a policy can create.

Key concern # 3: System for review of service manager decisions

Outline of issues

Since the *Social Housing Reform Act* was passed, CHF Canada has been concerned that a fundamental gap in the Act is the lack of any mechanism for housing providers to seek an independent review of a service manager decision, other than expensive and time-consuming litigation. The co-op and non-profit housing sectors have participated in legal action in recent years that has resulted in the courts recognizing housing providers' right to retain counsel and imposing requirements on service managers when exercising their authority under the SHRA, including requirements for notice and procedural fairness. Although these legal interventions have been very successful, they have been very expensive and have only been possible because the sector associations have been willing to participate and cover most of the costs.

Both CHF Canada and the Ontario Non-Profit Housing Association (ONPHA) used our submissions on the Long-Term Affordable Housing Strategy to highlight the need for a cost-effective and efficient system that housing providers can use to seek an independent review of a service manager decision. This has been a top priority for both associations and we were very pleased that Bill 140 included a review system. Unfortunately, we have very serious concerns with the model that has been used in the Bill.

We retained the services of Mr. Raj Anand to help us examine the review model adopted in Bill 140 and to recommend an alternative approach that is fairer and offers more appropriate protections. Mr. Anand is a senior and highly respected administrative, civil litigation and human rights lawyer with the firm of WeirFoulds.

His letter to us setting out his opinion and advice is attached as an Appendix.

Mr. Anand's view is that "the protections provided by these sections are inadequate, indeed probably inferior to what presently exists under the common law and the *Social Housing Reform Act*". The model in the Bill he says

- lacks independence
- lacks procedural safeguards
- lacks substantive protection, and
- reduces housing providers' current remedies.

Mr. Anand recommends a different approach than the brief provision in the Bill. He advises that

A much less intrusive, while at the same time more independent, system can easily be achieved by providing for an *ad hoc* or standing board of independent arbitrators to adjudicate disputes as they arise. This can be done by an individual service manager, or by several or all service managers acting together. The key is that the decision-makers must have the perception and reality of impartiality.

Mr. Anand notes that "there are any number of appropriate arbitration systems that can be put in place, as they have been in commercial, labour and public law proceedings". The

key is to enshrine in the Act itself provisions to ensure that the system is truly impartial and sets out suitable procedural safeguards and substantive protections.

The recommended system for reviews requested by housing providers is set out below. Our proposed changes would not affect the provisions in the Bill related to reviews requested by households.

Recommended changes to review of service manager decisions provisions

Changes from the second reading Bill are shown except where noted.

1. Subsection 155(1): Suggested changes:

System for dealing with reviews *requested by households*

155. (1) A service manager shall have a system for dealing with reviews requested under section 156 ~~or 157~~.

Comment: Our proposal is that a separate system be established for reviews requested by housing providers.

2. Section 157: Suggested changes:

Reviews requested by housing providers

157.(1) A housing provider may request a review of ~~a decision~~ *the following decisions* of a service manager ~~if the decision is prescribed for the purposes of this section~~.

- 1. A decision to reduce, discontinue or suspend subsidy payments.*
- 2. A decision to allow the service manager to perform any of the duties and exercise any of the powers of the housing provider under the Act.*
- 3. A decision to appoint a supervisory manager.*
- 4. A decision to appoint a receiver or receiver and manager.*
- 5. A decision to remove some or all of the directors.*
- 6. A decision to appoint one or more individuals as directors, unless such individuals are replacing other directors who were appointed by the service manager.*
- 7. A decision to require the housing provider to prepare and follow plans under subsection 71(5).*
- 8. A change in the target for rent-g geared-to-income and modified units referred to in section 79.*

9. A decision of a service manager to consent to a transfer of a housing project to the service manager, a local municipality or any related body.
10. A decision of a service manager to consent, or refuse to consent, to a transfer or mortgage of a housing project under subsection 162(2).
11. A decision prescribed for the purposes of this paragraph.
 - (2) The review shall be completed prior to implementation of a decision mentioned in subsection (1) unless there is an emergency and complying with subsection (1) may materially worsen the situation. In that case the review shall be completed as quickly as possible and the decision of the arbitration board shall include any steps that may be necessary in view of the action taken by the service manager.
 - (3) After requesting a review, a housing provider may agree voluntarily with a service manager to implement all or part of the proposed decision on an interim basis pending the review. In that case the arbitration board shall not consider such agreement as a factor in reviewing the decision, but its decision shall include any steps that may be necessary in view of the interim action.
 - (4) The right to request a review of a decision of a service manager does not affect any rights a housing provider may have with respect to the service manager's decision-making process.
 - (5) A request for a review of a decision of a service manager, or the results of such a review, does not limit or affect any other rights or remedies of a housing provider.

Comment: The intent of these recommendations is to leave the review system for households as stated in Bill 140, but to change the system for housing providers.

The recommended changes to section 157 have been prepared based on the provisions that appear in the second reading of Bill 140. We have recommended a number of amendments to some of those provisions and, if such changes are accepted, they might involve changes to these recommendations.

In our view the substantive content of housing providers' right to a review of service manager decisions should be guaranteed by statute.

The original Section 157 does not specify the service manager decisions that will be subject to review, but leaves this crucial matter to be filled in by regulations. Section 156, on the other hand, lists eight specific types of decisions affecting households that can be reviewed.

These are important rights that presently exist through applications and judicial reviews in the Superior Court and changes in these rights should be sanctioned by legislative authority with full legislative scrutiny.

3. Section 159: Suggested new section between 158 and current 159:

Rules for reviews requested by housing providers

- 159.** (1) *This section applies to decisions where a housing provider may request a review under section 157.*
- (2) *Before a service manager implements a decision that may be reviewed under section 157, it shall give the housing provider a copy of the decision.*
- (3) *Within sixty days of the communication of the decision by the service manager to the housing provider, the housing provider may notify the service manager in writing of its desire to submit the decision for review by an arbitration board. The notice shall contain the name of the housing provider's nominee to the arbitration board.*
- (4) *Within ten days of receipt of the notice, or such further time as is agreed by the parties, the service manager shall inform the housing provider of the name of its nominee to the arbitration board.*
- (5) *Within twenty days of the appointment of the service manager's nominee, or such further time as is agreed by the two nominees, they shall appoint a third person to chair the arbitration board.*
- (6) *If the service manager does not appoint its nominee, or the two nominees do not appoint the chair, within the times set out in subsections 4 and 5 respectively, the appointment shall be made by the Minister on the request of either party. Such appointment shall be made from a list of qualified arbitrators that is maintained by the Minister.*
- (7) *The arbitration board shall hear and determine the request for review, and shall issue a written decision and reasons to the parties within thirty days of completion of the board's hearings.*
- (8) *The decision of the arbitration board is final and binding on the housing provider and the service manager. The decision of a*

majority is the decision of the arbitration board, but if there is no majority, the decision of the chair governs.

- (9) The regulations may provide for rules of practice and procedure of arbitration boards constituted under this section, including (without limiting the generality of this authority) provisions relating to the nature of the proceeding; notice; disclosure; provision of particulars and documents in advance of the hearing; the fixing of dates for hearings; manner of adducing evidence; administration of oaths and affirmations; right to make oral submissions; and funding of counsel. In the absence of such rules, the parties may agree to apply the Arbitration Act.*
- (10) On the request of either party, and with the consent of the other party, the Minister may appoint a settlement officer to endeavour to effect a settlement before the arbitration board begins to hear the arbitration.*
- (11) Each of the parties shall pay the remuneration and expenses of its nominee, and each shall pay one-half of the remuneration and expenses of the chair of the arbitration board, regardless of whether the individuals were appointed by the parties themselves or by the Minister.*
- (12) If a housing provider is in receivership, or otherwise not in control of the housing project, the board of directors of the housing provider may act as the housing provider under this section and retain counsel to advise them and to represent the housing provider at the expense of the housing provider.*
- (13) If any of the directors were appointed by the service manager, such persons shall not be considered directors for the purpose of subsection (12). If any persons were removed as directors or deemed directors by the service manager, such persons shall be considered as directors for the purpose of subsection (12).*
- (14) If the service manager has appointed or removed any directors and a quorum of directors does not remain in office after applying subsection (12), then the deadline referred to in subsection (3) shall be extended for thirty days to permit new directors to be elected.*

***Comment:** The specifics proposed above have been substantially prepared by Mr. Raj Anand. The recommended system will be expeditious, less expensive than going to court, and will permit the use of arbitrators with experience in relevant areas.*

As with any arbitration system, the participants may be motivated to seek a voluntary solution. Subsection (10) of the above provides a mechanism to facilitate this.

Key concern #4: Ministerial consent to transfer of housing projects

Outline of issues

Under the *Social Housing Reform Act*, the consent of the Minister is required for any sale or transfer of a housing project. This requirement has been dropped from Bill 140.

There is an inevitable and unresolvable conflict of interest in cases like the Region of York and Thornhill Green Co-op where the service manager cannot possibly be impartial and certainly could not appear to be, or be perceived to be, impartial.

The consent of the Minister offers housing providers a fundamental protection in case of conflicts with a service manager. This helps to ensure protection of the public interest in the housing provider's assets and the fair treatment of all parties involved.

This was recognized by the unanimous decision of three judges of a panel of the Divisional Court in the Thornhill Green Co-op case where the decision of the Court stated:

[73] ... The Legislature has given two separate governmental entities, the Region and the Minister, the power to control whether a proposed sale will take place. This ensures that the public interest in social housing and its availability will be taken into account in any proposed disposition of a "housing project," as defined in the SHRA.

Ministerial Consent is a major element that has been included in the SHRA to ensure balance in the system and provide a check on inappropriate decisions by a service manager. Experience has shown that even under the SHRA system, which includes Ministerial Consent, service managers have an inordinate power to erode the independence of housing providers.

The Ontario system of community-based provision of non-profit housing works only if there is a reasonable balance between the rights and responsibilities of the government regulator and the provider that owns the housing and is legally accountable for its successful operation. We feel that omission of the requirement for Ministerial Consent from Bill 140 will fundamentally erode the protections of community housing providers and therefore of the public interest.

Recommended changes to consent to transfer of housing projects provisions

The following are suggested changes to Bill 140 to implement the requirement for Ministerial Consent in the context of the Bill.

Subsections 162(2) and (3): Suggested changes:

1. Consent required for certain transactions

- (2) The housing provider may transfer or mortgage the housing project or the land where it is located only with the written consent of the service

manager in whose service area the housing project is located *and of the Minister.*

~~Prescribed~~ Exceptions

- (3) Consent is not required under subsection (2) for ~~a transaction prescribed for the purposes of this subsection~~ *the housing provider to:*
- (a) *lease or offer lease,*
 - (i) *an individual unit in the housing project for a term not exceeding one year, or*
 - (ii) *a part of the housing project that is not residential;*
 - (b) *in the case of a housing provider that is a non-profit housing co-operative,*
 - (i) *allow a member of the co-operative to occupy a member unit of the co-operative, and*
 - (ii) *allow a non-member of the co-operative to occupy a non-member unit of the co-operative for a term not exceeding one year;*
 - (c) *in the ordinary course of operating the housing project, dispose of chattels in the housing project.*

Comment: *The changes to subsection (2) implement the requirement for Ministerial Consent.*

Subsection (3) deals with exceptions to the Consent requirements. Such exceptions should not be permitted by regulation. A power to permit service managers to dispense with Ministerial Consent in cases where they may have a conflict of interest is too significant to be left to a regulation. Any permitted exceptions need to be addressed in the Act directly.

Bill 140 defines “transfer” to include leases. It then omits two crucial exceptions that are in subsection 95(2) of the SHRA. No consent is needed to routine transactions, such as the granting of ordinary leases and occupancy agreements. Bill 140 leaves this for regulations.

Our revision to subsection (3) restores the SHRA exceptions.

2. Subsection 166(5): Suggested changes:

Required consent

(5)The consent required under subsection (2), (3) or (4) in relation to a housing provider is the written consent of each service manager whose service area includes a housing project described in subsection (1) that is operated by the housing provider *and of the Minister*.

Comment: Bill 140 closes a loophole that would permit transfer of a social housing project through a variety of corporate manoeuvres. Ministerial consent is needed in these situations in the same way as for a direct transfer.

3. Subsections 166(6): Delete this subsection.

Comment: This subsection was inserted to permit regulations to reduce the administrative burden in the case of routine corporate changes. However, it is very difficult to define such changes in advance. To ensure that the requirement for Ministerial Consent governs indirect transfers to a service manager or related party, there cannot be any exceptions by regulation. In our view this will not create a significant administrative burden, since legitimate changes are not very frequent and can be handled quite easily when consent is requested.

5. Other Recommended Changes

The following are suggested changes to Bill 140 to deal with legal matters not addressed in the recommendations above.

- 1. Section 2, Definition of non-profit housing co-operative:** The Bill uses the term “co-operative corporation” to refer to non-profit housing providers that are co-ops. However, the defined term in the *Co-operative Corporations Act* is “non-profit housing co-operative”. The same term is defined in the SHRA by reference to the *Co-operative Corporations Act*. OR 298/01 uses a comparable reference in the definition of “rent” and the term is used in the other regulations under the SHRA. The same term is also used in other statutes and regulations, most notably the *Residential Tenancies Act*.

The definition was created in the *Co-operative Corporations Act* in order to specify a corporate structure and set of rules for a certain type of co-operative corporation that would protect the public interest in the assets acquired by the corporation. The restrictions contained in sections 171.1 to 171.6 and other parts of the *Co-operative Corporations Act* provide a very significant level of protection of the public interest in such assets—far more protection, for instance, than with respect to a non-profit corporation under the *Corporations Act* or the *Not-for-Profit Corporations Act*. (The *Co-operative Corporations Act* also uses the concept of non-profit housing co-operative for a system of rules governing the relationship between non-profit housing co-ops and their members, in many ways comparable to those that govern ordinary residential landlords and tenants.)

We believe that “Non-profit housing co-operative” should be a defined term, using the same definition as in the SHRA, and the term “non-profit housing co-operative” should be used throughout the HSA instead of “co-operative” or “co-operative corporation”. This is important because there could be other kinds of co-operatives that would not be consistent with the provincial interest in a system of housing and homelessness services.

Recommendation: *Section 2, Definitions, should be amended to insert the same definition as in the SHRA:*

“non-profit housing co-operative” means a non-profit housing co-operative under the *Co-operative Corporations Act*; (“coopérative de logement sans but lucratif”).

Recommendation: *The defined term “non-profit housing co-operative” should be used instead of “co-operative corporation” throughout the Housing Services Act.*

- 2. Subsection 71(5), Plans:** This new subsection gives service managers an open-ended ability to insert themselves into the day-to-day affairs of housing providers with no need to establish that the provider is, in any way, in breach of its duties under the Act. This flies in the face of the goal stated in Section 1, Purpose of the Act, of giving housing providers more flexibility to run their housing. Instead, it shifts more control to government.

Recommendation: Subsection 71(5) should be deleted.

3. **Subsection 79(5), Imposing target without agreement:** The SHRA limited changes without agreement to 10 percent. Any greater change could totally change the character of a housing provider.

The 10 percent limit in the SHRA should be restored and should be cumulative with any change under the SHRA so that the maximum imposed change would be 10 percent.

Recommendation: Subsection 79(5) should be amended by adding the following paragraph:

3. No change may be made in a target that would have the effect of increasing or decreasing the number of units not occupied by households receiving rent-geared-to-income assistance by more than 10 per cent of such households under the targeting plan originally in effect for the housing project under section 98 of the former Act.

Comment: This wording adapts the SHRA provision to the concepts in Bill 140 and relates any change under section 79 to a change under the SHRA.

4. **Subsection 82(1), Annual report from housing provider:** This requirement corresponds to parts of section 113 of the SHRA. However, Bill 140 removes an important safeguard that is in the SHRA. Subsection 113(5) of the SHRA states:

- 5 The housing provider shall not be required to collect or report information about the income of households not receiving rent-geared-to-income assistance in a housing project.

Residents who pay market rents or housing charges are an important component of housing projects. Mixed communities are a major reason why the SHRA system in Ontario does not suffer from many of the same issues that are endemic in the United States. Market-paying residents should be encouraged. As such, they should not have fewer rights than tenants in other market rental accommodation.

The Bill should be amended to restore the protection for information about households who pay market rents or housing charges.

Recommendation: Subsection 82(1), Annual report from housing provider should be amended by adding:

The housing provider shall not be required to collect or report information about the income of households not receiving rent-geared-to-income assistance in a housing project

5. **Section 83, Other reports from housing provider to service manager:** This section also corresponds to parts of section 113 of the SHRA. However, in addition to the point stated above about market payers, Bill 140 also removes other safeguards that are in section 113 of the SHRA.
- (a) Under subsection 113(3) of the SHRA a requirement to report about the households in a housing project could only be imposed by regulation.
 - (b) Under subsection (4) the form of report had to be authorized by the Minister.
 - (c) Subsection (5) referred to above respecting market residents also applied to these reports.
 - (d) Under subsection (6) any additional reports had to relate to the housing provider's compliance with the Act and regulations.
 - (e) Under subsection (6) the request for additional reports had to be reasonable.

Without these safeguards, service managers will be able to impose undue reporting burdens on housing providers and can require information about individual households that it is not appropriate to collect and/or release.

Section 83 should be amended by restoring the safeguards that are in Section 113 of the SHRA regulating the reporting requirements.

***Recommendation:** Subsection 83, Other reports, etc., from housing provider should be amended to read:*

Other reports, etc., from housing provider

83. (1) A housing provider shall give the service manager such reports, documents and information as the service manager *may reasonably request relating to the housing provider's compliance with this Act and the regulations.*

Report re households

(2) *If required to do so by a regulation, a housing provider shall give the service manager a report about the number, type and income of households occupying units under housing programs in the housing provider's housing projects in the service area.*

Form and manner

(3) ~~(2)~~ *The reports, documents and information required under subsection (1) must be given in the form and manner authorized by the service manager. The reports required under subsection (2) must be given in the form and manner authorized by the Minister.*

Restriction

(4) *The housing provider shall not be required to collect or report information about the income of households not receiving rent-geared-to-income assistance in a housing project.*

False information

(5) ~~(3)~~ A housing provider shall not knowingly furnish false information in a report, document or information given under subsection (1).

February 24, 2011

VIA E-MAIL

Mr. Dale Reagan
Managing Director, Ontario Region
Co-operative Housing Federation of
Canada

Mr. Sharad Kerur
Executive Director
Ontario Non-Profit Housing Association

Dear Sirs:

I am writing to provide my opinion on the procedural and substantive protections provided to housing providers by sections 155 to 159 of the second reading version of Bill 140.

In principle, the proposed adoption of an administrative review of service manager decisions is commendable because it is likely to be less costly and time-consuming than the current resort to judicial remedies. Empowering an appointed body with legislative authority to review municipal Council decisions is nothing new; a whole host of provincially appointed bodies are presently authorized to overturn municipal Council decisions, including the Ontario Municipal Board, the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario, and many others.

The difficulty resides not in principle, but in the particular model that has been adopted in sections 155 to 159 of Bill 140. In my view the protections provided by these sections are inadequate, indeed probably inferior to what presently exists under the common law and the *Social Housing Reform Act*, for the following reasons:

1. Lack of independence

Under section 155 of Bill 140, the "system for dealing with reviews requested under section...157" (i.e., reviews requested by housing providers of decisions of service managers) is created and managed by the service manager under review. In other words, the adjudicator is appointed by one side of the dispute. There is nothing in the bill (and particularly in paragraph 155(3)(a)) to prevent a service manager from naming its own employees to the review body. The review "system" is structurally biased and lacks institutional impartiality. Decision-making structures of this type have been held by courts to violate principles of administrative law, the *Charter* and the *Canadian Bill of Rights*, but for present purposes that task is to enact a proper procedure rather than create a body which is vulnerable to such challenges.

2. Absence of procedural safeguards

There are minimal procedural requirements in section 158 of Bill 140: the duty to provide a written decision with reasons, and the obligation to give the parties to the review notice of the decision and reasons. The *Statutory Powers Procedure Act* is excluded, and no right to a hearing is provided. Indeed, no guidance is given as to the nature of the proceeding that is required by the review body: notice, disclosure, manner of adducing and challenging evidence, right to make oral submissions, funding of counsel, to name only a few issues. None of these important specifications is stipulated in the bill; again, all of them are left to be decided by the service manager, which is one side of the dispute.

3. Lack of substantive protection

Section 157 does not specify any service manager decision that will be subject to review; it leaves this crucial detail to be filled in by regulations. In this sense, it is substantively devoid of content. Section 156, on the other hand, lists eight specific types of decisions affecting households that can be reviewed, and allows additional types of decisions to be prescribed by regulation under section 156(9). The substantive content of housing providers' reviews of service manager decisions should be guaranteed by statute. The extent to which housing providers can review decisions of service managers should not be determined by post-enactment lobbying of a future government behind closed doors; these are important rights that presently exist through motions and judicial reviews in the Superior Court, and any modification demands legislative scrutiny.

4. Reduction of housing providers' current remedies

Judicial review is presently available to challenge a variety of service manager actions under the *Social Housing Reform Act*, and the senior courts in this province have imposed requirements of notice, procedural fairness and a right to retain counsel in these situations: *Labourview Co-operative Homes Inc. Chathan Kent (Municipality)* (2007), 228 O.A.C. 65 (Div. Ct.); *Co-operative Housing Federation of Canada v. York (Regional Municipality)*, (2009), 247 O.A.C. 90 (Div. Ct.); *York (Regional Municipality) v. Thornhill Green Co-operative Homes Inc.* (2010), 262 O.A.C. 232 (C.A.); *(Simcoe County) v. Matthew Co-operative Housing Inc.* [2010] O.J. No. 3087, 96 R.P.R. (4th) 195 (Sup. Ct.), *Peterborough (City) v. Kawartha Native Housing Society Inc.* (2010), 325 D.L.R. (4th) 426 (ON C.A.), Hearings in the Superior Court, including applications for judicial review in Divisional Court, allow the adducing of sworn evidence through affidavits and cross-examinations and written and oral argument before the Court.

It is at best uncertain, and in fact unlikely, that many of these rights are preserved in the administrative recourse that is vaguely sketched and left to the service managers to fill in the details under Bill 140. In addition, while a fair and cost-effective administrative remedy is in principle a worthwhile substitute for expensive, time-consuming litigation in the courts, the "review body" does not provide an equivalent substitute; rather, under the prematurity doctrine that has been adopted in the public law jurisprudence, Bill 140 will preclude judicial review, at least until the inferior process it creates has been exhausted. And when judicial review is then undertaken, it must challenge not the decision of the service manager, as was done in the cases cited above, but the decision of the review body, within the as yet undisclosed and quite possibly patchwork quilt to be developed across the province by service providers under section 156. In other words, the added step of judicial review, with its attendant cost and delay, must accept the inferior procedural and substantive rights I described above, and determine whether the review body acted properly within the Bill 140 framework.

The preferred alternative

The Bill 140 model is something of a hybrid in terms of provincial involvement. It leaves the creation of the "review system" in the hands of the municipal level of government, yet it reserves both the substance and procedure of the review system to the Cabinet: "the system must comply with the prescribed requirements" (ss. 155(4) and 159(4)); and the decisions to be reviewed - the substantive jurisdiction of the review system - are again "prescribed" (s. 157).

A much less intrusive, while at the same time more independent, system can easily be achieved by providing for an *ad hoc* or standing board of independent arbitrators to adjudicate disputes as they arise. This can be done by an individual service manager, or by several or all service managers, acting together. The key is that the decision-makers must have the perception and reality of impartiality. There are any number of appropriate arbitration systems that can be put in place, as they have been in commercial, labour and public law proceedings: single arbitrators or three person boards, with the parties' nominees appointing a chair; standing rules created by regulation or adoption of the *Arbitration Act*; compensation according to a schedule or determined on an individual basis; an agreed list appointed in rotation; and many others.

I will not attempt to fasten on the optimal arbitration alternative; there are undoubtedly many satisfactory choices in this regard. The key point is that the government has recognized in Bill 140 that the costly and time-consuming uncertainty of court

applications can be remedied by an administrative law solution. It has proposed one in sections 155 to 159 that is, in my view, seriously flawed. But the principle of a cost-effective, accessible review mechanism can be implemented at an administrative level without sacrificing the impartial decision-making that is the hallmark of the courts. In my view, the arbitration system I sketched above can achieve these twin goals.

Yours truly,

Raj Anand

RA/sn
c: Diane Miles
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