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RING OUT THE OLD LAW, BUT STILL APPLY IT

The Co-operative Corporations Amendment Act As Applied to Non-profit Housing Co-operatives

PAUL STUART RAPSEY*

RÉSUMÉ

L'auteur étudie la common law concernant le logement coopératif et les récentes modifications aux lois régissant les coopératives de logement à but non lucratif. L'auteur examine tout particulièrement la question des normes de vérification conformes aux décisions des conseils d'administration des coopératives et qui touchent aux droits d'occupation des membres et à la question distincte de la juridiction des cours pour accorder un redressement contre une déchéance. L'auteur analyse plusieurs décisions récentes de la Division générale de la Cour de l'Ontario et arrive à la conclusion que les cours ont toujours tendance à faire une interprétation restrictive de la common law malgré d'étonnantes mesures réformatrices contenues dans de récentes lois. L'auteur conclut que l'analyse juridique, lorsqu'elle existe, comporte de sérieuses lacunes.

INTRODUCTION

In 1992 the law with respect to non-profit housing co-operatives *vis à vis* member occupation changed dramatically. The jurisprudence, however, has remained stuck in out of date concepts. Cases under the new legislative scheme are decided with careless reliance on the former jurisprudence. The thinking is cloudy and the rationale filled with double-speak. As with many decisions affecting the disadvantaged, poor facts in a given case too frequently lead to poor legal analysis and an overly broad application of legal principles.

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BACKGROUND

Since the early 1970s, most non-profit co-operatives had been considered to be exempt only from Part IV of the *Landlord and Tenant Act*,¹ (the LTA). This was by virtue of what was formerly Regulation 547,² now Regulation 705.³ However, frequently the procedures under Parts I, II and III were relied on in the case of co-operative eviction applications. The reason for this is that Regulation 705 excludes non-profit housing co-operatives that meet certain regulatory requirements from the definition of “residential premises” contained in s.1 of the Act.⁴ The regulation does not state expressly that there is no landlord and tenant relationship at all.

The LTA, s.2 makes it clear that Parts I, II and III may apply to residential tenancies, subject only to Part IV. It also applies to “other” tenancies. These other tenancies are defined only by the common law. In the late 1970’s there was a failed attempt by the Ontario Government to separate out the legislation into residential tenancies legislation and separate commercial tenancies legislation. For reasons which are now historical only, this was thwarted by the Supreme Court of Canada: *Reference re Residential Tenancies Act, 1979*.⁵

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1. R.S.O. 1990, c. L-7, as amended.
 2. *Classes of Accommodation Deemed Not To Be Residential Premises*, R.R.O. 1980.
 3. R.R.O. 1990.
 4. Section 1 of Regulation 705 states:
 1. In this regulation, “non-profit housing co-operative corporation” means a corporation incorporated without share capital under the *Co-operative Corporations Act* or any predecessor thereof or under similar legislation of Canada or any province thereof, the main purpose and activity of which is the provision of housing for its members, and the charter or by-laws of which provide that,
 - (a) its activities shall be carried on without the purpose of gain for its members;
 - (b) on dissolution, its property after payment of its debts and liabilities shall be distributed to a non-profit or charitable organization;
 - (c) housing charges, other than charges similar to rent, or any other charges payable by members shall be decided by a vote of members or of a body duly elected or appointed by the members, or a committee thereof; and
 - (d) termination of occupancy rights may be brought about only by a vote of the members or a body duly elected, or appointed by the members, or a committee thereof, and that the member whose occupancy rights are terminated has a right to appear and make representations prior to such vote.
 5. [1979] 1 S.C.R. 714. This decision is now overridden by a more recent decision by the Supreme Court of Canada in *Reference re Residential Tenancies Act (Nova Scotia)* (1996), 193 N.R. 1 (S.C.C.).

In 1992, the Ontario Court of Appeal once and for all removed the jurisdiction of the courts to use any Part of the LTA with respect to tenancy-type issues of members in non-profit housing co-operatives: *McBride v. Comfort Living Housing Co-operative Inc.*⁶ However, “non-profit housing co-operative corporation” is a defined term for the purpose of the regulation.⁷

In *McBride*, the Court of Appeal held that Regulation 547⁸ took the co-operative premises right out of the LTA and not simply out of Part IV.⁹ The Court of Appeal likened housing co-operatives to a “social club”. The “tenant” was bound by the “club’s” rules and regulations.¹⁰

In effect, the Court of Appeal held that, at common law, this was not a landlord and tenant relationship. Parts I to III could therefore not be applicable. Ironically, the Government obviously had believed that, but for what is now Regulation 705, these forms of residential living were residential premises as otherwise defined in s. 1 of the LTA.¹¹ If not, there would have been no need for an express exemption from the definition of “residential premises”.

The Court, in *McBride*, held that this was not a traditional landlord and tenant relationship because members of co-operatives are both landlord and tenant rolled into one. The Court of Appeal expressly overturned considerable lower court jurisprudence that had held Parts I to III applicable to the termination of the occupancy rights of co-operative members.¹²

6. (1992), 7 O.R. (3d) 394 (C.A.).

7. *Op. cit.* Not all non-profit co-operatives would necessarily be exempted by the regulation. This issue was not examined by the Court of Appeal.

8. Now Regulation 705.

9. The reason the Court of Appeal determined that the LTA does not apply at all is that the definition of “residential premises” is contained in s.1 of the LTA and the regulation refers to the “Act”, rather than “Part IV”.

10. The Court held that in the context of clubs:

The courts recognize the supremacy, in this setting, of these consensual rules and will not interfere with a *bona fide* decision to terminate membership made in accordance with them.

11. Regulation 705 states:

2. The following are designated classes of accommodation deemed not to be residential premises for the purposes of the Act:

1. Premises occupied by members of a non-profit co-operative housing corporation.

12. *E.g., Re Bamburgh Circle and Laban* (January 11, 1988), (Ont. Dist. Ct.) [unreported]; *Alex Girvin Housing Co-operative Inc. v. Booth* (1985), 51 O.R. (2d) 587 (Ont. Dist.

In *McBride*, the Court limited the jurisdiction with respect to co-operative evictions to judicial review of decisions by co-operative boards and to relief against forfeiture pursuant to the Courts of Justice Act. In this case the tenant had relied on the LTA and not the *Courts of Justice Act*,¹³ (the CJA). She had not sought relief against forfeiture under the proper statute and, therefore, the Court simply declined consideration of that remedy.

LEGISLATIVE AMENDMENTS

Bill 166, the *Co-operative Corporations Statute Law Amendment Act, 1992*, which amended both the *Co-operative Corporations Act*,¹⁴ (the CCA) and the LTA, was introduced in December 1991. The *McBride* decision received considerable coverage in the legislative debates and changes were made to the Bill.¹⁵

The legislation makes it clear that the LTA does not apply to member units in a non-profit housing co-operative.¹⁶ Section 2 of the LTA has been expressly amended to this end. The new legislation provides certain safeguards to member occupants. Although these are not as extensive as would be available under Part IV to tenants, they are much more extensive than existed under Parts I to III of the LTA.

Members may rent their designated unit, subject to the by-laws. There may be grounds to terminate the member's occupancy rights and membership where the member ceases to occupy the unit. Where "subletting" by members is permitted, the sub-tenants only have occupancy rights so long as the member remains a member and has occupancy rights. Lengthy procedural safeguards are provided. These mirror the LTA s.113 procedures. The courts now expressly have similar equitable relief as that provided by the LTA.

Ct.); *Re Castlegreen Co-operative and Oickle* (June 16, 1982), Thunder Bay #10944/82 (Ont. Dist. Ct.) [unreported]; *Re Don Area Co-operative Homes and Lee* (1979), 26 O.R. (2d) 40 (Co. Ct.).

13. R.S.O. 1990, c. C-43, as amended.
14. S.O. 1992, c. 19.
15. The Bill received second reading on June 23, 1992 and went to Committee of the Whole House on the same date. It passed third reading on July 13, 1992. The legislation, was proclaimed in force effective August 24, 1992.
16. The exemption from the LTA only applies to "member units". Co-operatives may also designate a number of "non-member units". The LTA applies to those units. The exemption only applies to "non-profit" co-operatives. For profit co-operatives are not exempt from the LTA: e.g., *Re Solidarity Towers Co-operative and Cassidy*, [1994] O.J. No. 1265 (Ont. Ct. Gen. Div.) [unreported].

This paper addresses the issue of the scope of the courts review jurisdiction under the CCA as amended. There are a number of sections in the CCA that are relevant to this discussion.

- 171.6(5) – The procedures for awarding subsidies must be procedurally fair.¹⁷
- 171.8(2)2 – ... Membership and occupancy rights may not be terminated on a ground in the by-laws that is unreasonable or arbitrary.¹⁸
- 171.8(3) – Subject to the rules in subsection (2), the board of directors may by by-law determine procedures for the termination of the membership and occupancy rights of members but the procedures must be procedurally fair.¹⁹

RECENT JURISPRUDENCE

There is now a growing number of decisions which deal with the new legislation. For the most part, the courts still seem to limit themselves to an examination of procedural propriety. This is both an unnecessary and a disappointing result.

Procedural fairness

*Re Quigley and Charles Darrow Housing Co-operative Inc.*²⁰ was an application by a co-operative for termination of a member's occupancy rights pursuant to the CCA, as amended in 1992. There were two applications before the Court.

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17. The common law already provides that the procedures for *terminating* subsidies must comply with the requirements of fairness: see *Re Webb and Ontario Housing Corporation* (1978), 22 O.R. (2d) 257 (C.A.) in which the Court of Appeal held that no procedural fairness was required in the granting of rent subsidies but once they had been granted, they could not be revoked without procedural fairness. This section therefore extends the principle of fairness to the awarding of the subsidy itself. Fairness is not limited to the termination of a subsidy.
 18. In *York Condominium Corporation No. 382 v. Dvorchik* LW #1215-024, (Ont. Ct. Gen. Div.) [unreported], the court held that a rule prohibiting pets had to be reasonable and consistent with the purpose of the *Condominium Act*. A rule prohibiting pets over 25 pounds in weight was held to be void because it was unreasonable in the context of the legislation. I suggest that the courts should apply similar reasoning in the context of the *Co-operative Statute Law Amendment Act*. Certainly this is what the section itself indicates should be the approach to grounds for termination.
 19. This section appears to codify the common law position enunciated in *Re Webb and Ontario Housing Corporation*, *supra*, note 18, *vis à vis* termination of rent subsidies and extend it to co-operatives *vis à vis* eviction of members. In other words, they are no longer supposed to be considered as just "social clubs". Housing is an important and basic right, regardless of the formal structure of the relationship.
 20. (1993) 30 R.P.R. (2d) 310 (Ont. Ct. Gen. Div.).

The member brought an application for an order setting aside the co-operative's decision to terminate her occupancy rights and requiring it to comply with its by-laws. The co-operative brought an application for a declaration that it had complied with its by-laws and the legislation in terminating the applicant's occupancy. The co-operative asked for a writ of possession.

The Court held that the 1992 amendments to the CCA ended the application of the LTA and the attendant common law to member units of a non-profit co-operative.²¹ However, the amendments mandated procedural fairness and, in this case, the co-operative had failed to provide it.

The Court examined the requirements of procedural fairness in this context. The Court stated that the notice to the member of the meeting of the Board to consider termination of her occupancy failed to give any real or substantive indication of the complaints or case against her. That obligation does not necessarily include providing names of complainants. However, the co-operative is required by any standard of fairness to provide an outline of the specific incidents and conduct complained of, and even sometimes the names of complainants where they are necessary to the decision process, to the member whose rights are in question before the meeting of the Board. Without such information, there is no point to giving a person a right to respond or to make representations.

The provision of a more detailed list after the Board meeting but before the final membership meeting did not cure the defect for three reasons:

- i) The more detailed list included incidents from two and three years before, some of which had been resolved. This list was at best misleading, although its method of outline and detail seem to be more in keeping with what is required by the process in the Act and the by-laws.
- ii) The court felt that the membership vote could have been affected had the process and original decision been different.
- iii) Section 178 of the CCA provides for an application to court regarding any non-compliance with the by-laws or the Act. It does not provide for or imply a curing of such deficiencies by the courts. This was especially true where an important part of the duty of procedural fairness had been disregarded.

21. In actual fact, it was the Court of Appeal decision in *McBride v. Comfort Living Housing Co-operative*, *supra*, note 6, which did so. The amending legislation merely rectified the gap left by that decision.

The Board's and the membership's decisions were declared null, and the matter was returned to the Board to be dealt with in full compliance with the Act and its by-laws and the requirement of fairness.²²

*Re Labourview Co-operative Homes Inc. and Sickle*²³ was an application for termination of occupancy under the CCA, as amended. The writ was refused because the mandatory notice period was not complied with. The Court held that the Act, s.171.8, requires that procedures be fair.²⁴ The application had to be dismissed as the membership meeting was not properly brought. The co-operative's Rules used the term "shall" with respect to the notice requirements.²⁵ The mandatory time period is relevant and material and cannot be avoided.²⁶ The Court also implied that the failure of the Board's notice of decision to be signed would also have been a material breach warranting the court to dismiss an application.

The CCA sets out what notice is required. The failure to provide proper notice is not a mere technicality which can be amended even where there is no prejudice to the member. It is a substantive right which cannot be waived.²⁷

Procedural regularity

In *Re Woburn Village Co-operative and Kannundurai*,²⁸ the Court refused to deal with an issue raised in dispute by the member because that issue had not been raised before the Board. The issue was whether the arrears had been properly determined. The same conclusion had been reached in *Re Mimico Co-operative Homes Inc. and Ward*.²⁹

This cannot be based on *res judicata*. Nor can it be based on general issue estoppel. The application to court is an extension of the same proceedings. In

22. The decision does not review the legislative parallels between Part IV and the amended co-operative legislation. However, the decision clearly implies more specific requirements into the duty of fairness in the context of co-operatives due to the legislated rights of member tenants.

23. (December 13, 1993), Chatham #2646/93 (Ont. Ct. Gen. Div.) [unreported].

24. *Ibid.*, at pg. 4.

25. *Op. cit.* at pg. 5. The Act also uses the word "shall" in this context.

26. *Supra*, note 23 at pg. 4.

27. *E.g.*, see *Creekview Housing Co-operative v. Rupp*, [1996] B.C.J. No. 75 (B.C.C.A.) [unreported].

28. [1995] O.J. No. 2485 (Ont. Ct. Gen. Div.) [unreported].

29. [1995] O.J. No. 2216 (Ont. Ct. Gen. Div.) [unreported].

Kannundurai,³⁰ the Court may have been correct in the result on the particular facts of that case. This was due to the general jurisdiction to avoid an abuse of process. However, at times a co-operative member may have quite legitimate concerns about the process before the Board. He or she may legitimately wish to have a matter determined by the court. The courts should remember that these are often unsophisticated people. They should not be quick to deny them access to a remedy on a narrow or questionable jurisdictional ground.

To deny a member the right to dispute on the basis of blindly accepting an arrears determination by the co-operative is directly akin to a landlord and tenant court evicting a tenant by blindly accepting an arrears determination by a landlord. Indeed, it has been held that a court which does so has acted without jurisdiction.³¹ There is no statutory basis for this blinkered justice.

Standard of Review

Several judicial decisions have now held that the standard of review of a decision by a co-operative Board is whether the decision rendered was “reasonable” and not whether the decision is “correct”. Only one judge has offered any attempt at an analysis of the issue. This was in *Re Tamil Co-operative Homes Inc. and Arulappah*.³² I intend to review this decision in some detail because I believe it to be an example of extreme judicial flip-flop. By this, I mean that there is only the appearance of a sound legal analysis. The decision is simply fact-based and result-oriented. In the end, it is legally unsound.

The member, a Tamil, had a subsidized unit in a co-operative for Tamil refugees. She took in a long term guest and obtained the approval of the Board to do so. The guest was the spouse of another member/occupant in a different unit. Because of family violence he had been obliged to vacate that unit. The guest was not a member.

The member had been absent for lengthy periods on two occasions. This also was with the approval of the Board. The first absence was due to the death of a sister. The second was due to the mysterious death of her husband in Sri Lanka. She had gone to stay for a period of time with a daughter in Toronto and then went to visit another daughter in Australia. She stayed away for many more

30. *Op. cit.*

31. *E.g.*, see *Schoen v. Manitoba Housing Authority* (1994), 97 Man. R. (2d) 260 (Man. C.A.) and *Re 3071235 Canada Inc., In Trust, and Palonen* (November 25, 1995), File # 239/95 (Ont. Div. Ct.) [unreported]; leave to appeal to Court of Appeal denied (March 11, 1996).

32. [1996] O.J. No. 768 (Ont. Ct. Gen. Div.) [unreported].

months than she had approval to be away from the unit. She did not advise the Board of this. However, the Board knew where she was and how to contact her.

The guest was to have moved out after the allowed six month period of occupancy was expired. The member was absent during this time but believed the guest would move and actually had moved in her absence. The guest applied for membership and for a unit in his own right. None were available but membership was ultimately granted. The Board was aware he was still residing in the absent member's unit.

The long-term guest's income was to be taken into account when determining the amount of household income for the purpose of rent subsidy. The guest advised the Board that he had \$2200 per month income and that he was paying an occupation fee to the member in an amount greater than her rent. However, on other evidence, it appeared the guest was in fact on welfare. The member had signed a letter for the purpose of the welfare authority that the guest was paying her rent; but the evidence established that she received very little money from him and none on a regular basis.

The Board started proceedings to terminate the membership and occupancy rights of the absent member.³³ The intention was to give the guest, who was now a member, the occupancy of that unit. The Board served the member, in her absence, with all documents in the proceeding on the guest in her unit as an apparently adult person.³⁴ The guest did not advise the member of the documents. The member did not appear before the Board; did not request an appeal before the members; and ultimately did not appear before the court. Default judgment granting a writ of possession to the co-op was granted by the registrar.

33. The legislation and by-laws had a number of requirements that the member was allegedly in breach of: i.e., the guest remained beyond six months' without approval; the tenant was absent for more than six weeks without approval; the member had accepted compensation from the guest in an amount that exceeded her unit charge; and the member failed to pay the market rent after her subsidy ended as a result of her lengthy absence.

34. S.171.23(4) states:

If a notice or other document is required to be given to or served on a person occupying a member unit and it cannot be given or served by reason of the person's absence from the unit or by reason of the person evading service, it may be given or served,

- (a) by handing it to any apparently adult person at the unit;
- (b) by posting it in a conspicuous place on some part of the unit; or
- (c) by sending it by registered mail to the person at the unit.

On learning from another member that something was going on, she had advised the Board that she would be returning within a number of weeks.

The Court reviewed the legislative changes. It recognized that under the pre-1992 regime there was limited review by the courts of a co-operative's decision to evict one of its members. It stated that if the eviction was in accordance with the co-operative's own by-laws and did not breach principles of natural justice and procedural fairness, the courts would not intervene. However, the Court acknowledged that in 1992 there were "sweeping legislative amendments" which gave co-operative members "substantially, but not entirely, the same protections" as are provided to tenants under Part IV of the LTA. Having accepted this, the Court nevertheless held that the philosophy underlying co-operative housing would be completely undermined if the decisions of co-operatives were treated in the same manner by the courts as decisions of private landlords.³⁵

The Court correctly stated that the Court of Appeal judgment in *McBride v. Comfort Living Housing Co-operative*³⁶ is distinguishable as being made in the context of the law prior to the CCA amendments. It expressly finds that *McBride* is not binding authority. At the same time, it finds itself in substantial agreement with the views expressed in that decision, – views which were based solely on the pre-amendment common law and pre-amendment relationship between members and the co-operative.

The Court noted that co-operatives do not have untrammelled powers over their members. Under the CCA, the courts have a "supervisory role to ensure that members are treated fairly and in accordance with the legislation and the by-laws". The Court held that, generally, it should not intervene if the member has been dealt with in accordance with the principles of natural justice and procedural fairness and if the Board had a rational basis for its decision in the circumstances.

The decision expressly finds that the Board in this case had no valid proven ground for terminating the occupancy or membership of the member. However, the Court concluded that the Board did not have to make a correct decision. If the decision of a Board is reasonable, that is sufficient. In other words, the

35. According to the Court, the legislatively protected rights of co-operative members are not the same as those of ordinary tenants in recognition of their enhanced rights as members in the democratic management of the co-operative. The Court makes this finding on the basis of an admitted presumption: *i.e.*, there was no evidence of this before the Court.

36. *Supra*, note 6.

standard for judicial review of decisions by expert tribunals was applied.³⁷ In making this finding, the Court applied two earlier decisions which had made the same finding without any analysis of the issue.³⁸

It is important to determine the nature of the courts' role under the CCA. If, as the Court in *Re Tamil Co-operative Homes Inc. and Arulappah* suggests, that role is merely supervisory, then the CCA as amendments serve no purpose. The CCA refers to the co-operative "applying" to court for a writ of possession.³⁹ This is clearly not an appeal.⁴⁰ Moreover, it does not give the member him or herself the independent right to apply to court. Rather, only if a co-operative applies may a member "dispute" the application. Therefore, it would seem that the court application is merely a further step in the initial process.

There is no statutory basis for the very restrictive approach to jurisdiction taken in decisions such as *Re Tamil Co-operative Homes Inc.* Presumably where the right to dispute the co-operative's court application is granted, the member is entitled to a full dispute. Nothing in the legislation restricts this right.⁴¹ Nothing in these decisions addresses the fact that this legislation was remedial in all respects.

*Re La Paz Co-operative Homes Inc. and Jackson*⁴² is a decision in the same vein by the same judge that decided *Re Tamil Co-operative Homes Inc. and Arulappah*.⁴³ The facts are not as sympathetic toward the member in question. The co-operative was founded to accommodate the needs of recently arrived

37. Yet the same judge has held that the court proceedings contemplated under the CCA are not judicial review: see *Re La Paz Co-operative Homes Inc. and Jackson*, [1996] O.J. No. 1181 (Ont. Ct. Gen. Div.) [unreported], discussed later in this paper. Moreover, boards are almost certainly not expert tribunals to which deference of the type accorded in these cases ought to be given.

38. I.e., *Re Mimico Co-operative Homes Inc. and Ward*, [1995] O.J. No. 2216 (Ont. Ct. Gen. Div.) [unreported] and, following this decision, *Re Woburn Village Co-operative Homes Inc. and Kannundurai*, [1995] O.J. No. 2485 (Ont. Ct. Gen. Div.) [unreported].

39. S.171.13.

40. An appeal ultimately lies from the decision of the court to the Divisional Court: CCA, s.171.16. This appeal is not limited. It is a broad right of appeal from the final decision.

41. The absurdity of the position in these cases is taken to extremes by the Court's finding with respect to the reasonable basis of the decision in *Re Mimico Co-operative Homes Inc. and Ward*, *supra*, note 38. The Court concluded the reasonable basis was that the staff was intimidated by the member's "physical bearing and striking appearance" and by his "pride, intelligence and rigorous logic", at 4-5! Quære: How is such a ground reasonable? How is it correct?

42. [1996] O.J. No. 1181 (Ont. Ct. Gen. Div.) [unreported].

43. *Supra*, note 33.

refugees from El Salvador. Not all residents were Salvadorean. Some units were for low income individuals and some were specifically for abused wives and their children.

The member was a non-Salvadorean single mother who was studying to be a legal assistant. She felt alienated partly because she did not speak Spanish and most of the other residents communicated in Spanish. Her unit was above the co-operative meeting and party room. The member complained frequently about the noise and on several instances had called the police. The member did not have a good relationship with the board and was belligerent and (as found by the court) prone to hysteria. The board formed a "task force" to investigate the allegations of noise and ways to resolve the problem. The member was a participant. The group met only once.

The co-operative rules contained a prohibition against violence toward other residents and employees. After one party in which the member had complained to the police, she became involved in an altercation with the Salvadorean person whose party it was. This person was a board member. The police were called and the member was charged after witnesses confirmed that an assault as alleged had taken place. The member's version of the incident was quite different.

One of the board members sitting at the meeting to decide the issue of the member's eviction was a member who had signed a petition against the member at an earlier meeting. At that meeting the board member in question had disqualified himself from participating. Without this member's presence at the later meeting there would have been no quorum.

In determining whether or not the board had a reasonable basis for its decision, the Court found that it was entitled to look at the facts and the evidence in support of those facts. Since the member was attempting to stab another member, the board had a reasonable basis for determining that these actions were contrary to the rules and grounds for eviction.⁴⁴

The main objection to the fairness of the proceedings themselves was that a proper quorum was not in place. The Court had heard no evidence to suggest any personal animosity between the board member and the member.⁴⁵ It held that it would be unreasonable to suggest that only board members with no

44. Oddly, the Court makes no mention that this was not only a reasonable decision on the facts as found, but also a correct decision in terms of grounds for termination.

45. One of the basic tenets of natural justice is that justice must not only be done but that it must be seen to be done. Another is that there should be no reasonable apprehension of bias. Actual bias need not be shown.

foreknowledge or no opinion could sit at the Board hearing. This was a closely knit community. There was no doubt in the Court's mind that the scuffle was the subject of much discussion, conjecture and gossip between them. This was, in the Court's expressed opinion, incidental to the very unique nature of the co-operative.⁴⁶

As in *Re Tamil Co-operative Homes Inc. and Arulappah*, the Court follows pre-amendment jurisprudence confining the courts' jurisdiction.⁴⁷ This seems quite inappropriate.

The Court held that the proceedings before it under the CCA were not judicial review.⁴⁸ This is true. Nevertheless, the decision of a Board is now definitely a statutory power of decision outlined expressly and in detail in the CCA.⁴⁹ Decisions of the Board must now be subject to judicial review in appropriate circumstances regardless of the statutory right of appeal.⁵⁰

Power to grant relief against forfeiture

The decision in *Re Tamil Co-operative Homes Inc. and Arulappah*⁵¹ is disturbing for another reason other than its finding on the standard of review by the courts. Its analysis of the courts' now express jurisdiction to grant relief against forfeiture under the CCA, as amended, is troublesome. The Court held that it would be an unusual situation which could be seen as both (1) procedurally fair to the member and (2) a reasonable decision in the circumstances but which would also lead the judge to conclude that it would be unfair to grant the writ

46. However, the court expressly stated that it was not suggesting that one group or clique, or one specific nationality in a co-operative is entitled to "gang up" on another member because he or she is an outsider.

47. One of the decisions was the very decision which spurred the Legislature into making the amendments in the first place: *McBride v. Comfort Living* (1992), 7 O.R. (3d) 394 (C.A.). The other was the decision in *Re Webb and Ontario Housing Corporation*, discussed above at note 17.

48. I suggest that this conclusion is eminently self-evident. For that very reason, the type of deference accorded in judicial review is not appropriate. As previously suggested in this paper, the court proceedings are merely a final step in the initial proceeding.

49. This was not the case in the Court of Appeal decision in *Re Webb and Ontario Housing Corporation*, *supra*, note 17. The decision of the Board in that case was not regulated by legislation. It was not a judicial or quasi-judicial decision subject to review by the courts. Moreover the applicant had no justiciable right to the rent subsidy in that case.

50. The *Judicial Review Procedure Act* R.S.O. 1990, c. J-1, s-s.2(1) expressly provides for the remedy of judicial review, despite any appeal right. Of course, judicial review is itself a discretionary remedy. Rarely would it be granted where an appeal right exists.

51. *Supra*, note 33.

of possession.⁵² The Court in *Re Tamil Co-operative Homes Inc.* held that the CCA gives the judge discretion to exercise on an equitable basis in only those exceptional circumstances.⁵³ The Court was, however, appropriately concerned that the unit had been given to the guest who did not have clean hands and who has clearly benefitted from his own deceit. Despite this significant concern, in the Court's opinion there was no basis to exercise the Court's discretion in favour of the member.⁵⁴

While recognizing an independent power to grant relief, the Court refused to do so in *Re Coady Housing Co-operative Inc. and Fekete*.⁵⁵ The Court stated:

... it would require some demonstration of error or a clear case of unfairness in process in order to justify the court's intervention at this stage to relieve against forfeiture⁵⁶ [emphasis added].

I suggest that the Court has not stated the law correctly. The unfairness with which the court should be concerned has nothing to do with "process". That is

52. *Re Highland Homes Inc. and Lundrigan*, [1994] O.J. No. 323 (Ont. Ct. Gen. Div.) [unreported] appears to take this approach. The Court seemed to think that as long as the procedure followed was correct, that was the end of the matter. The conduct of the tenant, her children and a pet were in question. The Court held that it was not unfair in the circumstances to order termination despite some improved conduct after the proceedings had been commenced. As far as the court was concerned, the grounds for termination were sufficient and the proper procedure had been followed.

53. It is unsettling that the Court makes this highly restrictive interpretative finding after concluding that:

(1) the discretion given to a judge to refuse a writ of possession under s. 171.21(2)(a) is similar to the discretion a judge has under s. 121(2)(a) of the LTA and the two provisions should be interpreted in the same manner;

(2) the provision enables the court to refuse a writ of possession based on equitable considerations even when the landlord has otherwise met the legal requirements for its issuance; and

(3) the Court has the discretion to refuse the writ of possession notwithstanding the cooperative's compliance with the CCA and its own by-laws, based on overall considerations of fairness after weighing the interests of the parties and, if relevant, the public interest.

54. See also *Re La Paz Co-operative Homes Inc. and Jackson*, *supra*, note 43, in which the same judge denies relief after considering the overriding jurisdiction to grant relief against forfeiture. It held that to keep her in these premises would simply be inviting continuing trouble. Relief was refused even though the member would be subjected to economic hardship.

55. (1995), 23 O.R. (3d) 674 (Ont. Ct. Gen. Div.).

56. *Ibid.* at page 677.

a separate issue. If the process were found to be unfair, then the court *must* decline to grant the writ. That is mandatory. Where relief against forfeiture is concerned, the issue is “having regard to all the circumstances, that it would be unfair to grant the writ”.⁵⁷ The court must consider all the circumstances.⁵⁸

The *Re Tamil Co-operative Homes Inc.* decision and these other restrictive decisions do not seem consistent with much of the pre-existing case law. For example, *Re Arauco Housing Corporation and Baron*⁵⁹ was an application to evict a co-operative member under s.76 of Part III of the LTA.⁶⁰ Despite the Board having followed proper procedure and committing no error, the trial judge refused to grant the writ in the circumstances of the case. The Court did not refer to a relief from forfeiture provision *per se*. Rather it looked at the use of the word “may” in the context of the power of the court to grant a writ of possession. The Divisional Court affirmed the decision stating that whether the power of the Court was found in the LTA or under the Rules,⁶¹ the word “may”, found in both provisions, is permissive. In this case, the Divisional Court held that

the discretion was exercised upon an appropriate consideration of the evidence of the personal circumstances of the tenant ...

There was no basis for the appeal court to interfere.⁶²

CONCLUSION

The misguided deference accorded to Boards of Co-operatives in decisions such as *Re Tamil Co-operative Housing Inc.* are presumably based on the assumption

57. *I.e.*, CCA, s.171.21(1)(a).

58. This includes the member's circumstances. An example of a decision in which the jurisdiction to grant relief was properly exercised is *Re Ventura Park Housing Co-operative Inc. and Conway* (September 1, 1994) #33461/94 (Ont. Ct. Gen. Div.) [unreported]. The court took into consideration all the circumstances, including the closeness of the vote to evict the member. So, too, in *Re Castlegreen Co-operative Inc. and Strand*, [1995] O.J. No. 2460 (Ont. Ct. Gen. Div.) [unreported], the Court refused to grant the writ despite some evidence to substantiate reasonable grounds for termination of membership. The Court held it would be unfair to grant the writ where the respondent had been a member for ten years, had serious disabilities and severely limited resources.

59. (January 21, 1991), Toronto File # L14089/91 (Ont. Ct. Gen. Div.) [unreported]; aff'd (January 19, 1993) File #119/91 (Ont. Div. Ct.) [unreported].

60. This case was prior to the CCA amendments of 1992.

61. *I.e.*, Rule 60.

62. Section 117.13(12) of the CCA also uses “may” with respect to the court's power to grant a writ. Moreover, in addition to the general discretion, there is an express relief from forfeiture provision.

that co-operatives are benevolent dictators or true democracies. Unfortunately, that is not always the reality. Too often, there are cliques and the co-operative becomes the fiefdom of a few interest groups or individuals.⁶³ Members are often in no better position with many boards than are many tenants with landlords.

The small private and for profit co-operatives may have been a true “club” of equals; but this is not the case for large non-profit co-operatives. Many of the most needy members are the most vulnerable and the least able or likely to participate as equals.

Boards of housing co-operatives are volunteers. They are also not experts in policy or procedure and rarely in legal principles. It is precisely for that reason that the supervision of the courts is required. Housing is too important a right to be dealt with lightly.

The decisions in *Re Tamil Co-operative Homes Inc.* and in *Re La Paz Co-operative Homes Inc. and Jackson* pay lip service to a liberal philosophy and a remedial approach to legislation but in reality, blatantly ignore both by sticking rigidly to the pre-amendment jurisprudence. It is always unfortunate when judges make overly broad proclamations where a narrow finding on the facts and limited to the facts would have been justified, and more appropriate.

63. Even the Court in *Re La Paz Co-operative Homes Inc. and Jackson*, *supra*, note 43 gives passing comment on this possibility. In that decision, Molloy, J., states that no one group or clique or nationality within a co-operative housing complex should be entitled to gang up on an outsider who lived in the co-operative.