MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: *The Human Rights Code*, C.C.S.M. c. H175, as amended;

IN THE MATTER OF: A Complaint by Delphine Kinvig against Winnipeg Condominium Corporation No. 30, alleging a breach of section 13 of *The Human Rights Code*.

BETWEEN:

DELPHINE KINVIG,

Complainant,

- and -

WINNIPEG CONDOMINIUM CORPORATION NO. 30,

Respondent.

Appearances: Delphine Kinvig, the Complainant

Candace Grammond, counsel for the Respondent Winnipeg Condominium Corporation No. 30

Isha Khan, counsel for the Manitoba Human Rights Commission

Before: M. Lynne Harrison

REASONS FOR DECISION

Introduction

[1] These proceedings arise out of a project for the replacement of the exterior windows in a condominium complex. The Complainant, Delphine Kinvig, was a unit owner and resident in the complex. In her Complaint, she has alleged that the

Respondent Winnipeg Condominium Corporation No. 30 (the "Respondent") discriminated against her in the provision of services relating to the window replacement project, and failed to reasonably accommodate her special needs based on her disabilities (legally blind with 3% vision and glaucoma), contrary to section 13 of *The Human Rights Code*, C.C.S.M. c. H175 (the "*Code*"). Ms Kinvig's Complaint relates primarily to the Respondent's decision to replace the original clear glass windows in her condominium unit with tinted windows. She also complains of the handles on the new windows extending outward and being dangerous, and the locks being too high to reach without a ladder.

[2] Ms Kinvig's Complaint is one of four Complaints which were filed against the Respondent by four separate Complainants with respect to the same window replacement project, the other three complainants being Doug Gordon, Ronald Franklin Pollock, and Susan Renard. On April 28, 2010, I was designated by the Minister of Justice as a Board of Adjudication, to hear and decide all of these Complaints.

[3] All four Complaints first came before me on May 28, 2010 for a hearing with respect to a number of preliminary issues. The main issue at that time was whether the Manitoba Human Rights Commission (the "Commission") could terminate all proceedings, including the adjudication, where the Respondent made a settlement offer after the Complaints had been referred to adjudication, an offer which the Commission considered reasonable but each Complainant rejected, or alternatively, whether the Commission could withdraw from the proceedings in these circumstances.

[4] On October 12, 2011, I delivered Reasons for Decision with respect to those preliminary issues, in which I concluded, among other things, that the *Code* neither required nor enabled the Commission to terminate all proceedings respecting the Complaints in those circumstances, the Complaints having been referred to adjudication. I also concluded that while the Commission could not withdraw as a party to the adjudication, it could withdraw from actively participating at the adjudication.

[5] The Complainants in each of the Complaints subsequently determined that they wished to proceed with the adjudication of their Complaints. Several conference calls were convened to address different procedural matters and set dates for the hearing of the merits.

[6] In the course of those conference calls, counsel for the Commission, Ms Khan, outlined the Commission's intentions with respect to its role at the hearing of the Complaints. She advised that the Commission expected to have someone in attendance each day for the hearing, but did not intend to actively participate therein. In particular, the Commission did not intend to call or cross-examine any witnesses. The Commission did intend, however, to deal with the usual preliminary matters, to make an opening statement focusing on the applicable tests and authorities, and to make a final submission and address public interest remedies, in keeping with its public interest in the Complaints.

[7] The procedure with respect to the calling of evidence was discussed, and it was agreed that:

a) the Complaints would be heard together and general or common evidence relevant to all of the Complaints, or more than one Complaint, would apply *mutatis mutandis*;

b) as the Complainants would bear the onus of establishing a *prima facie* case, they would call their evidence first, and would decide amongst themselves the order in which they would do so;

c) the Complainant who proceeded first would call all of the evidence that he or she considered relevant to his or her Complaint. After the first Complainant had finished questioning a witness, each of the other three Complainants would have an opportunity to ask the witness additional questions relating to his or her own case, then the Respondent would have the opportunity to cross-examine the witness;

d) after the first Complainant had completed his or her evidence, the second Complainant would call any further witnesses that he or she might have and ask questions relating to his or her case. The third and fourth Complainants would then have an opportunity to put additional questions to each witness relating to each of their cases, and the Respondent to cross-examine each witness;

e) after the second Complainant had completed his or her evidence, the third Complainant would call any additional witnesses that he or she might have and ask questions relating to his or her case. The fourth Complainant would have an opportunity to put any additional questions to each witness relating to his or her case, and the Respondent to cross-examine each witness;

f) after the third Complainant had completed his or her evidence, the fourth Complainant would call and ask questions of any additional witnesses he or she might have, and the Respondent would have the opportunity to cross-examine each witness;

g) after all of the Complainants had completed their evidence, the Respondent would call its witnesses. After the Respondent finished questioning each witness, the Complainants would have the opportunity, in turn, to ask questions of or cross-examine the witness with respect to their own cases.

[8] In advance of the hearing, the parties exchanged lists of the witnesses they intended to call, together with a brief indication of what each witness was expected to address and/or expert and medical reports from individuals whose evidence they expected to rely on at the hearing.

[9] The hearing of the four Complaints on the merits thus continued in Winnipeg over a period of 11 days, between March 5 and 23, 2012, with submissions

being heard on April 13, 2012. Ms Kinvig attended the hearings in March in person, and participated in the submissions on April 13 by teleconference.

[10] At the commencement of the hearing, the Complainants advised and it was agreed, that Mr. Gordon would proceed first, and call evidence with respect to his Complaint and that of Mrs. Renard, followed by Ms Kinvig, and finally Mr. Pollock. The issue of costs would be left to be addressed at a later date, if necessary.

[11] In the course of the hearing, I indicated that I would issue separate decisions, reflective of the relevant facts and circumstances in each case.

The Issue

[12] The parties agreed, prior to the commencement of the hearing, that the issue to be determined in each of the four Complaints was relatively narrow, namely:

> Whether the Respondent discriminated against each Complainant on the basis of disability by failing to make reasonable accommodation for his/her special needs based on disability when deciding to install or installing new windows in all condos.

The Evidence

Preliminary Comments

[13] I would note at the outset that it is not my intention to recite all of the evidence adduced and argument heard in the course of these proceedings, but to comment on the most salient points, where appropriate or necessary.

[14] As contemplated in the order of proceeding referred to above, Ms Kinvig relied on her own testimony, and to the extent that it was relevant to her case, the testimony of Mr. Gordon and the other individuals he had called as witnesses, namely:

1. Susan Renard, one of the other Complainants;
2. Roy Fondse, a Winnipeg real estate agent;

3. Kent Woloschuk, an architect;
4. Dr. Richard Leicht, an ophthalmologist and specialist in diseases of the eye;
5. Krystyna Briggs, another unit owner in the condominium complex;
6. Judith Christopherson, an interior designer and Ms Kinvig's sister.

[15] Ms Kinvig called three further witnesses, namely:

1. Nick Donaldson, a friend and colleague of Ms Kinvig;
2. Dr. Donald McLeod, a physician;
3. Dr. Jill Slywka, an optometrist.

[16] Five witnesses testified for the Respondent with respect to Ms Kinvig's Complaint, namely:

1. Robert Schafer, a unit owner since 1999, member of the Respondent's Board of Directors since 2003, and President of the Board since 2004;
2. John Wells, a partner in the engineering firm of Crosier Kilgour and Partners, and engineer on the window replacement project;
3. Sharon Kula, property manager at the condominium complex;
4. Robert Sakowski, a former unit owner and member of the Respondent's Board of Directors from 2003 to 2008;
5. John Henry Kemp, the purchaser of Ms Kinvig's unit through his holding company.

Expert Evidence

[17] Issues arose during the course of the hearing with respect to the qualification of certain witnesses as expert witnesses.

Judith Christopherson

[18] The Complainants sought to call Ms Christopherson as an expert witness and also as a lay witness with respect to her personal knowledge or observations relating to the Complaints, particularly, though not exclusively, Ms Kinvig's Complaint.

[19] As indicated above, Ms Christopherson is an interior designer. She is also Ms Kinvig's sister. After reviewing Ms Christopherson's qualifications and experience with her, Mr. Gordon advised that the Complainants were seeking to have her qualified as an expert with respect to the effects of tinted windows on the interior of rooms in terms of contrast, colour perception and moisture; the construction and design of windows; how the windows could be adapted differently, in this case, for non-tinted windows; and the locks on, and energy efficiency of, the windows.

[20] Ms Grammond had previously indicated and confirmed that she was objecting to Ms Christopherson being qualified as an expert witness on two grounds in particular. First, she noted that opinion evidence is to be called and presented from independent individuals, and Ms Christopherson was not independent; she was the sister of one of the Complainants. This lack of independence applied not only to Ms Kinvig, but also to the other Complainants, at least two of whom Ms Christopherson had met through her sister. Moreover, the four Complaints were being heard together, and Ms Christopherson ought not to be allowed to give opinion evidence where it would have an effect on Ms Kinvig's case as well. Ms Grammond submitted that whether the Complaints were being heard together or separately, Ms Christopherson was still not independent. Secondly, Ms Grammond argued that it did not appear that Ms Christopherson had anything to add on the merits or that she had the right experience or quantity of experience to be qualified as an expert on the topics which had been put forward.

[21] With respect to the qualification of Ms Christopherson as an expert witness, Ms Kinvig submitted that the fact that she was her sister did not negate her qualifications. Ms Christopherson had knowledge and experience with respect to the issues of moisture, the effects of colour and contrast, the construction of windows and the effects of glazing, and should be allowed to testify with respect to these issues. In

response to a question from me, Ms Kinvig confirmed that she also intended to have Ms Christopherson testify as to her personal knowledge with respect to Ms Kinvig's functionality and individual circumstances.

[22] No authorities were referred to or provided to me with respect to the issue of expert evidence. The authorities have generally established that an expert should provide independent assistance to a tribunal in respect of matters within his or her area of expertise, and should not assume the role of an advocate. The criteria for the admissibility of expert opinion evidence have been identified as being: (1) a properly qualified expert; (2) relevance; (3) necessity; (4) reliability; (5) prejudice/probative analysis; and (6) the absence of an exclusionary rule.

[23] Ms Christopherson is Ms Kinvig's sister. In the circumstances, I was satisfied this gave rise to at least a perception of bias, and difficulty in terms of whether independent assistance was being provided. I was also not persuaded that the evidence was necessary. I could appreciate that it might be helpful to Ms Kinvig, but being helpful was not enough. The evidence had to be necessary, and I was not persuaded that it was. This was not to be in any way critical of Ms Christopherson's qualifications or expertise, in respect of which I make no comment. I was simply not convinced that the criteria of objectivity, independence and necessity existed in this instance.

[24] I recognize that an adjudicator has the authority under subsection 39(2) of the *Code* to "receive at the hearing such evidence or other information as the adjudicator considers relevant and appropriate, . . . whether or not it would be admissible in a court of law." As previously indicated, however, I was not persuaded that the admission of such expert opinion evidence would be appropriate in these circumstances.

[25] I therefore determined that Ms Christopherson could not testify as an expert witness in these proceedings.

John Wells

[26] Ms Grammond sought to call Mr. Wells both as the engineer on the project and as an expert witness. Mr. Wells is a partner in the engineering firm of Crosier Kilgour, the engineers of record for the window replacement project. Ms Grammond advised that the Respondent was seeking to qualify Mr. Wells as an expert in structural engineering as it related to the window replacement project at 55 Nassau.

[27] The Complainants objected to Mr. Wells being qualified to give expert evidence on the basis that he was not at arms' length from the Respondent and was not unbiased. It was argued that whether Mr. Wells was competent had nothing to do with this; the objection related to objectivity and fairness.

[28] I had no reason to doubt Mr. Wells' credentials, or that his evidence would be relevant and probably helpful. He was, however, the engineer for the Respondent on the project which was the subject of these Complaints, and on that basis, I was not convinced that he could be described as independent or unbiased. In my view, there was a real perception of bias, where he acted as the Respondent's engineer on this project and would also be testifying as such. Again, I recognize that I have the authority under the *Code* to receive evidence whether or not it would be admissible in a court of law. In the circumstances, however, I was not satisfied that the admission of such opinion evidence would be appropriate. I therefore determined that Mr. Wells could not testify as an expert witness in respect of these Complaints.

Facts

[29] The Respondent is a corporation incorporated under *The Condominium Act*, R.S.M. 1987, c. C170 (the "*Act*"). The Respondent manages and maintains a 38-storey condominium complex located at 55 Nassau Street North in Winnipeg, and known as 55 Nassau ("55 Nassau"). 55 Nassau was constructed in 1969 to 1970. It contains approximately 300 condominium units, and has an estimated 500 residents.

[30] The affairs of the Respondent are managed by an elected Board of Directors (the “Board”) composed of five individuals, all of whom are volunteers.

[31] Ms Kinvig is a former owner and former resident of one of the condominium units in 55 Nassau. She purchased and took possession of her unit on July 19, 1997. It was the first home she had ever bought. She said that she chose her unit over several other units in the building because it was “so lovely and light and bright, and I love light and bright.”

[32] Ms Kinvig explained that shapes and contrasts are important to her due to her visual impairment, that colour and contrast are how she perceives things. She noted that she has to function with light and cannot function with muted colours because she cannot see them, adding that “[t]his is an individual perception. Everybody’s perceptions are different, but this one is mine.”

[33] Ms Christopherson similarly observed that Ms Kinvig had chosen her home because of the brightness of the light that comes in from outside, which she really prefers to interior lights. She noted that Ms Kinvig uses minimal amount of inside light, and stated that natural light seems to be the best for Ms Kinvig to get around. Ms Christopherson noted that in her own house she has more greyed, muted colours, and it is more difficult for Ms Kinvig when she comes to visit her, partly because of the greyed climate in Vancouver where she lives, and this causes Ms Kinvig to move more cautiously and less confidently.

[34] Ms Kinvig testified at some length as to her history of eye problems, emphasizing the importance of dealing with this in the person’s context, in light of their personal perception of things, and of understanding the perspective she comes from when she talks about windows. Ms Kinvig stated that she was born totally blind with cataracts. After numerous surgeries, she acquired 10% vision in her left eye and 7% in her right eye. Later, as a teenager, she developed glaucoma and was on very heavy medication for many years. Eventually, her vision started to diminish and she underwent a number of additional surgeries, during which time she was very ill. When

she could no longer do her job, she came to Winnipeg to retrain. She obtained a bachelor's degree from the University of Manitoba, and after completing a course of computer programming for the blind, was hired by the University, where she worked for 20 years. During that time, her vision continued to deteriorate, and after further procedures were unsuccessful and left her in considerable pain, her left eye was removed, with the result that she now has an artificial left eye. Her right eye then took over and is still functioning, leaving her with about 3% vision.

[35] Ms Kinvig testified that the Respondent has known all along that she has a disability. The day she took possession of her condominium unit, she went down to the front desk in the Respondent's office, introduced herself, and stated that she had a disability. She always asked to record meetings at 55 Nassau because of her disability, and Mr. Schafer allowed her to do so. She said that she always walks with a white cane, and everybody in the building knew she had a disability.

[36] For many years prior to 2004, there had been discussions with respect to replacing the exterior windows in 55 Nassau. The existing windows dated back to the original construction. They were aluminum frame, single pane windows, with vertical sliders. By 2004, they were almost 35 years old, and well beyond their expected 20 year lifespan.

[37] At or about the beginning of 2004, the Board began making a concerted push towards having the windows replaced. The windows had become obsolete. New parts could no longer be obtained, making repair work very difficult. Tests showed that the windows were far beyond acceptable levels of air leakage. There were substantial drafts and complaints of windows shaking and making whistling noises under high wind conditions. The windows were also plagued with wind-driven rain. Where windows were no longer sealed, water and wind regularly entered the building, causing water damage and a substantial draft. Water penetrating and cascading down behind the drywall was resulting in corrosion to steel studs and mould growing on the drywall. The Respondent was having to pay to repair water damage to common elements. It was

also having to pay on average over $10,000 a year attempting to repair the windows, some of which were said to be beyond repair.

[38] The Board holds monthly meetings, as well as special Board meetings from time to time. Window replacement is referred to in the minutes of a number of monthly Board meetings which were filed as exhibits at the hearing, including the minutes of each monthly Board meeting from February to December 2004.

[39] At the Respondent's 2004 Annual General Meeting ("AGM"), Ms Kinvig had read four motions, which were then referred to the next Board meeting for discussion. Ms Kinvig thus attended the next meeting of the Board, on November 18, 2004. (I would note that Ms Kinvig had originally indicated in her Complaint and at the beginning of her testimony that the Board meeting was in November 2005, but ultimately conceded, on cross-examination, that it would have been on November 18, 2004.)

[40] Ms Kinvig's evidence with respect to the November 18 meeting was that after her motions had been discussed, Mr. Schafer asked her how she felt about tinted windows, and she said "please do not put them in my suite", that she could not function with tinted windows, that coloured glass reduces the contrast and would not allow her to live in her own home in a comfortable manner. She said that she volunteered at that time to help select a window that would be appropriate for people with disabilities, as well as everybody else, but that she was ignored, and her request was disregarded. When it was put to her on cross-examination that she had never had any further discussions with any Board members about that issue and her offer of help, she said that she had offered her services in front of the whole Board, and would have thought at that point that they could respond; that she waited for a response from the Board.

[41] It was Mr. Schafer's recollection that Ms Kinvig came to the meeting with four questions, that the Board answered those questions prior to the official start of the meeting, that Ms Kinvig asked if she could stay for the meeting but was told that non-board members cannot sit in because the Board deals with confidential issues, and that

she then thanked the Board for its time and left. Mr. Schafer testified that he did not have any conversation with Ms Kinvig about the windows on November 18, 2004, and that tinting was not even on the agenda at that time. He said that his sole discussion with Ms Kinvig regarding the windows occurred just before the May 2006 (or possibly the August 2006) meeting (see ¶101 below), when he was on his way to the meeting and Ms Kinvig got on the elevator. Mr. Schafer stated that he never had a conversation with Ms Kinvig regarding tinted windows, that he never asked her how she felt about tinted windows, and that she never expressed any view about tinted windows to him.

[42] With respect to Ms Kinvig's testimony that she offered her assistance with respect to the window process, Mr. Schafer said that the Board would not have taken assistance in 2004 or early 2005, that this was too early in the project. He said that there is a building committee and a Board of Directors, and that if people want to assist, they can apply for one of the committees that is sanctioned by the Board. When it was put to Mr. Schafer on cross-examination that he had testified that he recalled that Ms Kinvig offered assistance in the selection of windows, he categorically denied that that was the case.

[43] The first reference to tinting appears in the Minutes of a Special Meeting of the Board on December 13, 2004 , which state, *inter alia*, as follows:

> The window pane has a slight tint low e argon filled glass. The low e argon filled glass is energy efficient. The only problem with having the project over three years is the dye lots for the window tint and frames might have a slight variance. Tinted windows were discussed. The problem with tinted windows is at night the resident could see their reflection in the glass.

[44] Commenting on the above excerpt from the December 13 Minutes, Mr. Wells stated that the Board was considering whether they would go for clear glass, as they currently had, or incorporate a tint, both for aesthetics and performance. Advantages and disadvantages of tinted glass were discussed. One of the advantages which Mr. Wells said he discussed with the Board was that tinted glass would reduce the amount of glare and result in reduced cooling costs in the summer and reduced

heating costs in the winter. A potential disadvantage, as indicated in the excerpt, was that people might see their reflections in the glass more at certain times of the day.

[45] It took several meetings for the Board to discuss and make a decision with respect to tinting. Individual Board members provided input, including with respect to other projects they had seen such as Place Louis Riel, where Mr. Wells and his firm were the engineers of record. The Board reviewed several tints, and Mr. Wells brought boxes of tint samples to one of the meetings so that the Board members could actually look at the glass.

[46] The Board ultimately decided to go with tinted windows. In doing so, the Board opted for the lightest possible tint from the selections that had been presented to them. The Board's decision was unanimous.

[47] The Board communicates with unit owners in a number of ways. Minutes of monthly Board meetings are available to unit owners, on request. The evidence indicates, however, that at all relevant times, the minutes would not have been distributed on a monthly basis, but would have been packaged and provided periodically to those who requested them, sometimes on a month to month basis and sometimes in a bundle of two or more. Minutes of special Board meetings are not available to unit owners.

[48] Ms Kinvig received copies of the minutes of Board meetings. She could not remember exactly when she started receiving them, but thought that she received them for part of 2004, and would have received them for 2005 and 2006. She said she did not read all of them, and that it was kind of hit and miss as to when or whether she read them.

[49] On cross-examination, Ms Kinvig was referred to the January 2005 Minutes, where there is a heading "Window Replacement" and mention of a quotation for engineering services relating to the replacement of the windows. She stated that she did not remember seeing this at all, adding that "If I'd have known that, I would have

been down there like a dirty shirt saying, oh goodie, what's happening now? Can I help?" She was then referred to the February and March 2005 Minutes, each of which also contained a section headed "Window Replacement", and said that she never read these either.

[50] General information and notices are also put on bulletin boards located in three different areas of the building: at the parkade level, in the recreation area, and in the mail room where people pick up their mail. In addition, they are posted in all three elevators. Notices that are posted are also provided to unit owners who are visually impaired, in a very large font. This would have included Ms Kinvig during the time she owned her unit. Lengthier documents and notices or communications dealing with more serious issues may be addressed to unit owners and passed out by security.

[51] Minutes of the Board meeting on May 19, 2005 indicate that a window information session was to be held on June 2, 2005 at 7:30 p.m. Unit owners were invited to attend the meeting, which took place as planned.

[52] Ms Kinvig did not remember getting these Minutes, but did remember attending the meeting on June 2, 2005. She thought that there was some discussion about windows, but said that she could not remember a lot about it.

[53] Mr. Schafer attended the June 2nd meeting, and said that the Board answered such questions as they could at that time. He did not recall anything contentious regarding windows having come up at that meeting. On cross-examination, Mr. Schafer confirmed that the Board did not hold any other information meetings dealing specifically with windows prior to April 13, 2006, the date on which the contract for the window replacement project was signed.

[54] The Board had also discussed and arranged for the preparation of a mock-up test window, with the proposed tint, to be installed in the living room in one of the condominium units. The mock-up window was installed in unit 406 on June 14, 2005. The Board's objective and understanding when it arranged to have that window

installed was that this would provide an opportunity for the Board and unit owners to walk through a unit, and physically see, from both inside and out, what the proposed new window would look like. After the window was installed, however, the unit owner advised that she did not want people coming into her suite.

[55] Ms Kinvig testified that she heard about the test window but never had an opportunity to see it. She went to look at it, but the lady said that she had had too many people come and would not let her in. Ms Kinvig said that she tried looking at the window from the outside, but could not see that far.

[56] After the owner of unit 406 refused to let people into her unit to see the test window, the Board arranged for a notice with a digital photo of that window to be posted on the bulletin boards and in each of the three elevators, together with a request that residents view the window from the outside of the building only. Ms Kinvig said she saw that notice, but not the photo, and that as she said, she did not see the window.

[57] Mr. Schafer's evidence, which was unchallenged, was that the Board received positive feedback from residents after they had seen the test window, and that it did not receive any feedback from Ms Kinvig or any of the other Complainants in these proceedings.

[58] In or around December 2005, the Board had one foot square samples of the tinted glass placed against the window in the main floor lounge, for viewing. A Memorandum to Residents was posted on the bulletin boards and in the elevators, inviting the residents to take a look at the tint and noting that it was the exact tint that would be on the new windows. The Memorandum, dated December 8, 2005, thus read as follows:

> Please note that in the lounge (main floor) there is a 1' x 1' piece of tinted glass, which has been attached to the window on the east side.
>
> This is the exact tint that will be on the new windows. Please have a look at the tint.

[59] Ms Kinvig did not recall seeing this Memorandum or any such glass samples in the lobby. Mr. Schafer testified that the Board did not receive any feedback or responses after the Memorandum was posted.

[60] Minutes of the Board meetings on January 19, 2006 and February 17, 2006 refer to arrangements being made for the windows to go out for tender and indicate that the "tint of glass is to be based on the sample window installed in unit 406 that was provided."

[61] On March 14, 2006, Ms Kinvig's uncle who lived in Merrit, B.C. passed away. Merritt was Ms Kinvig's hometown. She said that she had always told her uncle that she would buy his house. After he died, his beneficiaries offered her the chance to buy the house and she did. Ms Kinvig agreed, on cross-examination, that the closing date and possession date was August 8, 2006, but said that the agreement to purchase the property took place right after her uncle's funeral when she was speaking with the beneficiaries, and before she was notified about the windows.

[62] Ms Kinvig testified that her original plan in acquiring her uncle's property was to treat it as an investment property and rent it out until she retired. She knew that repairs had to be done, and intended to take a leave of absence from her job at the University to go to Merritt for a year to fix up the house. She would then hire a property manager and return to Winnipeg, leaving the property manager to look after the house and rent it out for her until she retired to Merritt at age 65.

[63] Ms Kinvig said that she asked a friend of hers, Nick Donaldson, who is also visually impaired, if he and his girlfriend would look after her condo and her two cats for the year while she was in Merritt, and that he agreed to do so and to pay her $800 a month for that year. Mr. Donaldson had visited Ms Kinvig a number of times in her condo and looked after her cats while she was on holidays.

[64] Mr. Donaldson testified that after Ms Kinvig's uncle died, and while she was considering whether to stay in Winnipeg or permanently stay in Merritt, they

discussed the idea that he and his girlfriend would rent the condo and look after her cats for her for approximately $800 per month on an ongoing basis. Mr. Donaldson said that the idea was on the table for quite a while, and that they were very seriously considering it when it was first suggested. He thought that this was in late 2006 or early 2007, but agreed that it might have been earlier that they actually showed great interest.

[65] In the meantime, there was a delay in the tenders for the window project going out, and the cost of building materials was going up on a monthly basis. The Minutes of the Board meeting on March 21, 2006 indicate that the Board discussed cost and how they would pay for the windows, and refer to the tinting of the windows, *inter alia*, as follows:

> The design of the windows include [sic] tinting to save on heating and cooling costs. John Wells noted that most new buildings install tinting for that reason. Robert Schafer spoke to the manager of The Place Louis Riel who had new tinted windows installed and he said they definitely save money with the tinting.

[66] The Minutes of the March 21 meeting went on to state that the Board would be contacting the Respondent's lawyers to request "a legal opinion to see if an owner vote [would be] required to have tinting put on the new windows."

[67] In a written opinion dated April 11, 2006, the Respondent's lawyers wrote that it was their understanding that the Board's decision to replace the windows was due to the current condition of the windows, such that the matter had become one of repair and maintenance. They advised that decisions with respect to repair and maintenance of the building fell within the sole jurisdiction of the Board, and opined that a vote of the owners was therefore not required.

[68] Two days later, on April 13, 2006, the Board entered into a contract with Gardon Construction Ltd. ("Gardon") for the complete replacement of all of the exterior windows and the installation of new aluminum panels in 55 Nassau, at a cost of over $4

million. Ms Kinvig noted in her evidence that it was signed “prior to [her] knowledge” and that she “had no input”.

[69] Ms Kinvig testified that she became aware of the window contract when she received a document which was sent to unit owners, entitled “Special Reserve Fund Levy for Windows and Run-out Heating/Cooling Lines” and dated April 28, 2006. In that document, the Board announced that the new windows were finally on their way, and referred briefly to various reasons why the windows needed to be replaced and certain features of the new windows, including the “improved look . . . from the energy efficiency tint of the windows”. It also indicated that the cost of the project was approximately $4 million, which would be paid from a special reserve fund levy, spread over four payments and three fiscal years. Finally, it was stated that more information would be available at the next information meeting scheduled for May 8 at 7:00 p.m.

[70] A Memorandum dated May 2, 2006, was also posted in the elevators and on the bulletin boards, advising all unit owners of the information meeting on May 8 to discuss the window replacement project.

[71] As indicated previously, Mr. Schafer’s evidence was that he had a brief conversation with Ms Kinvig in the elevator on his way to one of the information meetings. He thought that this would have been on his way to the May 8, 2006 meeting, but that it could have been on the way to the August 30, 2006 meeting. His recollection of that conversation was that he said to Ms Kinvig that he had heard she was moving to B.C., and that her response was “and I’m not paying for those windows.” Ms Kinvig did not recall any such conversation, and added that the only time she said that she was not paying for the windows was when she later wrote a letter to the Board. (see below ¶103)

[72] With respect to the May 8th meeting, Mr. Schafer testified that there were a couple of obstacles which they had to overcome at that time. The first was whether everyone’s windows had to be replaced, as some people felt their windows were in good shape, while others felt theirs were in horrible shape. The second was the sticker

price. Mr. Schafer said that they tried to explain how the cost would be broken down, based on percentage of ownership, with each unit being responsible for its share of the common elements. He said that the amounts floored people, just as they had floored the Board when it had learned how much this would cost, and that there was a great deal of opposition.

[73] Ms Kula, the property manager, who also attended the May 8th meeting, testified that people had many questions about the windows, especially with respect to the cost of the project, and in particular, the way the costs were to be broken down, such as why someone with one window would have to pay almost as much as someone with five windows. Neither Mr. Schafer nor Ms Kula recalled anyone raising any human rights issues at that meeting.

[74] Ms Kinvig's evidence with respect to the May 8, 2006 meeting was that it was chaired by a Mr. Kay. She said that she had no idea who he was at the beginning of the meeting, so she stood up and asked him a number of questions, including who he was, whether he was an owner and what his role was. She said that he got angrier and angrier, and told her to sit down or he would have her thrown out, but that she continued and finally got her answers. Ms Kinvig said that she stood up again later in the meeting and said that she could not handle tinted windows because of her disability, and asked that they please not put them in her suite, but she was booed and hissed and sat down.

[75] Ms Kinvig said that at the end of the meeting, she went up to the Board and asked them to please not put coloured windows in her suite, as she said she could not see to function with them, but they said that it was too late, that the contract had been signed and she had no choice. Ms Kinvig commented in her evidence that she thought that in a $4 million dollar contract, the owners should have been given a choice, that the Board should have at least consulted the owners in the building to see if what they were selecting was appropriate for the people who were trying to live there.

[76] On cross-examination, Ms Kinvig said that she was not sure whether it was in May or August 2006 that she first saw or heard Mr. Kay. She said that she did

not remember him chairing meetings at 55 Nassau in 2004 or 2005. Asked about her testimony that she was told that she was out of order and might be thrown out, she said that this happened at either the May or August 2006 meeting, that she was not sure which of the two, and had spoken up at both. She said this only happened once, where she was "told to sit down by [Mr. Kay] when [she] spoke about having a disability and not being able to see through the tinted windows", but once was enough.

[77] Mr. Schafer's evidence was that the meeting on May 8, 2006 was an information meeting only. Accordingly, for all intents and purposes, it was he who would have been the chair, not Mr. Kay. No minutes were kept of the meeting, as it was not an official meeting.

[78] With respect to Ms Kinvig's reference to Mr. Kay, Mr. Schafer testified that the Board had decided to bring Mr. Kay in as an independent chair to run general or official meetings, to ensure that the agenda was respected and that those meetings moved along in an orderly fashion. That decision had been made after the Respondent's 2003 AGM had lasted just over six hours, due to people monopolizing the meeting, speaking out of turn, and throwing the meeting off the agenda.

[79] Mr. Schafer said that he had heard Mr. Kay threaten to have someone removed from a meeting where, for example, the person was speaking out of turn, speaking off topic, or making personal comments about unit owners or Board members. He remembered that there was a meeting at which Mr. Kay had threatened to have Ms Kinvig removed, when she was steering the discussion off the agenda, and was not correct. He therefore asked her to sit down, saying that she was out of order, and that if she did not stop, they would have her removed. He said that this would have been at a general meeting, but could not recall in what year, or what Ms Kinvig was speaking about, though he thought that windows would be the best bet.

[80] Mr. Gordon testified that there were a number of objections at the May 8th meeting, although he did not specify the nature of those objections. In response to questions from Ms Kinvig, Mr. Gordon said that Ms Kinvig stood up more than once at a

meeting to object about windows. He said that at one meeting, which he believed was the August 2006 meeting, she stood up to talk about disability and said that she was not going to be able to live with tinted windows, that the chair, Mr. Kay, told her to sit down, and that when she stood her ground, he said that he would have her escorted out of the meeting.

[81] On cross-examination, Mr. Gordon testified that when the Board first said that they had signed a contract, Ms Kinvig got up to speak and was basically told that there was a contract and they were going with the contract. He said that although the Board said they wanted to hear what people had to say, their response when anybody said something was that a contract had already been signed.

[82] Mr. Gordon indicated that at the end of the meeting on May 8, he and he thought Ms Kinvig and Mr. Pollock, went up to the front of the room and were trying to express concerns about the windows, but the Board just did not listen. Mr. Schafer recalled having had only one conversation after the meeting, which was with someone other than the Complainants. Asked if any of the Complainants approached him to discuss tinting, he said no.

[83] Following the meeting on May 8, the Board prepared a four-page document entitled “Window Replacement Project, Questions and Answers” and dated May 18, 2006, the purpose of which was stated as follows:

> The Board . . . has initiated a window replacement project for 55 Nassau. To ensure unit owners receive accurate information, the Board has prepared this question and answer sheet based on issues raised at the recent information meeting as well as questions presented to Board members in private.

[84] Mr. Schafer described the Questions and Answers document as providing an explanation of the window replacement project, the costs, the reasons, and where funds would be coming from. At the end of that document, it was stated that if unit owners had any further questions, they should “put them in writing and send them to the Board” as this was “the only workable way to address your concerns.”

[85] Mr. Schafer testified that copies of the document would have been mailed to unit owners or left at the security office, with a notice on the bulletin boards or in mailboxes stating that there was an important document for residents to pick up. Ms Kinvig produced the Questions and Answers document at the hearing as a document which she received. There is nothing to indicate that she came forward with, or sent any questions to, the Board at that time.

[86] As indicated above, a special assessment was levied against all of the unit holders in 55 Nassau to cover most of the cost of the window project. That assessment also included a component for a smaller amount to cover the cost of replacing the heating and cooling lines in 55 Nassau. The special assessment was applied according to each unit's allocated share of the common expenses. Assessments for each unit were split up into four one-time payments over a period of three and a half years.

[87] By letter dated May 19, 2006, Ms Kinvig was advised that the estimated total amount of the special assessment for her unit, based on her proportionate share of the common expenses (0.4076%), was $16,254.00. The letter indicated that the first part of her share of that assessment, in the amount of $4,515.00, was due September 1, 2006.

[88] At or around the time of the May 8th meeting, Ms Kinvig, Mr. Gordon and a number of other unit owners had become involved in a group known as the "Concerned Owners Committee". Mr. Gordon testified that the members of the Concerned Owners Committee were "just really unhappy that any kind of contract could have been signed for over $4 million that was not voted on by the owners."

[89] Ms Kinvig similarly testified that they were "really upset about the windows because of the fact that no one had been consulted." She said that they did not even know there was a contract until it was announced. They did not receive the Board minutes for January to April 2006 until May. She remembered telling people that she could not understand why everybody was not at least asked to see a presentation from a couple of contractors so they could make a constructive decision about which

windows would be appropriate. Ms Kinvig added that she “was really upset about the whole thing and especially when [she] found out that it was going to be coloured glass, because [she] knew that this would be a problem for [her].”

[90] It was Ms Kinvig’s evidence that after hearing about the windows, she told Mr. Donaldson that they were going to have a problem as the Respondent wanted to install dark tinted windows in the condo. She said that when she asked him if he still wanted to rent the condo, he thought about it for a little while, then said that there was no way he was going to live there either.

[91] On direct examination, Ms Kinvig asked Mr. Donaldson what his reaction was when she told him that the Respondent planned to put dark windows in her suite. His response was that he was not overly enthused, because he knew from seeing similar types of windows in other facilities that the natural light was going to be significantly cut and he was not going to like that. Asked if he would have still continued to rent from Ms Kinvig if the windows had been dark, he said no, that he would have opted out because that was not suitable for what he wanted.

[92] With respect to his own eye condition, Mr. Donaldson said that he has found, at least in his preference, that clear glass windows are best for his functioning, that they give him the most natural light, which he prefers to use where possible. Mr. Donaldson stated that he has been in places that have had various types of shading applied to the window glass, and has always found these to be unappealing because they reduce too much daylight and make it necessary to rely on man-made light where it is not necessarily required.

[93] On cross-examination, Mr. Donaldson acknowledged that he had not seen the tinted windows at 55 Nassau when he decided that he would not rent Ms Kinvig’s condo, but noted that having experienced many different tinted windows in other locations, he found that to be very off-putting. He said that he had yet to see a tinted window that he liked. Mr. Donaldson agreed that people with low vision will have

varying perspectives on lighting conditions. While he agreed that a tinted window will cut down on glare, he went on to add that it also cuts down on “good light”.

[94] As previously indicated, the possession date in respect of Ms Kinvig’s purchase of her late uncle’s property in Merritt was August 8, 2006.

[95] On August 8, 2006, Ms Kinvig also submitted her retirement notice to the University of Manitoba, stating that her last working day would be September 15 and her first day of retirement October 1, 2006. In her letter to the University, she indicated that she would be moving back to her home town of Merritt, B.C., where she would be living in the house she had purchased from her uncle’s estate and working at her home-based businesses. Ms Kinvig acknowledged, on cross-examination, that there was no mention of any issues related to the Respondent or this case in that letter, then added that it was not the University’s business.

[96] Ms Kinvig first listed her condominium unit for sale on August 19, 2006, at a list price of $179,900, which was subsequently reduced to $169,900. Ms Kinvig testified that she specified as one of the conditions of sale that the windows would have to be paid for because she “was not going to pay for windows that [she] did not think were appropriate”.

[97] In or about August 2006, the Concerned Owners Committee prepared a petition to the Board, seeking a vote on the project and the removal of the entire Board, the property manager and legal counsel. The petition was presented to the Board, but the Board refused to accept it. There is no indication as to what, if any, involvement Ms Kinvig had with that petition.

[98] On or about August 24, 2006, the Board circulated a Memorandum to Unit Owners regarding the window project. Mr. Schafer described the Memorandum as further explanation from the Board regarding the project, and dealing with issues brought forward by the group opposed to the windows, specifically items or misinformation in the petition they had circulated. Attached to the Memorandum were

two legal opinions relating to the Board's obligation to maintain the common elements and its authority with respect to the window replacement project.

[99] Mr. Schafer said the Board was reacting to complaints and questions they had received from unit owners arising from the petition. He said that the petition was expected in a way. However, unit owners had complained that they were being bothered, and were coming to the Board with questions, asking if what they were being told was true. He said that the Board viewed the petition as a one-sided document that was designed to disseminate misinformation and confuse the unit owners, and as not being in the best interests of the building.

[100] In late August, 2006, a second test window was installed in a thirty-third floor unit on the North side of the building, as a test for both the unit owner and the construction company. While installing the window, the contractor learned that the windows in the building were all hooked together, from the second to the thirty-eighth floor on each column of windows, and the new windows would have to be installed in the same design, as opposed to following the original plan where the more urgently required windows would be replaced first.

[101] Following up on the August 24th Memorandum, the Board held a third information meeting, on August 30, 2006. Ms Kinvig's evidence was that she attended and spoke at that meeting, but could not recall precisely what she had said. Nor, as indicated above (¶41), could she say whether it was at that meeting or the earlier meeting on May 8th that Mr. Kay threatened to have her removed.

[102] Mr. Schafer's evidence was that most of the meeting on August 30 was spent answering questions relating to the cost of the windows, the contract, and the special assessment, and that human rights issues were not raised. Ms Kula similarly recalled that the discussions again basically related to the cost of the windows, the special assessment, and that type of thing, and that human rights issues were not raised. As with respect to the May 8 meeting, Mr. Schafer said that the August 30 meeting was not an official meeting, but an information meeting, and that for all intents

and purposes, he would have chaired the meeting. No minutes were kept of that meeting.

[103] By letter dated September 1, 2006, Ms Kinvig advised the Respondent that she was unable to pay her September 1 instalment for various reasons, and was disputing the amount of her assessment until she received certain information as listed in her letter. Her letter thus read as follows:

> I have several concerns with regard to the Windows and Heating & Cooling Line projects. Due to extreme hardship, I am unable to pay my September 1 fee of $4,515.00. My reasons are as follows:
>
> 1) I have my condominium up for sale and as yet have not received an offer to purchase.
> 2) I have my common element fees to pay.
> 3) I have my mortgage on #2707-55 Nassau St. N. to pay.
> 4) I have just taken possession of a house in Merritt, B.C. on August 8th with the result that I have to pay an extra mortgage on September 8, 2006.
> 5) I have retired from the University of Manitoba which means that my income is being drastically reduced . . . .
> 6) I am moving on September 27, 2006 and will need to pay moving expenses.
> 7) Somewhere in all of this I have to pay my normal bills.
>
> I am also disputing the estimated assessment amount of $16,254.00 for my unit #2707 until I receive the following information:
>
> 1) Justification of the numbers in the estimated budget, as outlined in the May 16, 2006 letter to all unit owners . . . .
> 2) A description of the process in which the consultant, contractor and window manufacturer/installer were decided upon.
> 3) All correspondence to the parties asked to tender plans and estimates for the windows project including discussions concerning tinted versus clear windows.
> 4) Affidavit evidence that contractors and suppliers are "dealing at arm's length" . . . .
> 5) Copies of the contracts signed . . . .
> 6) Copies of correspondence submitted to Manitoba Hydro, Centra Gas and other granting agencies, requesting funding assistance/rebate for the windows project.
> 7) Copies of correspondence to all project participants, requesting that the 7% GST calculation to be reduced to 6%, on all contracts.

> 8) Copies of any and all other documents or contracts pertaining to the windows project.
>
> All of these documents should have been made available to unit owners at the "Information Meeting", held by The Board of Directors on . . . August 30, 2006 if not before that time.
>
> Your demand for payment by September 1, 2006 . . . should be postponed until The Board justifies the billing to all other concerned unit owners and my satisfaction.
>
> As all of these documents should be in the board's possession, I request copies within one (1) week, by Friday, September 8, 2006.
>
> It is my position that the Board of Winnipeg Condominium Corporation No. 30 did not proceed in a manner that was fair and equitable to unit owners.

[104] With respect to that letter, Ms Kinvig testified that she wanted the Respondent "to justify their $4 million dollar price tag on the windows", and had they done that, she said, she "would have been happy" or "at least . . . have had more understanding". Ms Kinvig acknowledged, on cross-examination, that there was no mention in the letter of concerns about the tinting, of her selling her condo because of the tinting, or of the tenant having "bailed out" on her.

[105] Ms Kinvig did not pay the first instalment of the special assessment when it came due on September 1, 2006. She testified that the reason for this, as stated in her letter, was that she wanted the numbers for the cost of the windows and the heating justified.

[106] On September 11, 2006, the Respondent issued a Memorandum to All Owners at 55 Nassau regarding the next steps and plans for window installation. That Memorandum referred to the change in the sequence and manner in which the windows would have to be installed, and indicated that they would be starting work from the second floor of the "03" riser.

[107] The Board posted a second Memorandum to the unit owners of 55 Nassau on September 11, advising that they had rented a room at Place Louis Riel

Hotel for the weekend of September 16 and 17, so that residents could view the tint on the new windows which had been installed there recently. It was noted that the "window construction and tint [are] identical to 55 Nassau's new windows". Unit owners were invited to make time on those days to come and view the windows from the inside.

[108] Ms Kinvig said that she found out about this invitation to see the windows at Place Louis Riel on September 12, but did not go to see them. She said that she saw no point in going; she had already told people that she could not see with tinted windows, and it just seemed ludicrous to go and see the windows when she knew she could not see with them.

[109] Ms Kinvig originally testified that she had seen the new windows in unit 203 in the middle of August 2003. On cross-examination, she said that she was not absolutely positive about the date, and after reviewing certain correspondence which was later marked as Exhibit 140, she agreed that it must have been sometime after September 12 and before September 27, 2006 that she would have seen the windows in unit 203.

[110] With respect to unit 203, Ms Kinvig said that when she went into that unit, a new window had been installed in one of the rooms and the original window remained in another. She said that the new window seemed to grey out and remove the contrast everywhere, to the point that she actually tripped over a coffee table which she did not see because of the greying of the window. She found it much easier to see in the room with the clear window. Looking outside, she found that with the new window, even though the sun was shining, everything looked dull to her, the sky was grey and it was harder to see the cars and the trees, whereas with the clear window, it was much brighter and she could see the blue sky and the colours of the trees and cars. Ms Kinvig said that "I decided at that point that I did not like the coloured window because it would really create a problem for me in my own suite" and "would make it much more difficult for me to see and function".

[111] As indicated in her letter of September 1, Ms Kinvig was moving to Merritt, B.C. on September 27. Before leaving for the airport that day, Ms Kinvig received a response to her letter from the Respondent's property manager, which stated, in part, as follows:

> The Board of Directors does understand that the installation of the windows does create a hardship for a few people.
>
> . . . . The Board does realize that people do have other bills to pay.
>
> The window/heating and cooling line projects are costly ones; however, I am not sure why you are protesting the amount. The amounts are correct and the figure quoted in the letter you received of May 2006 is correct.
>
> Unfortunately the Board of Directors … must treat unit owners equally and in that regard they must follow the next step as per the by-laws and declarations of the Corporation. If a lien were to be placed on your unit in the future it would be removed as soon as the unit sold. That would be a legal cost to you; however, we could arrange to have this done quickly.
>
> The additional information you have requested has been forwarded to Krystyna Briggs.

[112] Ms Kinvig testified that she has yet to see any documents or justification of any kind in response to her letter of September 1, 2006.

[113] Ms Kinvig said that when she moved to Merritt on September 27, 2006, she took her two cats and her furniture with her. On cross-examination, she said that she had not looked for any other tenant after Mr. Donaldson no longer wanted to rent her unit because she wanted someone she could trust to look after her cats and her furnished home. She also agreed that she did not look around Winnipeg for any other suitable accommodation. She acknowledged that she had always planned to retire to Merritt, but qualified that by saying that she had planned to do so at age 65. She agreed that she had a very good job at the University which she enjoyed and which gave her a decent salary. When asked if she was saying in effect that she retired from that job ten years early because of the windows, she said yes, that she did not feel that she had a choice.

[114] When Ms Kinvig left Winnipeg on September 27, 2006, the windows in her unit were still the original ones, with clear glass; none of them had been replaced.

[115] On November 14, 2006, the Respondent caused a lien to be registered in the Winnipeg Land Titles Office ("WLTO") against title to Ms Kinvig's unit with respect to non-payment of the special assessment instalment. Ms Kinvig pointed out that she did not receive a copy of the lien until February 4, 2007.

[116] On November 22, 2006, the Respondent held its 2006 AGM. As Ms Kinvig was in Merritt at that time, she did not attend the AGM but gave her proxy to Mr. Gordon.

[117] The Minutes of the 2006 AGM refer to the election of the Board of Directors. Mr. Schafer said that the AGM was "in the middle of the window debate" and that the group opposed to the windows had put forth two candidates for the Board. He said that prior to the election, he had stated to those in attendance that a vote for the incumbent board was a vote for the window replacement project. The incumbent board was re-elected.

[118] The Minutes also refer to the resident of unit 203 having spoken about her windows, and the chair having asked her to contact the Board as this was not the forum for such a discussion. Mr. Schafer testified that controversial matters are typically not dealt with at AGMs. Other than the discussion with respect to the above two items (Mr. Schafer's statement with respect to the vote and the comments regarding unit 203), Mr. Schafer did not recall anything being said at the AGM about windows.

[119] Mr. Gordon testified that one of the unit owners had tried to speak about human rights at the AGM, and was told by the chair to sit down. There is no reference to this in the Minutes.

[120] On November 25, 2006, Ms Kinvig's condominium was again listed for sale, at a list price of $179,900.

[121] On or about January 19, 2007, the Respondent caused a Notice of Exercising Power of Sale ("NEPS") to be registered in the WLTO against title to Ms Kinvig's unit, due to her failure to pay the special assessment instalment.

[122] Two months earlier, on November 21, 2006, Krystyna Briggs, another unit owner and a member of the Concerned Owners Committee, had initiated an application against the Respondent in the Court of Queen's Bench, File No. CI 06-01-49638, for an order declaring that the contract for the window project was *ultra vires* because it had not been approved by a vote of the unit owners (the "Briggs Application"). That Application came on for hearing before Justice Jewers on January 24, 2007.

[123] On February 14, 2007, Justice Jewers delivered Reasons for Judgment which resulted in an Order declaring:

> (a) that the complete replacement of all existing exterior windows at 55 Nassau Street North is a non-substantial alteration or improvement to the common elements that requires the approval of a majority of unit owners at a duly convened meeting held for that purpose;
>
> (b) that the contract entered into by the respondent with Gardon . . . for the replacement work is *ultra vires* but may be ratified by the requisite majority of the unit holders pursuant to s. 16(1.2) of *The Condominium Act*.

[124] In his Reasons, Justice Jewers stated that the Order stopping any further work under the contract with respect to the units in which the Applicant herself had an interest would remain in effect until the requisite vote had been held and majority approval given, but expressly declined to order that all work under the contract should cease. The Order preventing any work being done thus applied to Mrs. Briggs' units only.

[125] On February 26, 2007, Ms Kinvig sent an email to Ms Kula stating:

> As per Justice Jewers' decision . . . and in keeping with the advice of the Concerned Owners Committee's lawyer, no further work on the windows will be permitted in my unit until further notice. . . .

Shortly thereafter, having received no response, she sent a letter to Ms Kula, with a copy of the email enclosed, to confirm Ms Kula's receipt of same.

[126] A special meeting was scheduled for April 11, 2007 at which a vote on the windows contract was to take place. Ms Kinvig returned to Winnipeg for that meeting. She said that when she arrived, she saw the new window which had been installed in the bedroom of Mr. Gordon's unit. She said that although it was daytime, she could not see through the window and into the bedroom from the balcony. She could not see inside the bedroom with the light coming in from the window, but actually had to turn the light on. She had looked after Mr. Gordon's unit once before and never had a problem, but with the tinted glass window she could not see. She visited another unit with the new windows, and while she was looking at the window, she hit her arm and hurt it on one of the locks which, she said, she could not see because of the colour of the glass.

[127] Ms Kinvig testified that when she walked into the building after being away from September to April, "it was like this huge dark cloud just descended." She said that everybody was so angry and some people were very rude. She said she became so upset that she "nearly had a nervous breakdown", and could not attend the meeting to vote. She gave her proxy to Mr. Gordon to act on her behalf because she felt that she just could not go into the meeting and face the attitude of the Board, the chair, and the people, and the booing and hissing.

[128] On February 23, 2007, Mr. Pollock had filed a Notice of Application against Gardon, the Respondent and the Government of Manitoba in the Court of Queen's Bench, File No. CI 07-01-50819 (the "Gardon proceedings"), seeking several forms of relief, including a declaration that he did not owe any money to the Respondent on the assessment regarding the contract declared *ultra vires* by Justice Jewers, and an order that Gardon halt all work until a decision has been made as to whether the contract was ratified by law.

[129] Ms Kinvig said that while she was in Winnipeg, she was asked if she would be willing to swear an affidavit in the Gardon proceedings, describing her

experience, and she agreed to do so. In that Affidavit, sworn April 9, 2007, Ms Kinvig stated, among other things, that:

> 3. I do not have the new tinted windows in as yet.
>
> 4. However, I have been in 3 units that do, and by comparison with the old clear windows in those units, the new tinted windows make seeing extremely more difficult, and as a result of that, I do not want them in mine.
>
> . . . .
>
> 6. Although people with glaucoma are super-sensitive to sunlight, tinting modifies colour. That negatively changes my ability to discern objects. And those new windows created such a negative change that there was a major reduction in my ability to see and function.
>
> 7. I requested in writing on September 1, 2006, full documentation in writing from the Board of Directors and the property manager Sharon Kula, prior to payment for the windows, so that I could ascertain whether or not these tinted windows would be beneficial in my home.
>
> 8. On September 27, 2006, at 12:58 p.m., I received a letter from Sharon Kula informing me that I could look at documentation available from another unit owner in 55 Nassau. I received the letter personally from . . . the building security office as I was leaving for the airport to move to Merritt, B.C. I had previously informed Ms Kula of my moving plans on or about September 1, 2006. Because of that circumstance, it was impossible for me to acquire the documentation. If I do not have to have the new tinted windows, I may move back to Winnipeg and stay in my unit.

[130] With respect to the Gardon proceedings, Ms Kinvig thought that she also attended in court one morning for a short period of time while she was in Winnipeg, as an observer, but that beyond that and the Affidavit she swore, she was not involved in those proceedings.

[131] On April 11, 2007, the Respondent held the special meeting of the unit owners, to vote on the contract. As indicated above, Ms Kinvig did not attend that meeting.

[132] Mr. Gordon’s evidence was that in advance of that meeting, he and a number of other individuals had been working with Peter Turner, who Mr. Gordon described as a windows expert they had hired, to come up with an option which included non-tinted windows and would be less expensive. He said that a request was made prior to the April 11 meeting to have a second option heard, but that it was made absolutely clear to them that only one option was to be heard, that being to ratify the contract.

[133] Mr. Schafer’s evidence, on cross-examination, was that he knew Mr. Gordon’s group had spoken to other companies, but was unaware they had a bid or specifications prepared, and did not recall Mr. Gordon asking him about a second option. Mr. Turner was not called as a witness at the hearing.

[134] Mr. Gordon testified that at the April 11, 2007 meeting, he heard people getting up to talk about the windows, and being basically told to sit down, that they were opposing the windows contract. He said that one individual, who is not a party to the proceedings before me, got up to speak about human rights and was specifically told not even to talk about it and to sit down. Mr. Gordon said that he was allowed to speak, and was trying to get his points across about the windows within the two-minute time limit, but was consistently interrupted by the chair. Mr. Gordon acknowledged, on cross-examination, that the two-minute time limit was imposed on all individuals who wished to speak. Mr. Schafer’s evidence was that no human rights issues were raised at the meeting.

[135] The Minutes of the April 11 meeting reflect that a motion was made that a vote be held to approve the complete replacement of all existing exterior windows at 55 Nassau and to ratify the contract entered into by the Respondent with Gardon for the replacement work. A further motion was then made, seconded by Mr. Gordon, to amend the original motion, to in effect provide for two separate votes, the first to approve the replacement of all existing windows and the second to ratify the contract. The motion to amend was defeated, and the question from the original motion was put to the vote. A total of 253 votes were cast, representing 85.54% of the available vote.

A large majority of the unit owners (202 or 79.84% of the votes cast) voted in favour of the window replacement project and the contract with Gardon, thus ratifying the contract. The number of votes against totalled 49 or 19.36% of the ballots cast and 2 ballots were spoiled.

[136] Ms Kinvig testified that on April 12, 2007, the day after the vote had been taken, she went to the Commission and presented them with a draft form of written complaint which, after being revised and finalized, was signed July 17, 2007 and became the Complaint herein.

[137] Ms Kinvig returned to Merritt on April 14, 2007. On April 16, 2007, her condominium was listed for sale for a third time, at a list price of $176,500. It sold that same day, for $167,500. Ms Kinvig did not make a counter-offer. Mr. Fondse, Ms Kinvig's real estate agent, testified that he advised Ms Kinvig to accept the offer because of the closeness of the May 1, 2007 possession date which she had stipulated in the listing, and that she accepted that advice.

[138] Each of the three listings for the sale of Ms Kinvig's unit (dated August 19, 2006, November 25, 2006 and April 16, 2007) had included a reference to the special assessment for windows. The Offer to Purchase provided that the purchaser would be responsible for all window and lien expenses.

[139] On cross-examination, Mr. Fondse agreed that a purchaser who is looking to make an offer on a condominium unit will take into account if there is going to be a special assessment, and would have to be prepared to pay for special assessments. He said that he was not aware until later whether any portion of the special assessment in respect of Ms Kinvig's unit, and more particularly the $4,500 instalment due September 1, 2006, had been paid.

[140] John Kemp testified by telephone from Florida. Mr. Kemp's home address was at 55 Nassau, where he had lived for seven or eight years. Mr. Kemp, or his holding company, purchased Ms. Kinvig's unit from her in 2007 for the purpose of

renting it, and still owned that unit and five others in the building. Mr. Kemp stated that in making the offer to purchase Ms Kinvig's unit, he took into consideration the money that was owing on the windows and certain improvements which he felt were needed, including taking out the carpet and redoing the flooring. As soon as his offer to purchase Ms. Kinvig's unit was accepted, Mr. Kemp put the unit in the paper as available for rent, and it was rented immediately, before he could even take out the carpet and redo the flooring. Mr. Kemp testified that his experience has been that the five or six units that he owns in the complex have never gone a month where they have been vacant. All he has to do is advertise a unit by putting a notice on the bulletin board in the complex and in the paper, and almost immediately he gets responses and the unit is rented.

[141] Mr. Schafer testified that he does not notice a difference in the amount of light coming in with the new windows. He has noticed, however, that there is less glare and that it is not as hot in his unit. On cross-examination by Ms Kinvig, Ms Kula said that there is a very slight difference between looking out one of the tinted windows and a window with clear glass.

[142] As indicated above, Ms Kinvig signed the Complaint which is the subject of these proceedings on July 17, 2007. It was filed with the Commission on August 9, 2007. The Complaint contains eight numbered paragraphs and reads, *inter alia*, as follows:

> 2. The Board of Directors of the [Respondent] indicated to all owners that they were going to put in new tinted windows.
>
> 3. Subsequently, I had the opportunity to visit three units at 55 Nassau Street, North that had the new tinted windows installed. I found that the tinted windows made seeing extremely more difficult for me. The new tinted windows created such a negative change that there was a major reduction in my ability to see and function. In addition, I could hardly see the window handle which extends outward, which is dangerous in my circumstance; and also, I cannot reach the locks, the top one being about 8 feet high, without standing on a chair or using a ladder.
>
> 4. To date, the new tinted windows have not been installed

> in my condo unit.
>
> 5. I informed the Board of Directors and Ms Kula commencing in November, 2005 that I do not want these new windows based on my disability. I sent Ms Kula an email on February 26, 2007 with confirmation by letter on March 1, 2007 that I do not want anyone in my unit to install the tinted windows.
>
> 6. I therefore did not pay for the tinted windows and I feel the lien which was placed against my condo should be discharged.
>
> 7. On Wednesday, April 11, 2007 a meeting took place with the Board of Directors and a vote was held by the condo owners. The result of the vote was that the majority of condo owners wish the tinted window project to move forward and no consideration was given towards my request for reasonable accommodation based on . . . disabilities: legally blind and glaucoma.
>
> 8. On Monday, April 16, 2007 I sold my condo unit with a possession date of May 1, 2007.

<u>Dr. McLeod</u>

[143] Dr. Donald McLeod is a member of the College of Physicians and Surgeons of B.C. practising general medicine in Merritt and Kelowna, B.C.

[144] A “Will Say Statement” from Dr. McLeod, which was filed as Exhibit 61, stated, in part, as follows:

> 8. I will say that since window colour changes the colour of surroundings, this can drastically reduce [Ms Kinvig’s] ability to function independently in her environment.
>
> 9. I will say that I understand that on the 27th floor one is surrounded by storm clouds at times. Add to that the dark glass windows and I am certain that Delphine would be hard pressed to function in an independent manner.
>
> 10. I will say that if Delphine can control the amount of light coming in to her suite through the use of blinds and drapes, she has a much better ability to function to her maximum potential.
>
> 11. I will say that tinted (dark glass) windows will severely restrict Delphine’s ability to see outside. It is my understanding

> that she seldom, if ever, wears sunglasses because the distortion in colour severely limits her ability to see and recognize objects and people. Delphine depends on colour and shape to identify objects and people.
>
> 12. I will say that Ms. Kinvig should have been accommodated in the form of clear non-tinted windows because of her visual impairment. She should have been allowed to live in her home without impediment.

[145] Dr. McLeod testified by teleconference. On cross-examination, he stated that he did not prepare Exhibit 61 but signed it after reading it over. He said that he had seen Ms Kinvig up to 24 times since November 2008. He acknowledged that he had never seen the building or windows at 55 Nassau, nor had he ever assessed Ms Kinvig in the context of a tinted window environment. He agreed that it was fair to say from the use of the word “can” in paragraph 8 of Exhibit 61 that reduction of an ability to function is “not a given”, and that in general, the effect of tinted glass on an individual is subjective. With respect to the reference to “dark glass”, he agreed that he did not know precisely what colour the windows were or how dark they were.

Dr. Slywka

[146] Dr. Jill Slywka is an optometrist registered with the college of Optometrists of B.C. and practising in Merritt and Princeton, B.C.

[147] A “Will Say Statement” for Dr. Slywka, filed as Exhibit 62, stated that Dr. McLeod had referred Ms Kinvig to her, to confirm her disability. Although numbered differently, the text of paragraphs 9 through 13 of Exhibit 62 was identical to that of paragraphs 8 through 12 of Exhibit 61.

[148] Dr. Slywka testified by teleconference. On cross-examination, she stated that she had seen Ms Kinvig only once, in January 2012. She said that Ms Kinvig drafted the Will Say Statement. Dr. Slywka then read it and gave Ms Kinvig some changes, which were made, and she signed it.

[149] Dr. Slywka also testified that she had never seen the building or windows at 55 Nassau, or assessed Ms Kinvig in the context of a building with tinted windows. She acknowledged that a person's perception of the effect of tinted windows is "somewhat" subjective. She also agreed that she had no knowledge of what colour the windows were or how dark they were.

Kent Woloschuk

[150] Kent Woloschuk testified for the Complainants as an expert witness. Mr. Woloschuk is a registered architect, with experience in window replacement and building envelope upgrades.

[151] For the purpose of providing his opinion, Mr. Woloschuk had viewed the windows in Mr. Gordon's and the Pollocks' units, as well as the recently installed window system in another unit. Mr. Woloschuk stated that the tinted glazing on the new windows changes the quality of the natural light available in each unit. He observed that visible light transmission has been reduced, and that this may or may not affect individuals who have reduced vision capabilities, depending on their individual conditions. When questioned by Ms Kinvig, he noted that there are an incredible number of possible tints, and that he had not seen the technical specifications of the glazing which would indicate the amount of light transmitted through it.

[152] On cross-examination, Mr. Woloschuk confirmed that he could not speak to how tinting would affect someone's abilities. He could not say that the reduction in the amount of light would make it harder for an individual with limited vision to see, only that it might or might not do so, and might or might not affect his or her ability to function in that space. He said that for this, he would have to rely on opinions or perceptions by the individuals in that space.

[153] Mr. Woloschuk testified that it would not be too difficult to install clear, non-tinted windows as opposed to tinted ones in a unit. He concluded that if the other components with respect to the newer style of windows remained the same or similar,

clear glazing would comply with the building code. In Mr. Woloschuk's opinion, it would have been cost neutral, or could have cost slightly less, to install clear glazing as opposed to tinted glazing if this had been done as part of the original installation.

[154] With respect to the locks, Mr. Woloschuk stated that in order to change the locks now, they would have to modify the entire window configuration, as the locks are an integral part of the window frame. He said that the locks could have been accommodated at a lower height at the original time of installation.

Remedies

[155] The Complaint which Ms Kinvig filed did not address the remedies she was seeking. A list of 21 remedies which Ms Kinvig was asking for was provided in advance of the hearing, and filed as Exhibit 58. Those remedies are referred to in more detail at paragraph 181 below.

[156] Ms Kinvig apologized at several points during her testimony for being upset and overly emotional. She said that the whole situation was extremely upsetting and it had taken her six years to try and talk about it with some rationality, but that she was still very, very upset about it. She said that it is not easy for her to function anywhere, and she has to work really hard in order to be able to function to her maximum capacity.

[157] With respect to indications by the Commission that it might be seeking an order that the Respondent implement certain policies and what the Respondent itself has done in this regard, Mr. Schafer testified that working with a human rights lawyer, the Board has taken steps to develop three different draft policies for 55 Nassau which they were prepared to implement. The first two, entitled "Policy of Nondiscrimination" and "Discrimination Complaint Resolution Procedure", were prepared for and with the Board for setting up a non-discrimination policy and a complaint resolution procedure. The third, entitled "Accommodation Policy", was prepared not only for the Board, but for other residents as well, as a reminder of how to interact with persons with disabilities.

[158] In terms of other contacts or steps which the Board has taken with respect to human rights issues, Ms Kula testified that subsequently, in 2010, when they were installing new elevators at 55 Nassau, the Board asked to have someone from the Commission come and meet with them to discuss what their obligations were as far as the elevators were concerned. The individual who came from the Commission spoke to them about reasonable accommodation for residents in general, and he discussed not only the elevators, but also the interphone or intercom system and other more general matters with them. The Board then posted notices, listing buildings where residents could go and see various types of features which had been installed in elevators, such as lighting and buttons, which might be appropriate for residents with any kind of problem. Ms. Kula said that the elevators which were eventually installed at 55 Nassau have a number of features, including bright lighting, different buttons, and voice enunciation, and in her view, are the best in the city.

The Positions of the Parties

The Complainant

[159] As previously indicated, Ms Kinvig participated in the making of submissions by teleconference. She made her final submission following those of Messrs. Pollock and Gordon, and began by stating that she adopted all that they had said in their submissions as it pertained to her.

[160] Addressing the issue of whether she has a disability, Ms Kinvig stated that she had defined her disability in her evidence, which was then corroborated by others. She was born totally blind with cataracts, has glaucoma and has been classified as legally blind since birth. She noted that Mr. Schafer admitted that she was visually impaired, and that the Respondent did not dispute that she had a disability.

[161] In terms of whether she has special needs, Ms Kinvig argued that the evidence established that she purchased her condominium unit because it was light and bright, and she loves light and bright. Colour and shape are how she perceives things and people, and she requires contrast in order to function to her maximum potential.

For her, tinted windows "grey out" colours, both inside and out. She controls light using layers of drapes, and uses minimal inside light.

[162] Ms Kinvig referred to the evidence of witnesses who confirmed that her condominium unit was very bright, with lots of natural light, that she always picks very defined contrasting colours, and that reduced light impacts her vision. She noted that Dr. Leicht had said that individuals with vision problems would want to increase the amount of natural light, and that this is an element of subjectivity of the person.

[163] Ms Kinvig noted that when she saw the tinted window in unit 203 in mid to late September 2006, the contrast had decreased and greyed out the room to such an extent that she tripped over a coffee table because she could not see it. Comparing the dark and clear glass windows in unit 203, she found that she could easily see the furniture in the room with the clear glass windows. When she returned to Winnipeg in April 2007 and went into Mr. Gordon's bedroom where the tinted window had been installed, she again found that she could not see and had to turn the lights on in order to see the furniture.

[164] With respect to the Respondent's awareness of her disability, Ms Kinvig argued that the Respondent had been aware that she had a disability from the time she moved into 55 Nassau in 1997. As she explained in her evidence, she speaks about her disability often, and tries to educate others. She always uses a white cane. Every time she asked to record meetings, she identified herself as having a disability and Mr. Schafer allowed her to tape the meetings.

[165] Ms Kinvig stated that the evidence showed that when Mr. Schafer asked her at a Board meeting in November 2004 if she wanted tinted windows in her unit, she informed him that she could not have tinted windows, that she could not survive properly with coloured glass windows because of how she sees. She offered her services to the Board at that time, to help them select proper windows which would suit not only people with disabilities, but also the rest of the owners, but she was ignored. She said that Mr. Schafer admits that she made that offer, but said that it was too early.

[166] In Ms Kinvig's submission, the evidence indicates that she spoke at almost every meeting. This shows that she was not only a responsible homeowner but was also trying to raise the issue of disability and windows. She referred to the Affidavit she swore in April 2007, noting that it defined her disability. She submitted that the Respondent had not yet begun to install the windows at that point and could have tried to accommodate her then, but did not.

[167] Ms Kinvig submitted that the Respondent did not undertake any investigation based on her special needs. Referring to the Commission's Policy #L-9, *Reasonable Accommodation: Disability*, she stated that even though she had already explained her issues, the Respondent had an obligation to investigate and ask further questions to determine what issues she had with the windows. She said that the Respondent had an obligation to inquire of others with disabilities, as well, as to what issues they might have had, and that it should have actually asked all of the owners. In spite of that, no investigation was undertaken.

[168] Ms Kinvig acknowledged that her case is different from the other three cases that were before me. Referring to the Commission's Policy #L-13, *Bona Fide and Reasonable Cause*, she noted, in particular, that each case is to be assessed based on its individual merit and circumstances.

[169] With reference to the issue of accommodation and whether she had been accommodated to the point of undue hardship, Ms Kinvig spoke of the attitude of the Board and the owners in the building as a result of the Board's actions. She argued that the Board used bullying and intimidation tactics, and that six years later, she is still very upset by this process. No one was allowed to speak out against the windows or the window project. Anyone objecting to the project was booed and hissed. There were no time limits at meetings for people who were in favour of the project, only for those who were against it.

[170] Ms Kinvig pointed out that she was not against installing new windows. What she was against was how the project was handled. She felt blind-sided in May

2006 when she received notification of the contract from the Board. She noted that she did not receive the minutes for the January to April meetings until after May 8, and even then, there was nothing in those minutes to state that the Board was ready to sign a contract. She and others tried to speak of disability and human rights, but were basically told that the project had nothing to do with human rights and were not allowed to speak. She said that the atmosphere in the building was very tense, and it was not a nice place to live at the time.

[171] Ms Kinvig submitted that Mr. Schafer's evidence was that the Board does not run the building by referendum; that it governs everything in the building and determines what documents are distributed. She said that the Board would not allow them to have a meeting in the building to talk to the owners about tinted windows or anything else. In her submission, that was discriminatory against everyone. If the Board does not allow owners to speak, it acts like a dictatorship. She submitted that the Board may run the building, but it is supposed to allow owners to act as a democracy.

[172] Ms Kinvig argued that there was no accommodation. If there had been, she said, they could have saved the Respondent thousands of dollars, and themselves terrible aggravation and pain, and had uniform windows throughout the building as the Respondent wished. Ms Kinvig argued that if the Board had taken affirmative action when they were informed in 2004 that the windows were a problem for her and conducted a proper investigation and sought information from those with disabilities, as well as others who also have a right to their input, this would have been a more equitable approach. The Board could have eliminated all of the litigation and these proceedings.

[173] Ms Kinvig refuted the Respondent's assertion in its Reply to her Complaint that one unit owner cannot make a decision which affects the whole. In her submission, that is the whole point or purpose of human rights, to accommodate the individual who has special needs. She stated that most of the points raised in the Respondent's Reply to her Complaint, at the hearing, and in the documents, do not remotely pertain to human rights; they just talk about the windows, and not of any accommodation at all.

[174] Ms Kinvig noted that Mr. Schafer testified that clear glass was not offered to the unit owners as an alternative, and wondered why that was the case. She noted that the Board requested coloured glass, but never asked Mr. Wells to try to accommodate persons with visual impairment when selecting the glass, and the Board and Mr. Wells never considered the needs of persons with disabilities.

[175] With respect to her reaction to all of this, Ms Kinvig argued that she had made plans before she knew about the tinted windows, which included buying her uncle's house in Merritt, renting her condominium unit to Mr. Donaldson for a year while she went to B.C. to fix up and rent her uncle's house, then returning to live in her condominium until she retired at age 65. By renting her unit, she would have offset condominium fees and some of the costs of working on the house in Merritt.

[176] Ms Kinvig said she was devastated when she found out about the windows. The dark windows sent her over the edge. They were being installed against her will, and she was being told she had no choice. She wanted peace of mind in her own home. She cannot always see everything else, but she can see colour, and wanted to keep that colour.

[177] Ms Kinvig said that she deals with society and the way it treats people with disabilities every day. It was happening again in her own home. She felt trapped. The quality of life she had enjoyed would no longer be there. She could not function with tinted windows, and was being forced out of her home. She was being intimidated by the Board and other owners. When she could not get the Board to listen to her and Mr. Donaldson would not rent her condominium because of the windows, she felt that she had no alternative but to retire early and move to B.C. permanently, in order to maintain her quality of life and be able to function normally. She said that she should not have to live with restrictive barriers to satisfy the aesthetics of a condominium corporation. In her words, she left because she "was not going to live in a hole".

[178] Ms Kinvig further argued that she was not opposed to new windows, but to the tint. In the circumstances, she had to make decisions which affected her job, her

home and her life. She lost a very significant amount of income which she would have earned if she had continued to be employed at the University. As Mr. Donaldson had changed his mind about renting her condominium, she now had two mortgages and two places to pay for, which she could not afford. Ms Kinvig said that she nearly had a nervous breakdown when she came back in April 2007 because of the attitude and anger of the owners. She could not attend the meeting to vote against the windows, and had Mr. Gordon vote for her. Her unit was put up for sale as a result. She would not have moved if she had had clear glass windows installed, or if the Board had at least offered or indicated in any way in 2006 or 2007 that they would have clear glass windows installed instead of the tinted ones. When she sold her condominium unit, she sold it at a loss due to the dissension in the building and the windows problem.

[179] Ms Kinvig argued that her home was her refuge, and that she should not be bullied in her home. She has the same right as anyone else to live her life without impediment, to enjoy looking out the window, to move around in her home without tripping over things. She submitted that she did what she had to do "in order to survive in [her] own head". She took her life back in spite of the Respondent's attitude. She chose to see, rather than to live with the impediment of dark windows.

[180] Ms Kinvig argued that contrary to what the Respondent was suggesting, her Complaint was not moot. The *Code* does not specify whether a person should be present or not. Section 23 of the *Code* only provides that a complaint must be filed within six months of the alleged or continuing contravention of the *Code*. Ms Kinvig noted that she still owned her condominium unit when she submitted her draft Complaint to the Commission. She referred to the decision in *Pantoliano* v. *Metropolitan Toronto Condominium Corporation No. 570*, 2011 HRTO 738, noting that a number of orders were made in favour of the applicant in that case, even though the applicant had moved out of the condominium by that time.

[181] As indicated above, in advance of the hearing, Ms Kinvig had provided a list of 21 remedies which she would be seeking. That list consisted of, among other things, costs and damages, and reimbursement for a variety of expenses, including Ms

Kinvig's share of the window costs, one year of condominium rental, upgrades to her condominium, real estate losses, the cost of the lien filed against her unit, and moving expenses. It also included remedies regarding steps which the Respondent's Board should be required to take, such as adopting various policies and manuals to guide them in the future and modifying its Declaration and Bylaws, as well as publishing a letter apologizing to the Complainants and absolving them from any blame for the proceedings which followed the announcement of the tinted glass windows, a monitoring order to ensure there are no further human rights infractions, and an order that I retain jurisdiction until all matters have been resolved and orders implemented.

[182] Finally, with respect to general damages or injury to dignity and feelings, Ms Kinvig suggested that she had been hurt much more than the applicant in *Di Salvo* v. *Halton Condominium Corporation No. 186*, 2009 HRTO 2120, the case which Mr. Gordon had referred to in his submission, and that an award of $20,000 would therefore be appropriate.

<u>The Commission</u>

[183] Ms Khan began her submission by referring to the limited role that the Commission had taken at the hearing of these Complaints, where it had focused solely on the public interest in the outcome of these proceedings. She noted that having neither called nor cross-examined any witnesses, the Commission did not intend to comment on the evidence. The Commission would, however, be referring to certain basic principles and authorities which I might wish to consider in assessing the evidence. Further, while the Commission did not intend to speak to the matter of any individual remedies, it would be seeking certain remedies in the public interest.

[184] Ms Khan noted that a complainant bears the initial onus of establishing a *prima facie* case, being a case which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. (See: *Ontario (Human Rights Commission)* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 558) The inquiry at this point is

directed towards three questions: whether the complainant has a disability under the *Code*, whether the complainant has special needs based on that disability, and whether the respondent is aware or ought reasonably to be aware of those special needs based on that disability.

[185] With respect to the first of these inquiries, Ms Khan submitted that disability must be interpreted broadly and in a flexible manner. An act or omission which results in a loss or limit on a person's ability to take part in society on an equal level will be considered discrimination. Ms Khan urged me to give weight to the impact of the window replacement project on the daily life or home life of the Complainants, as that is the focus of the case, and to consider not just the medical diagnoses but also the evidence with respect to the functional limitations experienced by each so as to render them unable to participate on an equal level with others.

[186] Ms Khan submitted that the second inquiry is as to whether a complainant has special needs based on that disability, being ones which lead to and trigger a duty to accommodate. This second inquiry requires a determination as to whether the evidence establishes that the particular complainant has a special need, based on their disability, to have non-tinted windows. In this regard, Ms Khan again urged me to consider not only medical information but also the evidence of lay witnesses when assessing whether each Complainant believed that he or she had a special need for non-tinted windows. Ms Khan submitted that this aspect is important, that whether each Complainant in fact had a special need, or whether the Respondent would challenge a Complainant's belief that he or she had a special need, relates to the duty to inquire and the need to assess the request for accommodation.

[187] In the Commission's submission, the third inquiry, as to whether the Respondent was aware or ought reasonably to have been aware of any such special needs, relates to the duty to inquire, and whether the Respondent was sufficiently aware of such needs to require it to inquire further into the specifics of the needs or to enable it to engage in any process to challenge the medical or other basis for the Complainant's perceived need. The Commission submitted that the nexus between the

disability and the request for accommodation is integral to an assessment of whether the Respondent should have known that a person required accommodation. A complainant may not need to formally notify a respondent that he or she requires accommodation, if they are able to show that there was a nexus which was sufficient to trigger a duty to accommodate them or to at least make further inquiries.

[188] In the Commission's submission, it is necessary to determine first whether such a nexus was established, and secondly, whether inquiries could have been made, thereby allowing the complainant to request accommodation. Ms Khan urged me to give due weight to the evidence with respect to the Complainants' efforts to alert the Respondent that there were human rights issues or disabilities which would be impacted by the decision to install tinted windows. It was submitted that such an assessment should be contextual, and that sifting through the evidence with respect to the litigation between certain of the Complainants and the Respondent might be difficult, given the abundance of evidence with respect to litigation that was unrelated to human rights issues specifically. In the Commission's submission, the focus should be on whether there was sufficient evidence of the possibility that the Complainants' disabilities would be impacted by the window replacement project or the decision to install tinted windows in all units in the building.

[189] Ms Khan went on to submit that if a complainant establishes a *prima facie* case, the onus shifts to the respondent to establish that it accommodated the complainant's needs to the point of undue hardship. It was submitted, based substantially on the decision in *British Columbia (Public Service Employee Relations Commission)* v. *BCGSE*, [1999] 3 S.C.R. 3 ("*Meiorin*"), that in determining whether there has been reasonable accommodation or accommodation to the point of undue hardship, consideration should be given to both the procedure employed by a respondent to assess the issue of accommodation and the substance of the accommodation offered to an individual.

[190] In terms of procedure, factors to be considered should include whether any alternative approaches to accommodation were investigated and whether the

Complainants had the opportunity to assist in the search for possible accommodation or participate in the process of assessing accommodation. It was submitted that due weight should be given in the circumstances to the evidence with respect to the procedure to keep unit holders generally apprised of the developments in the project. While there is an abundance of evidence with respect to the project and its progress in general, Ms Khan submitted that such evidence should be weighed with caution, and the focus should remain more specifically on the procedure undertaken by the Respondent to engage each of the Complainants individually and directly, and to assess their respective requests for accommodation. With respect to the Complainants' obligations, it was submitted that the particular surrounding facts and climate at meetings, and the relationship between the Complainants and the Board, should be considered, to assess whether the Complainants could have done more to alert the Board to their request for accommodation.

[191] In terms of substance, it was submitted that the question becomes what, if anything, was really provided to each of the Complainants in terms of accommodation.

[192] Referring to the decision in *McDaniel* v. *Strata Plan LMS 1657*, 2012 BCHRT 42, Ms Khan submitted that it is appropriate to be attentive to the rights of other owners, but that even in light of that, the issue remains as to whether the requested accommodation would cause undue hardship. Ms Khan pointed to the decision in *Di Salvo* v. *Halton Condominium Corporation No. 186*, *supra*, as involving similar issues to the issues in these cases, and urged me to consider that decision in its entirety.

[193] Ms Khan reiterated that she would not be speaking to the individual remedies in these cases, but wished to make a few general comments. She observed that the remedial provisions of the *Code* should be construed liberally to achieve the purposes of human rights legislation, and urged me to consider the general principles regarding remedies as set out in *Cameron* v. *Nel-Gor Castle Nursing Home*, 84 C.L.L.C. 17,008 (Ont. Bd. of Inquiry).

[194] With respect to the assessment of damages, Ms Khan noted that there is no cap for general damage awards in the *Code*. She stated that the highest award for general damages in Manitoba (as of the date of the hearing) was *Budge* v. *Thorvaldson Care Homes Ltd.* (2002), 42 C.H.R.R. D/232, where Adjudicator Peltz awarded $4,000. Ms Khan pointed out that *Budge* was ten years old and a very different case, and submitted that it would be unreasonable to use that decision as a cap or to limit general damage awards in Manitoba.

[195] With respect to public interest remedies, Ms Khan advised that the Commission was seeking:

- an order that the Respondent develop and implement a reasonable accommodation policy within two months of the date of my decision herein, that the Commission be involved in reviewing or approving that policy, and that that policy be circulated among all existing unit owners and provided to new unit owners on their purchase of units at 55 Nassau;
- an order that at least two of the Respondent's five volunteer Board members be required to attend an accommodation workshop, put on by the Commission or otherwise, within one year of the date of my decision, and that every five years the Respondent review which Board members have received reasonable accommodation training and make best efforts to have new Board members take similar training as well.

The Respondent

[196] At the commencement of her submission, Ms Grammond stated that the Respondent did not disagree with the applicable tests as articulated by Ms Khan. To begin with, as submitted by the Commission, it is clear that the Complainants bear the onus of establishing a *prima facie* case, consisting of three components.

[197] With respect to the first component, that is, whether each Complainant has a disability, Ms Grammond stated that it is not disputed that there are disabilities.

The diagnoses are in evidence. The Respondent has not taken issue with this from the beginning.

[198] The Respondent has, however, taken issue with the second and third questions, namely whether the Complainant in each case had special needs based on her or his disabilities, and if so, whether the Respondent was aware or ought to have been aware of such special needs.

[199] With respect to the second question, Ms Grammond stated that to be clear, the Respondent recognizes that Ms Kinvig does have certain special needs based on her visual impairment. The Respondent's issue, from the beginning, has been whether clear windows were a special need which was linked to Ms Kinvig's disability.

[200] Ms Grammond referred at some length to a timeline of events, noting that there were a lot of different things going on at different times, and that from the Respondent's point of view, the timing of various events is of particular significance in each case.

[201] It was submitted that the Board communicated with unit owners in many ways, and that from the beginning of 2004 up until April 13, 2006, when the contract was signed, unit owners had the opportunity to involve themselves and express a view with respect to the replacement of the windows through a variety of means. Ms Grammond noted that, among other things, minutes of Board meetings were available to unit owners and repeatedly referred to the window replacement project. The evidence showed that Ms Kinvig was receiving these minutes in 2004 or 2005, though she was not sure of the date. While the Respondent was not in a position to prove that Ms Kinvig read the minutes at the time, they were certainly provided and there was no indication that there was anything in the minutes that concerned her.

[202] Ms Grammond referred to Ms Kinvig's submission with respect to a conversation with Mr. Schafer in November 2004 about tinting. Ms Grammond pointed out that it was simply not the case, as Ms Kinvig had stated in her submission, that Mr.

Schafer had agreed in his evidence that he had asked her about tinting in November 2004, that she had said that it would not work for her, or that she had offered to help pick the windows. In fact, the opposite was true. Mr. Schafer said more than once that this did not happen, that it was too early in the process, and specifically, that Ms Kinvig did not make that offer.

[203] In the Respondent's submission, there was no such conversation in 2004. Ms Kinvig was either misremembering or now believed that such a conversation happened, but this did not fit with the rest of her actions and the timeline of what went on. In this regard, it was noted, among other things, that if such a conversation occurred and Ms Kinvig knew that tinting was being considered, it did not make sense that she did not ask questions or follow up on this for the rest of 2004, and into 2005 and even 2006. It was not until April 2007 that she swore an Affidavit tying the issue of tinting to her disability.

[204] Ms Grammond noted that a window information meeting was held in June 2005. Ms Kinvig said she attended that meeting, but did not remember anything about it.

[205] On June 14, 2005, a test window with the tint was installed in unit 406. That window was intended for viewing, and while the unit owner did not make her unit as available for viewing as the Board had initially hoped, owners were made aware of its existence and purpose and at least some of them did see the window. Ms Kinvig said that she tried but could not get in to see the test window. Mr. Schaefer's evidence was that the Board received positive feedback from unit owners generally.

[206] It was submitted that another key point in time was December 8, 2005, when a sample of the specific glass that was to be used in the project was posted in the lobby. There is no evidence that Ms Kinvig gave any feedback or made any comments to the Respondent with respect to the tinted glass sample.

[207] It was submitted that by April 2006, the window project had been discussed on an ongoing basis for a very long time. Having obtained a legal opinion that there was no need for a vote with respect to the project, the Respondent entered into a contract on April 13, 2006 for the replacement of the windows. There had certainly been a variety of opportunities to express a view or have input up to that point in time, but there is no indication that Ms Kinvig had participated or availed herself of those opportunities.

[208] Having entered into the contract, the Respondent issued a notice about the window replacement and held a second information meeting on May 8, 2006. Ms Grammond noted that it was on the date of that meeting that Ms Kinvig had a short conversation with Mr. Schafer in the elevator and told him that she was not paying for the new windows.

[209] In Ms Grammond's submission, the evidence thus shows that all of the complaints or questions that were raised up to and including the time of even the second information meeting, on May 8, 2006, related to whether the windows needed to be replaced and cost; no issues had been raised with respect to human rights.

[210] The Respondent issued letters to unit owners reflecting their portion of the special assessment on May 19, 2006, as well as details with respect to the windows and the heating and cooling lines.

[211] Continuing on with the timeline, Ms Kinvig bought the property from her uncle's estate in Merritt B.C. in August 2006, and resigned her employment on the same day. Ms Grammond noted that Ms Kinvig's evidence was that she enjoyed her job and had a good salary, but retired ten years early because of the windows. Her evidence was also that she had always dreamed of going back to her hometown in B.C. to retire, and to buy her uncle's house. When her uncle passed away in March, she thus had a decision to make.

[212] Then, on August 19, 2006, Ms Kinvig listed her unit for sale. It was noted that Ms Kinvig first testified that she had seen the new windows in unit 203 in mid August 2006, but that she later accepted that this would have to have been sometime in late September. Based on her evidence, and given that she also said she had not seen the test window, it was submitted that Ms Kinvig put her unit up for sale before she had ever even seen the tint.

[213] It was submitted that an important piece of evidence is the letter which Ms Kinvig wrote to the Respondent on September 1, 2006. In that letter, Ms Kinvig set out many reasons why she was not paying the special assessment that was due that day. She set out a number of questions and comments with respect to the window project, all of which related to the project itself and the cost of the project. There was nothing in that letter about tinting or disability. It was all about money, the window project and documents relating to the window project. At this point, Ms Kinvig already had her unit on the market. Her evidence was that she intended to rent out the Merritt property and to have her friend come in and rent her unit, and that the tinting dashed all her hopes, yet she says nothing about those issues when writing a lengthy letter to the Respondent with respect to the project. In the Respondent's submission, the content of Ms Kinvig's letter is just not congruent with the evidence she has given in this case.

[214] It was submitted that at the end of the day, it does not ring true that Ms Kinvig put her condominium up for sale because of the tinted windows, when there is no indication anywhere in writing that that was the case. It makes no sense that she writes a letter to the Respondent telling it why she is not paying her special assessment and makes no reference in that letter to this issue.

[215] Ms Grammond stated that it was evident from Ms Kinvig's submission at the hearing that she is still stuck on the issue of the process and the contract, and issues related to the building. Yet Ms Kinvig chose to move, and whatever goes on at 55 Nassau now is not relevant to her, other than as a member of the general public, and it was Ms Khan who was there to represent and make comments on behalf of the public interest, not Ms Kinvig.

[216] Ms Kinvig testified that she did not go to Place Louis Riel to see their windows in September 2006, because she saw no point in doing so.

[217] On September 27, 2006, the Respondent provided a reply to Ms Kinvig's earlier letter about the window project, the same day that Ms Kinvig physically moved to B.C. Ms Grammond noted that very few new windows had been installed at 55 Nassau at that point, only the test windows and the window in unit 203.

[218] Ms Kinvig's evidence was that she had had discussions with Mr. Donaldson about renting her condominium, and Mr. Donaldson said that he had seriously considered renting. Mr. Donaldson did not, however, testify that they actually had an agreement that he would rent her unit, or that he would have rented it if the windows were clear. Ms Kinvig did not look for an alternate tenant.

[219] Ms Kinvig suggested that her only alternative was to leave 55 Nassau and move to B.C. By her own evidence, however, she made no attempt to find alternate living arrangements or accommodation in Winnipeg.

[220] Window installation started in October 2006, and the Briggs Application, seeking a vote with respect to the window project, was filed November 21, 2006.

[221] On February 14, 2007, Justice Jewers ordered that a vote be held. It was noted that a few days later, on February 26, 2007, Ms Kinvig sent an email to Ms Kula saying that she did not want the tinted windows. There is no mention of Ms Kinvig's vision in that email, just that she did not want the windows coming in, and she reiterated that on March 1, 2007.

[222] It was submitted that April 9, 2007 is a key date. On that date, Ms Kinvig swore an Affidavit in the Gardon proceedings. While she had previously expressed that she did not want the windows, this was the first indication tying her visual impairment to the tinted windows. In essence, therefore, this was the first time that the Respondent

had notice of this. Ms Grammond noted that by that time, Ms Kinvig's unit had been for sale for about eight months and she had not lived in Winnipeg for about seven months.

[223] The vote took place on April 11, 2007. Ms Grammond pointed out that there was no issue with the vote after it was taken. The majority voted in favour of the project and the matter was at an end. Then, within a week of her giving first notice of not wanting the tinted windows because of her vision, Ms Kinvig sold her unit.

[224] The Respondent's submission, therefore, was that Ms Kinvig did not move because of the windows, or if she did, she totally jumped the gun. She said she was told she had no choice, but it was not clear when or by whom. The windows were not being forced into her unit. When she moved to B.C., it was very early in the process and the vote had not even been ordered yet. Looking at the timeline and how everything unfolded, there was simply no need to take the steps she did, unless she just wanted to take those steps.

[225] With respect to Ms Kinvig's submission regarding condominium life, Ms Grammond commented that any person who lives in a condominium, whether disabled or not, relinquishes some power by doing so. She noted that in saying this, she was not referring to matters of accommodation, but to work in general. In a condominium setting, the timing of projects such as the replacement of windows or resurfacing of a parking lot, and expenses incurred with respect to such projects, are imposed on all owners. That is the nature of condominium living. It is not like owning a house where a person can choose when he or she is going to undertake certain projects. Thus, anybody who wanted to move out or sell their condominium unit in 2006, for whatever reason, had to deal with the issue of the assessment.

[226] As an aside, Ms Grammond submitted that while Ms Kinvig had used words like bullying and intimidation when talking about what took place at meetings, that was not the issue here. At any rate, the evidence was that the Board was trying to keep the crowd in order on all sides, to keep meetings moving and stick with the agenda.

[227] It was noted that Ms Kinvig filed her Complaint in July 2007, and although she said she had discussions with the Commission prior to the Complaint being signed, those did not involve the Respondent. The Respondent filed a Reply to the Complaint in August 2007, stating that it really had no idea what remedy Ms Kinvig was seeking as she was no longer residing in the building.

[228] It was submitted that from the point of view of the Respondent, as was borne out by the evidence, Ms Kinvig's position was that she did not want her windows replaced.

[229] With respect to the third part of the test, that is whether the Respondent was aware or ought to have been aware of some special need of the Complainants, it was noted that the Respondent was certainly aware of some special needs. Memos that were circulated and posted were available in large font. Ms Kinvig was allowed to record meetings when she asked. The evidence is clear, however, that special needs relating to the windows are subjective. In Ms Grammond's submission, this is not something that the Respondent should automatically have been aware of.

[230] Ms Kinvig's position appeared to be that if the Respondent knew of the disability, then it should have known that tinted windows were going to be a problem. It is clear from the evidence, however, that the effect of the tint on each individual and special needs relating thereto are subjective. As the evidence of both of Ms Kinvig's physicians and Dr. Leicht showed, different people with different conditions will perceive tinting and light transmittance differently.

[231] Ms Grammond pointed out that Ms Kinvig made her issue known in April 2007 in the context which existed at the time and very late in the process. In that regard, the Respondent was not saying that there is a time limit within which such things need to be raised, but that the timing and way in which matters have unfolded go to the credibility of the allegations herein.

[232] Ms Grammond submitted that this is a different situation from one where, for example, a person who is wheelchair bound is told that a ramp is to be replaced by a staircase, it being obvious in that case that the person could not access the staircase by wheelchair. Ms Grammond acknowledged that this was perhaps an extreme example. She noted, however, that in addition to it being obvious, it represented the type of thing that an individual would bring forward immediately, not months or years later, as had occurred in this case.

[233] In other words, it was submitted that in the absence of Ms Kinvig having raised the issue of special needs due to her visual impairment, the Respondent would not know that this was going to be an issue. This was further compounded by the fact that once the details of the project became known, objections were focused on the cost and trying to stop the project as a whole. Ms Grammond submitted that the case law supports that complainants must make their need for accommodation known, and referred in this regard to the decision in *Soheil-Fakhaei* v. *Canadian Business College*, 2012 HRTO 172, at paragraphs 224 to 225. In the Respondent's submission, this was especially so in a situation like this, where things are subjective and depend upon perception.

[234] It was submitted, therefore, that Ms Kinvig had not made out the second and third parts of her *prima facie* case.

[235] With respect to the matter of remedies, it was noted that the nature of Ms Kinvig's complaint is somewhat different from the other three. In the Respondent's view, it was submitted that Ms Kinvig had not established a valid complaint or a link to the damages she was claiming.

[236] It was submitted that Ms Kinvig chose to move and sell her unit and should not get compensation with respect to the sale of her unit. She made no counter-offer when she sold the unit, and there was evidence that she was offered a fair price. Regardless of whether she kept the unit (with or without clear glass windows) or sold it, she was responsible for paying the special assessment. That would have applied to

anyone who sold a unit in the building at that time, and had nothing to do with disability issues.

[237] Ms Kinvig did not look for a tenant beyond Mr. Donaldson. Mr. Kemp's evidence was that there was good demand for units in the building. Ms Kinvig could have moved to B.C. and found someone else to rent the unit, but chose not to do so. She chose to go to B.C., and chose not to look for any other place to live in Winnipeg.

[238] In terms of damages, the Respondent's position was that no damages should be awarded to Ms Kinvig or any of the Complainants, given the way in which these matters unfolded and the courses of action they have taken. Alternatively, if I was inclined to award any damages in this case, it was submitted that for the reasons previously indicated, the amount should not be anywhere near what Ms Kinvig is claiming, and should be considerably less than the $4,000 awarded in the *Budge* decision which Ms Khan referred to in her submission.

[239] As for the remainder of the remedies which Ms Kinvig was claiming, it was submitted that they all relate to ongoing operations at 55 Nassau, and as Ms Kinvig is not a unit owner, she does not have standing to seek any such relief. In the Respondent's submission, the Board cannot be compelled to give her any information, as she does not have a relationship with the Respondent at this time.

<u>Analysis and Decision</u>

[240] The issue which is before me, as agreed to by the parties and stated at the beginning of these Reasons, is whether the Respondent discriminated against each Complainant, and in this case Ms Kinvig, by failing to make reasonable accommodation for their (her) special needs based on disability when deciding to install or installing new windows in all condos.

[241] The Complaint was brought pursuant to subsection 13(1) of the *Code*, which prohibits discrimination with respect to services and accommodation, and reads as follows:

> 13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

[242] "Discrimination" is defined in subsection 9(1) of the *Code* to mean, *inter alia*:

> . . . .
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

[243] The characteristics which are referred to in subsection 9(2) include:

> . . .
>
> (l) physical or mental disability or related characteristics or circumstances . . . .

[244] I would note that at the conclusion of the evidence portion of the proceedings, Ms Kinvig requested that the complaint be amended or expanded to include systemic discrimination against persons with disabilities under the *Code*. Ms Kinvig's request to amend the complaint was denied, on the basis that it did not form part of or fall within the scope of the issue as identified and agreed to at the beginning of the case and on which the case had proceeded, and that it was too late at that point to raise this issue.

[245] In assessing the evidence and making any necessary findings of credibility in this case, I have had regard to the well-known principles set out in the seminal case of *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), and in particular, the following passages from pages 356-7 of that case:

> . . . . Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility . . . .

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. *In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.* . . . Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.
>
> (Emphasis added)

[246] I have also had regard to the following comments by Doherty, J.A. for the Ontario Court of Appeal in *R.* v. *Morrissey* (1995), 97 C.C.C. (3d) 193, at 205, as quoted in *Soheil-Fakhaei*, *supra*, at paragraph 20:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

[247] The onus is on a complainant to establish a *prima facie* case of discrimination. In this instance, Ms Kinvig must therefore establish, on a balance of probabilities, that she has a disability under the *Code*, that she has special needs based on that disability, and in particular, a special need for clear glass or untinted windows, and that the Respondent was aware of, or ought reasonably to have been aware of, that disability-related need.

[248] As previously stated, the Respondent does not dispute that Ms Kinvig has a physical disability within the meaning of clause 9(2)(l) of the *Code*. There is no question that she is legally blind, with limited vision.

[249] The Respondent also does not dispute, and I accept, that at all relevant times Ms Kinvig had certain special needs which are related to her visual impairment. The Respondent had in fact taken steps over the years to assist or accommodate owners and residents who, like Ms Kinvig, were visually impaired. Thus, for example, the Respondent had seen that they were provided with large-print copies of notices which were otherwise posted in the building.

[250] What is in dispute, at this initial stage, is whether Ms Kinvig has established that she had a special need for clear glass or non-tinted windows based on her disability; and if so, whether Ms Kinvig has established that the Respondent was sufficiently aware of, or ought reasonably to have been aware of, that need. Based on the evidence which is before me, and for the reasons that follow, I am not satisfied that either of these elements has been established in this case.

[251] In her evidence and her submission, Ms Kinvig repeatedly emphasized the importance of dealing with the question of need within the person's own context, in light of his or her personal perception of things. She testified that from her perspective, light is very important, as she perceives things based on contrast, colour and shapes. Thus, she said:

> In my life, I have to function with light. I cannot function with muted colours because I cannot see them. This is an individual perception. Everybody's perceptions are different, but this one is mine. I've dealt with it all my life.

[252] Ms Kinvig has argued in absolute terms that tinting of any kind was or is a serious problem for her. Mr. Woloschuk stated that there are an incredible number of possible tints and that different tints have different effects. The evidence was clear that the Board selected the lightest tint which was presented to it. Ms Kinvig nevertheless

indicated in her evidence that she did not need to see the tinted windows, as she already knew that she could not see with them.

[253] Ms Kinvig confirmed that when she finally did see the tinted window in unit 203 in mid September, she found it had removed the contrast and made it harder to see in that unit. She similarly said that when she later saw the tinted window in Mr. Gordon's unit, she could not see and had to turn the light on. Ms Kinvig's evidence in this regard must be weighed against the fact that she had already decided, without having actually seen the new windows, that they would make it more difficult for her to see.

[254] In advancing her position, Ms Kinvig relied on the evidence of Drs. McLeod and Slywka, and of Dr. Leicht. In my view, the evidence of these three doctors is less than definitive and falls short of establishing that Ms Kinvig had a special need for untinted windows. I note that Dr. McLeod stated that the reduction in ability to function is not a given, and that both Drs. McLeod and Slywka stated that a person's perception of the effect of tinting is "subjective" or "somewhat subjective". I would also note that Drs. McLeod and Slywka's reports were drafted by Ms Kinvig, and their evidence was based on what Ms Kinvig had reported to them. Both doctors testified that they did not know what colour or how dark the windows were.

[255] Ms Kinvig specifically referred in her submission to Dr. Leicht having indicated that individuals with vision problems would want to increase the amount of natural light. I would note that Dr. Leicht had also agreed that tinted windows would not necessarily be a problem for every person with low vision, and that there is an element of subjectivity in terms of what an individual is comfortable with.

[256] In my view, the evidence of Drs. McLeod, Slywka and Leicht indicates at best that it would seem preferable or desirable for Ms Kinvig to have clear glass as opposed to tinted windows. I am not convinced that this is sufficient to trigger the duty to accommodate under the *Code*. The *Code* requires the accommodation of an

individual's disability-related needs, not what would be preferable or desirable for them. In my view, this is an important distinction.

[257] I am further of the view that Ms Kinvig's own evidence falls short of establishing a need for untinted windows. Her evidence with respect to when she eventually saw the tinted window in unit 203, was that she "*decided at that point* that [she] did *not like* the coloured window because it would create a *problem* for [her] in [her] own suite" and "would make it *much more difficult* for [her] to see and function." (emphasis added)

[258] Ms Kinvig also relied on her Affidavit sworn April 9, 2007 which she said defined her disability. In paragraph 4 of that Affidavit she stated that by comparison with the old clear windows in the units she had been in, the new tinted windows made seeing *extremely more difficult* and as a result, she did *not want* them in her unit. Similarly, in paragraph 6 she stated that tinting negatively changes her ability to discern objects and with the new windows there was a *major reduction* in her ability to see and function.

[259] Ms Christopherson also commented at the hearing that Ms Kinvig really prefers natural light to interior lights, and that natural light is better for her to get around. She noted that greyed colours or light cause Ms Kinvig to move more cautiously and less confidently.

[260] As indicated above, however, the *Code* requires the accommodation of disability-related needs, not preferences, desires or wants. That Ms Kinvig felt that it would be more difficult for her to see and function with the tinted windows, that she did not want or like those windows, or that she had to or would have to turn on a light to be able to see better because of the tinted windows is not sufficient, in my view, to establish that she had a special disability-related need.

[261] In light of the foregoing, I am not satisfied that Ms Kinvig has established that she had a special need for untinted windows.

[262] Further, even if it could be said that Ms Kinvig has proven that she had a special disability-related need for clear glass or untinted windows, I am not satisfied that the evidence establishes that the Respondent knew or reasonably ought to have known of that need.

[263] Ms Kinvig did not provide any medical reports or evidence to the Respondent prior to the filing of her Complaint to support a need for accommodation.

[264] Ms Kinvig argued that the Respondent knew all along that she had a disability. That does not mean that the Respondent knew or ought to have known that she had a special need for clear-glass windows based on that disability. On the contrary, as indicated previously, while she maintained that tinting was a problem for her, Ms Kinvig also emphasized that how people perceive things and function with light is very much subjective and depends on the individual. Drs. McLeod, Slywka and Leicht all agreed that a person's perception of the effect of tinting was subjective. Mr. Donaldson testified that he had found that clear glass was best for his functioning and that shading was unappealing, but acknowledged that people with low vision will have varying perspectives on lighting conditions.

[265] Mr. Woloschuk, who had been in a unit where a tinted window had been installed and observed that it changed the quality of the natural light and reduced visible light transmission, went on to say that this *may or may not* affect individuals who have reduced vision capabilities. He could not say that the reduction in the amount of light would make it harder for an individual with limited vision to see, only that it *might or might not* do so, and *might or might not* affect their ability to function in that space.

[266] Based on the evidence as a whole, I am satisfied that the effect that tinting may have on an individual with a visual impairment is to at least some extent subjective; that it will depend on the particular individual, on his or her condition, on the circumstances, and on the tint itself.

[267] As a result, I cannot conclude that it was or should have been obvious or that the Respondent should have known that tinted windows would have been a problem for Ms Kinvig, much less that she had a need for untinted windows.

[268] Ms Kinvig alleged in her Complaint that she informed the Board and Ms Kula in November 2005 that she did not want these windows based on her disability. I would again note that the *Code* requires the accommodation of disability-related needs, not a person's wants, preferences or desires.

[269] In her evidence on this point at the hearing, Ms Kinvig stated that Mr. Schafer had asked her how she felt about tinted windows at a Board meeting on November 2005, and she had responded that she could not function with tinted windows, as coloured glass reduces contrast and would not allow her to live comfortably, and asked that they not put tinted windows in her suite. She also said that she volunteered at that time to help select an appropriate window for people with disabilities and everybody else, but her offer was ignored. Based on my review of the evidence as a whole, I am not satisfied, on a balance of probabilities, that it supports that such a conversation occurred, as alleged or at all.

[270] In this regard, I note that Mr. Schafer categorically denied that they had such a conversation. While Ms Kinvig had originally stated that this discussion took place in November 2005, she later acknowledged on cross-examination that it would have to have been in November 2004. Mr. Schafer's evidence was that they were still at the very early stages, and tinting was not even on the agenda at that time.

[271] Further, in my view, the evidence with respect to Ms Kinvig's actions subsequent to November 2004 does not support Ms Kinvig's account of such a discussion having occurred at that time. In this regard, I would note, among other things, that:

- Ms Kinvig said that she would have thought that the Respondent could have responded to her offer of assistance. She therefore waited for a response from

the Board, but they ignored her and her offer. In the circumstances, given the concern and interest she said she had expressed, I would have expected that Ms Kinvig would have contacted the Board herself to find out what was happening. There is no evidence to suggest, however, that she made any attempt to follow-up on what she said had been discussed or the offer she said she had made.

- Ms Kinvig was receiving the Minutes of Board meetings, and the January to March 2005 Minutes all contain a section headed "Window Replacement". Ms Kinvig said that she did not recall seeing or reading these sections, and that if she had seen them, she would have been down asking what was happening and if she could help. If the issue of tinting had been raised with Ms Kinvig in November 2004, I would have thought that she would have been watching the Minutes and alert to any references to the window replacement project or approaching the Board to inquire as to what was happening with the window project.

- Ms Kinvig went to see the tinted test window in June 2005, but the lady would not let her in to see it. She said that she tried looking at the window from the outside, but could not see that far. In spite of this, there is no indication that Ms Kinvig made any further inquiries or raised any concerns with respect to the window or tinting at that time.

- Although samples of the tinted glass were placed against the window in the lobby in December 2005, Ms Kinvig did not remember seeing them or the Memorandum that had been posted, referring to the tint and asking residents to take a look at the tint.

- Ms Kinvig said that she was upset in May 2006 when she found out that a contract had been signed and the windows were to be tinted. The Board had, however, provided opportunities for unit owners to view and comment on the tinted windows in the year and a half since November 2004, and there was no

evidence that Ms Kinvig had asked any questions or expressed any concerns with respect to the proposed tint.

- Ms Kinvig said that she and one or 2 other Complainants tried to speak to Board members following the hearing on May 8, 2006, but the Board members did not hear them. In spite of this and the fact that the subsequent Questions and Answers document expressly encouraged unit owners to forward any questions or concerns to the Board in writing, there is no indication that Ms Kinvig submitted any concerns to the Board.

[272] In my view, Ms Kinvig's letter to the Board of September 1, 2006 is particularly significant. Ms Kinvig wrote a lengthy letter, requiring that the Board respond to a number of questions and provide her with numerous documents with respect to the window project. There is one reference to tinting in that letter, where Ms Kinvig requests "3) All correspondence to the parties asked to tender plans and estimates for the windows project including discussions concerning tinted versus clear windows." Ms Kinvig wrote that she was unable to pay her September 1 fee due to extreme hardship, that she was disputing the estimated assessment amount until she received the information she was requesting, and that it was her position that the Board did not proceed in a manner that was "fair and equitable" to unit owners. There is no indication whatsoever of her disability or of any concerns about the tinting, and certainly no mention of any disability-related need for accommodation.

[273] In pleading that she informed the Board "that she did not want these new windows based on her disability", Ms Kinvig also refers to the email she sent to Ms Kula in late February 2007, following the decision in the Briggs Application declaring the contract invalid, advising that no further work on the windows would be permitted in her unit until further notice. There is no reference in that email to Ms Kinvig's disability or any disability-related need.

[274] Ms Kinvig stated that her Affidavit sworn April 9, 2007 defined her disability. She argued that the windows had not been installed in her unit at that time,

and the Respondent could still have tried to accommodate her then, but did not do so. Again, in my view, the wording of that Affidavit falls short of establishing a disability-related need for untinted windows. Ms Kinvig thus stated in the Affidavit that the new tinted windows make seeing “extremely more difficult”, and that as a result, she “does not want them”.

[275] In my view, that Affidavit must also be considered in context and in light of the surrounding circumstances, and in particular, the timing of that Affidavit. I note that Ms Kinvig testified that she was asked to swear such an Affidavit in support of the Gardon Application, and that the Affidavit was sworn just two days before the vote on the contract. Ms Kinvig had seen the clear and tinted windows in a unit more that 6 months earlier, in September 2006. She had then left Winnipeg and essentially remained silent except for emailing Ms Kula in February, following Justice Jewers' decision, to say that no further work would be permitted in her unit until further notice. One week after swearing the Affidavit, Ms Kinvig sold her unit.

[276] Ms Kinvig argued that the Respondent had an obligation to investigate and ask questions as to what issues she had with the windows. I am not satisfied, however, that the Respondent had been provided with sufficient notice of, or that there was sufficient indication of, a disability-related special need such as to trigger such an inquiry or investigation.

[277] I note that Ms Kinvig made a number of comments in the course of the proceedings with respect to the climate at various meetings and unit owners having been booed and bullied and intimidated. I have considered those comments in terms of whether they hindered or prevented unit owners, and Ms Kinvig in particular, from making their (her) concerns or difficulties known to the Respondent. Overall, I am not satisfied that they had that effect. I am satisfied on the evidence that unit owners always had the opportunity, and were in fact encouraged, to provide questions and concerns to the Board in writing, as the most appropriate way or “only workable way” to address their concerns.

[278] In light of the foregoing, I am therefore satisfied, on a balance of probabilities, that Ms Kinvig has failed to establish a *prima facie* case of discrimination under the *Code*.

Conclusion

[279] In the result, I have determined, on a balance of probabilities, that the Respondent did not contravene section 13 of the *Code*. The Complaint is therefore dismissed.

Dated at the City of Winnipeg, in Manitoba, this 14th day of July, 2016.

"M.Lynne Harrison"
Adjudicator