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 Ronald Franklin Pollock on behalf of Natalie Pollock against Winnipeg Condominium Corporation No. 30, alleging a breach of section 13 of *The Human Rights Code*.

BETWEEN:

RONALD FRANKLIN POLLOCK
(ON BEHALF OF NATALIE POLLOCK),

Complainant,

- and -

WINNIPEG CONDOMINIUM CORPORATION NO. 30,

Respondent.

Appearances: Ronald Franklin Pollock, 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, Ronald Franklin

Pollock, has brought this Complaint on behalf of his sister, Natalie Pollock. Natalie and Ronald Pollock (the "Pollocks") are the registered owners of, and reside in, one of the condominium units in the complex. In the Complaint, it is alleged that the Respondent Winnipeg Condominium Corporation No. 30 (the "Respondent") discriminated against Natalie Pollock by failing to reasonably accommodate her special needs based on her disabilities (generalized anxiety disorder with panic attacks and obsessive-compulsive disorder), contrary to section 13 of *The Human Rights Code*, C.C.S.M. c. H175 (the "*Code*"). The Complaint relates, in particular, to the Respondent's decision to replace the original clear-glass, slider windows in the Pollocks' condominium unit with tinted, awning windows.

[2] This 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, Susan Renard and Delphine Kinvig. 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 these 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 on the merits of the four Complaints thus continued in Winnipeg over a period of eleven days between March 5 and 23, 2012, and submissions were heard on April 13, 2012. 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.

[10] 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

[11] The parties agreed, prior to the commencement of the hearing, that the issue to be determined in all 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

[12] 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.

[13] As contemplated in the order of proceeding referred to above, to the extent that it was relevant to his case, Mr. Pollock relied on the evidence of Mr. Gordon and Ms Kinvig and that of other individuals they 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. Krystyna Briggs, another unit owner in the condominium complex; and

5. Judith Christopherson, an interior designer and Ms Kinvig's sister.

[14] Mr. Pollock also testified and called the following additional individuals as witnesses:

1. Art Braid, a friend of the Pollocks; and
2. Dr. Patricia Furer, a clinical psychologist.

[15] There were indications at various times during the course of the proceedings that Natalie Pollock would be, or might be, called as a witness. Ultimately, however, Mr. Pollock advised that he did not feel that he could submit Ms Pollock to the ordeal of testifying and being cross-examined, and closed his case. Natalie Pollock therefore did not testify.

[16] Four witnesses testified on behalf of the Respondent with respect to this 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 ("Crosier Kilgour") and engineer on the window replacement project;
3. Sharon Kula, property manager at the condominium complex; and
4. Robert Sakowski, a former unit owner and member of the Respondent's Board of Directors from 2003 to 2008.

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] Mr. Pollock submitted that he had never met Ms Christopherson before that day. He had an individual complaint which was originally to have been heard separately from the others, in which case he could have called Ms Christopherson as an expert witness. He had ultimately agreed to his and the other Complaints being heard together based on the Commission's suggestion that this would be more efficient. Ms Christopherson's proposed expert evidence was expected to address not only whether the tinting was necessary or better, but also what effect the new windows would have on ventilation, and was directly relevant to his case. Mr. Pollock submitted that he should not be penalized for merely trying to make this a more efficient hearing, and it would be unfair if he were not able to have Ms Christopherson testify as an expert witness in his case.

[23] 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.

[24] Ms Christopherson is Ms Kinvig's sister, and whether these were individual complaints or not, Ms Kinvig is involved in these proceedings. The basic issue was the same in all four Complaints, and they were being heard together. In the circumstances, I was satisfied there was 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 Mr. Pollock's case, 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.

[25] 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.

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

John Wells

[27] 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.

[28] 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.

[29] 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

[30] 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.

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

[32] As indicated above, Natalie and Ronald Pollock are the registered owners of one of the condominium units in 55 Nassau, together with a 0.2844% interest in the common elements. The Pollocks purchased their unit and moved into 55 Nassau in or about September 1998, and have lived in the same unit since then. Their unit is on the thirty-fifth floor on the east side of the building, and has three windows: two in the living room and one in the bedroom.

[33] 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.

[34] 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 growth on drywall. The Respondent was having to pay to repair water damage to common elements. It was also having to pay an average of over $10,000 a year attempting to repair the windows, some of which were said to be beyond repair.

[35] The Board holds monthly meetings, as well as special Board meetings from time to time. Minutes of monthly Board meetings are available to unit owners, on request. Mr. Pollock asked to receive copies of the minutes of Board meetings when he and his sister moved into 55 Nassau, and had been receiving those minutes since roughly the fall of 1998. He pointed out that the minutes do not come month by month; he usually receives them in packages of about four at a time, approximately three times a year. Minutes of special Board meetings are not available to unit owners.

[36] 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.

[37] On cross-examination, Mr. Pollock stated that he did not recall these Minutes from 2004, adding that he could have received and scanned them but did not recall seeing anything that concerned him. When it was put to him that he would have known though, in 2004, that the Board was talking about replacing the windows in the building, his response was that it could have crossed his desk. As for when he first learned of the window replacement project, he said that he first paid attention to it when he was aware of the kind of windows they were going to be, and the “radical style change”, which could have been around early 2006 or a little before that.

[38] 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.

[39] 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 a reduction in cooling costs in the summer and 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.

[40] It took several meetings for the Board to consider 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.

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

[42] 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 and the meeting took place as planned. Mr. Pollock could not remember whether he or his sister attended that meeting. At this, and at several other points in his evidence, he commented that he does not remember dates that well, that they get jumbled. He said that he attended quite a few meetings, but could not place that one.

[43] Mr. Schafer, who was at the meeting, testified that the Board answered such questions as they could at the time. He did not recall anything contentious with respect to 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.

[44] The Board communicates with unit owners in a number of ways in addition to making minutes of Board meetings available. 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. They are also posted in all three elevators. Lengthier documents and notices or communications dealing with more serious issues may be addressed to unit owners and passed out by security.

[45] 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 the test 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.

[46] As a result, the Board arranged for a notice with a digital photo of that test 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. Mr. Pollock testified, on cross-examination, that he believed he saw the test window. He could not say whether he went to see that window with his sister or whether she saw it, only that it was possible that she did.

[47] 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 any of the Complainants in these proceedings.

[48] 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.

[49] Asked about these samples on cross-examination, Mr. Pollock said that he seemed to remember seeing something, but could not recall just what he saw or where he saw it. He said that he believed "it raised alarm bells if [he] saw something", and that it may have been at that point that he started being concerned and acquiring information for the claim which he would file six months later. He could not say whether his sister saw these samples or not.

[50] Mr. Schafer testified that the Board did not receive any feedback or responses after this Memorandum was posted.

[51] 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."

[52] The evidence indicates that there was a delay in the tenders going out at this time. Meanwhile, 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.

[53] The Minutes of the March 21, 2006 meeting go on to state that the Board will be contacting the Respondent's lawyers to request "a legal opinion to see if an owner vote is required to have tinting put on the new windows."

[54] In a written opinion dated April 11, 2006, the Respondent's lawyers stated 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 noted that decisions with respect to repair and maintenance of the building fell within the sole jurisdiction of the Board, and concluded that a vote of the owners was therefore not required.

[55] 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.

[56] Mr. Pollock testified that he and his sister approached Mr. Sakowski and Mr. Schafer many times on an informal basis, mainly outside and in the lobby of the building, asking them to consider making an exception for them. He said that because they were friends with Mr. Sakowski at the time, they spoke to him more, up to 15 times. Mr. Sakowski would be in the lobby, or sitting on a bench outside, smoking; Ms Pollock would go over and talk to him, and Mr. Pollock would overhear their conversation. Mr. Pollock said that he saw them having many heated discussions with him about the

windows. Mr. Pollock said that Ms Pollock felt comfortable talking with Mr. Sakowski about her disabilities, her panic attacks and how she could not handle the windows. She was becoming very upset and pleaded and begged with Mr. Sakowski. He said his sister did more of the talking because when someone says “no” to him a couple of times, he takes it as a “no”. His sister, however, will persist. Mr. Sakowski always said “no”, that it was not a matter that he was going to consider or discuss; that it was a done deal and the windows were going in.

[57] Asked on cross-examination whether Mr. Sakowski suggested that they put their concerns to the Board in writing, Mr. Pollock responded that he could not recall, adding that Mr. Sakowski might have said that, but that basically he had said that this was not going to happen. Mr. Pollock acknowledged that other than the lawsuit that he subsequently filed, this Complaint and the letter from Dr. Furer, he did not recall putting their concerns to the Board in writing.

[58] Mr. Sakowski described his relationship with the Pollocks as one of “homeowner friends” who would meet outside and discuss things they had in common. He said that he talked to Mr. Pollock about the windows “in the early development”, that Mr. Pollock had his own point of view, which was very strong, and differed from that of Mr. Sakowski, who was working with the Board to try to put things together. Mr. Sakowski’s recollection was that a lot of the discussion was about cost.

[59] As to whether the Pollocks expressed any other reasons for opposing the windows, Mr. Sakowski testified that Ms Pollock was really emphatic that she did not want the windows changed, that she liked her windows and felt that they were not ready to be replaced. He said that Ms Pollock was extremely vocal about the windows. He also said that her conditions were a constant theme in their discussions. Right from when he first moved into the building, in or around 2002, she had discussed everything with him, including her problems and her medications. He thought that she probably had a conversation with him regarding her medical issues and the windows.

[60] When Mr. Sakowski was asked if the Pollocks ever requested that he take action on their part with respect to the windows, he said that as with anyone else who had questions about the windows, he would just suggest that they write a letter to the Board.

[61] Asked what Ms Pollock told him as to why she did not want the windows, Mr. Sakowski said that he was not sure at that point if she had decided about the tinted windows. He remembered her mainly talking about not wanting to change the windows. She liked the slider windows and was convinced that the circulation in the apartment would be impaired with the new tilting (awning) windows.

[62] As for Mr. Schafer, Mr. Pollock testified that he and his sister approached him and tried to speak with him four to six times over a period of roughly six months between late 2005 and the middle of 2006. He said that they always told Mr. Schafer that the windows were going to affect them in a big way, that they could not have them in their unit and would not be able to stay if the windows were put in, and asked that the Board please make an exception for them.

[63] Mr. Pollock confirmed, on cross-examination, that the word they used was an “exception” and that what he and his sister were seeking at that time was to keep their existing windows. He said that this was before he had seen the Reply to his Complaint and Mr. Schafer’s Affidavit, in which Mr. Schafer swore that there was a danger to the old windows being in. When it was suggested to Mr. Pollock on cross-examination that he never had a conversation with Mr. Schafer about the windows, he said that was definitely wrong, that he vividly remembered occasions in the lobby when Mr. Schafer was getting into the elevators, and he and his sister tried their best to talk to him and said they could not handle or live with these windows.

[64] Mr. Schafer’s evidence was that his contacts with the Pollocks have been minimal. He said that he had never had four conversations with Mr. Pollock in his life. Their longest conversation was in an elevator and related to wine. As for Ms Pollock, he said that she is friendlier and will say “good morning” in passing, and that they will

exchange pleasantries if she is sitting on the bench in front of the building when he parks there. The only other conversation that Mr. Schafer recalled having with Ms Pollock was sometime between 2004 and 2006 when she approached him at a restaurant while he was having lunch and asked him a question relating to maintenance (heating and cooling) in her unit, and he said that he would speak to the building manager about it, which he did.

[65] On April 28, 2006, in a document entitled “Special Reserve Fund Levy for Windows and Run-out Heating/Cooling Lines”, the Board notified unit owners and residents that the new windows were finally on their way. The Board 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.

[66] 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.

[67] Mr. Schafer attended the meeting on May 8. His evidence was 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 that 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. Asked by Ms Kinvig on cross-examination if he recalled any of the Complainants speaking at the meeting, Mr. Schafer said he believed that Mr. Pollock spoke and asked what would happen if people did not pay their common

element assessment, and that the answer would have been that a lien would be placed against their property.

[68] Ms Kula, the property manager at 55 Nassau, also attended the May 8th meeting. She testified that people had many questions about the windows, especially with respect to 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.

[69] Mr. Pollock's evidence was that he attended three or four meetings in or around that time, but could generally not remember the dates of those meetings. Mr. Pollock testified that he did remember raising his sister's mental health at the May 8, 2006 meeting because it was referred to in paragraph 14 of the Statement of Claim which he subsequently filed, on July 26, 2006.

[70] The allegation in paragraph 14 of the Statement of Claim was that when Mr. Pollock asked, at a condominium meeting on May 8, 2006,

> . . . if they would allow exceptions to the window project for "*personal reasons*", Robert Schaefer [sic], the president of the board of directors, speaking on behalf of the whole board of directors publicly stated to [Mr. Pollock] at that meeting that there would be "*no exceptions*".
>
> (Italics in original)

[71] Mr. Pollock testified that he used the words "personal reasons" because he did not want to talk about his sister's mental illness in front of a whole group of people. When it was put to Mr. Pollock, on cross-examination, that he did not in fact raise his sister's mental health, he maintained that he did because it is in the lawsuit. When pressed on this, he agreed that what he raised was an issue relating to "personal reasons". He further agreed, with reference to the three or four meetings which he said he attended around that time, that at no time during those meetings would he have

mentioned that his sister had these mental health problems, as he did not want to discuss that in front of the whole building.

[72] Following the meeting on May 8, the Board prepared a four-page document entitled "Window Replacement Project, Questions and Answers" 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.

[73] 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."

[74] Mr. Schafer testified that copies of the Questions and Answers 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. There is nothing to indicate that the Pollocks came forward with, or sent any questions to, the Board. Mr. Schafer did not recall Mr. Pollock or any of the other Complainants coming forward with further questions for the Board.

[75] 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 or proportionate share of the common expenses. Assessments for each unit were split up into four one-time payments spread over a period of three and a half years.

[76] By letter dated May 19, 2006, the Pollocks were advised that the estimated special assessment amount for their unit, based on their proportionate share of the common expenses, totalled $11,378.00. The letter indicated that the first part of their share of that assessment, in the amount of $3,161.00, was due September 1, 2006. Mr. Pollock thought this would have been the first notice that he and his sister had of what the cost of the new windows was going to be for them. He said that it wasn't that important until he got "the specifics", but then it became very important.

[77] Mr. Pollock thought that at or around the same time, he received a package of Board Minutes which contained the Minutes of the March 21, 2006 meeting with its reference to seeking a legal opinion as to whether an owner vote was required to have tinting put on the windows. Mr. Pollock said that he became very concerned when he saw these Minutes, that this triggered him into believing there was a legal problem with the whole window project, at least to the extent of the tint, and that this warranted action.

[78] On cross-examination, Mr. Pollock said that there was a lot of talk in the building about this being an illegal project and that there needed to be a vote. He said that he was very concerned they were having to pay for something they did not have to pay for because it was an illegal project. He said that there was no mention in the assessment letter about the style of the windows, but that he had nevertheless "gotten the drift".

[79] As indicated above, in late July 2006, Mr. Pollock filed a 25-page Statement of Claim (the "Pollock Claim") against the Respondent in the Court of Queen's Bench, in File No. CI 06-01-48045 (the "Pollock proceeding"). A number of claims or alternate claims for relief were listed in the first paragraph of the Pollock Claim, the first of which was for an order that the Respondent "stop from proceeding, or . . . continuing with the new 'window project'". There is reference in the Pollock Claim to, among other things, alleged violations of the *Code* and the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), including allegations that Mr. Pollock and several other named individuals have disabilities which ought to have been but were not

considered by the Respondent in proceeding with the windows project. There is, however, no mention of Ms Pollock or allegations regarding any disabilities that she might have in the Pollock Claim.

[80] On August 14, 2006, the Respondent responded to that claim by filing a Notice of Motion seeking, among other things, an order striking the claim on the grounds that it was frivolous and vexatious, that it constituted an abuse of process, and that it failed to disclose a reasonable cause of action.

[81] 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 a group opposed to the windows, specifically items or misinformation in a 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.

[82] 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.

[83] Following up on the August 24th Memorandum, the Board held a third information meeting, on August 30, 2006. Mr. Pollock could not recall whether he attended that meeting or not. Mr. Schafer's evidence was that most of the meeting 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.

[84] The Pollocks did not pay the first instalment of the special assessment when it came due on September 1, 2006.

[85] 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. Mr. Schafer described this as one of many updates by the Board regarding the window project.

[86] That same day, the Board posted another Memorandum to the unit owners of 55 Nassau, announcing 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.

[87] The Pollocks did not go to see the windows at Place Louis Riel on September 16 or 17. Mr. Pollock testified that they actually went to see the windows before those dates, and that they looked terrible. On cross-examination, he said that when they went to see the windows, they went into the Hotel but did not go into a room. He was not sure quite what they saw, but remembered being very concerned about the windows and remembered "clear as a bell" that both he and his sister went and said that they could not live with those windows. Mr. Pollock said that he and his sister did not go on the 16th or 17th because there was "such antagonism" and they knew the answer already. On cross-examination, he said they knew that the Board was not going to listen to them, as they had "approached them on numerous occasions."

[88] On or about September 19, 2006, Ms Pollock, accompanied by Mr. Pollock, personally delivered a letter from her psychologist, Dr. Furer, to the Respondent's office at 55 Nassau. That letter, addressed to the Board and dated September 15, 2006, read as follows:

> Ms Pollock has been a patient of mine since 1997. She has Generalized Anxiety Disorder with panic attacks and Obsessive-Compulsive Disorder. I see her regularly for psychotherapy. Ms. Pollock has requested that I inform you of the importance of her having windows that open completely (like the ones that are in her suite at present) so as to provide good air circulation. Awning windows are not an acceptable option for Ms. Pollock as they do not provide the same degree of ventilation and this would trigger many panic attacks for her. In addition, tinted windows would not be acceptable because of Ms. Pollock's tendency to depression. She benefits from maximum sunlight, especially during the winter months.
>
> Thank you for your attention to these concerns.

[89] Dr. Furer's letter was not accompanied by a covering letter. Mr. Pollock said that neither he nor his sister had ever had an answer to Dr. Furer's letter, and were still awaiting a response from the Respondent.

[90] Mr. Schafer's evidence was that he did not view the letter as a medical note. It referred to what the writer had been told, and there was no declaration by the writer certifying that the conditions truly exist. Nor was there any request for accommodation. He said that the Board viewed the letter as an extension of the unwillingness to participate in the project for financial reasons, a continuation of the Pollocks' opposition to the windows and of the lawsuit that had been filed in July. When questioned on cross-examination about the lack of any response to that letter, Mr. Schafer reiterated that the Board took the letter as for information purposes only, since nowhere did it request a response.

[91] On September 29, 2006, the Master delivered an oral decision in the Pollock proceeding, granting the Respondent's Motion to strike out the Statement of

Claim. In his decision, a transcript of which was filed as Exhibit 86, the Master stated, *inter alia*, as follows, at page 3:

> When I look at the claim I see that the claim has 23 claims for relief or alternative relief, that's just the claims for relief. It advances the concerns of three other unit holders . . . . It attacks Mr. Schafer, it attacks a Mr. Sakowski and in paragraph (h) attacks a few others. It names the Board of Directors and states that the Board of Directors are being sued, but does not name them as defendants.
>
> The claim's central theme . . . is to stop or change the window installation and to seek the claritory [sic] relief, but it covers human rights legislation, the Charter of Rights and Freedoms, it advises of an intention to file a notice of constitutional question. It pleads that many unit owners are elderly, sick, disabled, do not understand the language, are infuriated and upset. The plaintiff also pleads that he is upset by the swimming pool policy. As counsel says, how do I plead to that?

[92] The Master went on to conclude, at page 4, that:

> Somewhere in all of this there may well be a valid claim that should be heard and determined on its merits. If the plaintiff could focus in on that claim. But this litany of complaints is not a concise statement of the material facts and it is replete with evidence. . . .
>
> For all of these reasons the claim is struck.

[93] On October 24, 2006, Mr. Pollock filed an appeal from the Master's decision.

[94] On or about October 25, 2006, the Pollocks received a demand letter from the Respondent's lawyers noting that the Respondent had not received the initial instalment of the special assessment due September 1, 2006, or certain other payments totalling $294.38, and demanding payment of those amounts, plus interest and legal costs, within ten days, failing which they had been instructed to file a lien against the Pollocks' unit and take whatever other remedies were available. In a subsequent letter, the lawyers confirmed that the sum of $294.38 had been paid, but the special instalment amount was still outstanding.

[95] On November 1, 2006, Mr. Pollock swore an Affidavit in support of his appeal from the Master's decision. Attached as an Exhibit to that Affidavit was a photo that was described as a "window already installed at 55 Nassau which is of a type which we are resisting." Mr. Pollock said that he took the photo when he saw the windows, but could not remember when that was, adding that it could have been from September or October 2006, or closer to November. In any event, it would have been before November 1, 2006, when the Affidavit was sworn.

[96] On cross-examination, Mr. Pollock accepted that the windows in question would have been those in unit 203. Other evidence indicates that those windows would have been installed in unit 203 sometime between September 12 and 25, 2006. Mr. Pollock testified that when he took the picture, this was the first time he saw an actual window and what it would be "kind of like" in the building, that it raised alarm bells and that this was when he became extremely concerned that they had a problem. He said he had heard references to the window project before, but it had never hit home with him before as to how it would be in the building.

[97] In his November 1, 2006 Affidavit, Mr. Pollock further deposed that the letter of October 25 from the Respondent's lawyers "triggered me to go to the Manitoba Human Rights Commission on October 27, 2006, where a file was opened on the case (including family status) with documents I provided."

[98] On November 1, 2006, a Memorandum from Management to the Residents of 55 Nassau was posted, advising that the windows had passed the required testing, and manufacturing of the windows would begin shortly.

[99] On November 3, 2006, Mr. Pollock's appeal from the Master's decision came before Justice Duval. Mr. Pollock asked at that time that the appeal not proceed until his human rights complaint had been dealt with, but Justice Duval ruled that the appeal should move forward, and set deadlines for the filing of briefs by the parties. One week later, on November 10, 2006, Mr. Pollock withdrew his appeal from the Master's order.

[100] On November 14, 2006, the Respondent caused a lien (the “Lien”) to be registered in the Winnipeg Land Titles Office (“WLTO”) against title to the Pollocks’ unit with respect to the non-payment of the outstanding special assessment.

[101] On November 21, 2006, a Memorandum from the Board to the Unit Owners of 55 Nassau was posted, advising that two new windows had been installed in the hair salon, and inviting owners to view the windows, but asking that they do so from the hallway. Mr. Pollock remembered seeing that Memorandum, and that he and his sister went to the hair salon and saw the windows from the hallway.

[102] On November 21, 2006, Krystyna Briggs, another unit owner who testified at the hearing but is not a party to any of the Complaints before me, initiated an application against the Respondent in the Court of Queen’s Bench, File No. CI 06-01-49638 (the “Briggs Application”), 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. Mr. Pollock testified that he knew of that application but was not involved in those proceedings.

[103] On November 22, 2006, the Respondent held its 2006 Annual General Meeting (“AGM”). 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 a 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.

[104] 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 these two items (Mr. Schafer’s comment with respect to the vote and the comments regarding unit 203), Mr. Schafer did not recall anything being said at the AGM about windows.

[105] 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.

[106] Mr. Gordon sought to introduce into evidence recordings of the 2006 AGM which Mrs. Renard had made and recordings of a special meeting on April 11, 2007 which he had made. Neither Mrs. Renard nor Mr. Gordon had requested permission to record those meetings. After hearing submissions from all of the parties with respect to these recordings, I ruled that the recordings would not be admitted into evidence. I recognize that an adjudicator has the authority under subsection 39(2) of the *Code* to "receive . . . such evidence or other information as the adjudicator considers relevant and appropriate, whether or not the evidence is given under oath or affirmation", but was not satisfied that these recordings were sufficiently reliable, necessary or relevant to the issue to be determined in this case. The Minutes of the meetings in question were in evidence and witnesses had the opportunity to testify with respect to what took place at those meetings.

[107] The Complaint which is the subject of these proceedings, dated November 14, 2006, was filed by Mr. Pollock on behalf of his sister Natalie, on December 5, 2006. The text of the Complaint reads, *inter alia*, as follows:

> 3. The Board of Directors of the Winnipeg Condominium No. 30 indicated to all owners that they were going to put in new windows. Ours are not broken. We were informed by the Corporation that the initial installment of the Special Assessment for the replacement of the windows and the heating/cooling lines was due and payable in the amount of $3,161.00 on September 1, 2006.
>
> 4. On September 19, 2006 we delivered a medical note dated September 15, 2006 from Dr. Furer to the Board of Directors in regards to Natalie's disabilities and how the change in windows would affect her disabilities. In the letter Dr. Furer informs the board of my sister's disabilities and that Natalie needs to have windows that open completely (like the ones presently in our unit) so as to provide good air circulation. Awning windows are not an acceptable option for Natalie as they do not provide the same degree of ventilation and this

> would trigger many panic attacks for her. Dr. Furer also mentioned that tinted windows would not be acceptable because of Natalie's tendency to depression and said that Natalie benefits from maximum sunlight, especially during the winter months. On October 26, 2006, and previously on numerous occasions since being notified of the new window installations, we have approached the board (specifically Bob Sakowski, Secretary) asking to discuss the letter but he refuses each time to acknowledge it.
>
> 5. On October 25, 2006 my sister and I received a "Special Assessment and other charges, Unit No. 3505 - 55 Nassau St. N., Winnipeg MB" letter from M.L. Rosenberg, legal counsel for the Winnipeg Condominium Corporation No. 30. We were advised that the initial installment of the Special Assessment for the replacement of the windows and the heating/cooling lines was due and payable on September 1, 2006 and that our payment in the amount of $3,161.00 had not been received. . . . If we do not pay the sum of $3635.18, which includes interest and legal fees within 10 days of this letter then a lien will be place against our unit. Mr. Rosenberg informs us that if the amount of the lien and the costs of same are not paid, the Corporation shall have the right to commence proceedings to sell the Unit.

[108] Mr. Pollock filed a second complaint against the Respondent on December 5, 2006, on his own behalf. That complaint was ultimately withdrawn, sometime in 2008.

[109] On January 19, 2007, the Respondent caused a Notice of Exercising Power of Sale (the "NEPS") to be registered in the WLTO against title to the Pollocks' unit. The NEPS indicated that the Respondent was commencing foreclosure and sale proceedings on account of the Pollocks' failure to pay the special assessment.

[110] The Briggs Application came on for hearing before Justice Jewers on January 24, 2007. Reasons for Judgment were delivered February 14, 2007, resulting 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*.

[111] 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; it did not apply to the Pollocks' unit.

[112] On February 23, 2007, Mr. Pollock 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 Application"), listing 13 forms of relief which he was seeking, 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 in the Briggs Application, an order that the Respondent was not to put any further assessments, liens or NEPS on his unit until the Commission had made a decision, an order that Gardon halt all work until a decision had been made as to whether the contract is ratified by law, and an order that Gardon was not allowed to do any work in his unit until the Commission had made a decision in respect of the complaint he had filed.

[113] On April 3 and 5, 2007, the Respondent held window information meetings to answer questions on the windows.

[114] On April 11, 2007, the Respondent held a special meeting of the unit owners to vote on the contract. Mr. Gordon testified that prior to 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. Mr. Schafer's evidence, on cross-examination, was that he knew that Mr. Gordon's group had spoken to other companies, but was unaware that they had a bid or specifications prepared, and that he did not recall Mr. Gordon asking him about a second option. Mr. Turner was not called as a witness at the hearing.

[115] 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 was 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.

[116] 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.

[117] The Gardon Application came before Justice McKelvey on April 12, 2007, and the date of May 18, 2007 was set for the hearing of the merits of the Application. Justice McKelvey also granted an interim injunction until the hearing of the merits, preventing the Respondent from taking steps under any lien and NEPS which had been registered against the units owned by the Pollocks and four others who had indicated that they would be applying to be added as Applicants. Mr. Pollock confirmed, on cross-examination, that no further steps were taken with respect to foreclosure following that Order.

[118] On or about April 19, 2007, the Respondent filed a 30 paragraph Reply to the Complaint herein. Mr. Pollock made reference in his evidence to certain allegations in the Reply relating to the original windows, including paragraph 26 of the Reply which reads as follows:

> The respondent also confirms that it is not possible to install new windows in the whole of the Property, excluding the complainant's unit. . . . [The] original windows in the Property leak excessively. When wind driven rain penetrates even one window in the Property, that water will cascade downward, causing leakage and corrosion to the condominium unit, or units below. In other words, if all of the windows in the Property are not replaced, there will be a breach of the building envelope through which significant damage will occur.

[119] Mr. Pollock stated that allegation "kind of raised a red flag" for him, and although he still believed that the windows in their unit were okay, he was starting to be concerned. Then he saw the Affidavit of Mr. Schafer, sworn May 11, 2007 in the Gardon proceedings, where Mr. Schafer's evidence was essentially the same. Mr. Pollock testified that at that point he was in a quandary: on one the hand, it was out of the question to keep the old windows, since they were dangerous and illegal, but on the other hand, he could not have the new windows, as he and his sister could not live there with them.

[120] The Gardon Application came on for hearing before Justice Simonsen on May 18, 2007. At the conclusion of the hearing, Justice Simonsen reserved her

decision on the merits, and in order to preserve the status quo pending that decision, granted further interim injunctions preventing steps being taken pursuant to the NEPS or the windows being replaced in the Pollocks' unit, and those of Mr. Gordon, Mrs. Renard and one other individual who had been added as Applicants to those proceedings.

[121] On July 6, 2007, Justice Simonsen delivered her decision in the Gardon proceedings. In her Reasons for Judgment, Justice Simonsen identified the relief which the Applicants were seeking, based on their submissions at the hearing, as: an injunction restraining the Respondent from taking any steps under the lien and NEPS registered against each of their titles until the resolution or adjudication of their human rights complaints; an injunction restraining Gardon from replacing the windows in their units until the resolution or adjudication of these Complaints; pending litigation orders; and unspecified relief based on various alleged violations of their rights under sections 7 and 15 of the *Charter*.

[122] Addressing each of these points in turn, Justice Simonsen dismissed the Application in its entirety. With respect to the replacement of the windows, Justice Simonsen concluded "that the balance of convenience weighs in favour of allowing the window replacement to continue, including replacement of the windows in the applicants' units, and having any modifications to the applicants' windows as may be ordered by the [Commission] dealt with following the Commission's decision."

[123] On or about July 27, 2007, the Lien and NEPS were discharged from title to the Pollocks' unit, the Pollocks having by then paid the special assessment.

[124] The Respondent did not replace the windows in the Pollocks' unit subsequent to the release of Justice Simonsen's decision. According to Mr. Schafer, Mr. Wells and Gardon figured out a way to address the concerns that had previously been identified regarding water damage and a breach of the building envelope. The Board thus decided to let the Complainants keep their windows, and devise a plan

which would ensure that the building envelope would be inspected and maintained in a satisfactory manner.

[125] Between mid-2007 and the date of the hearing, crews continued replacing the windows in the other units at 55 Nassau, including those around the Pollocks' unit and the two units owned by Mr. Gordon and the Renards, respectively. Replacement of the windows on the east side of the building, where the Pollocks' unit is located, was completed in or about 2009.

[126] The Pollocks and the other Complainants who still own units in the building thus kept their original windows. To mitigate any water damage and protect the building envelope while maintaining these original windows, new metal flashing was installed, attached to the building and sealed with caulking. The metal panels were also replaced. No significant changes were made, however, to the windows themselves.

[127] The Board has proposed maintaining the existing original windows in the Pollocks' unit and the other two units, with regular inspections by the Respondent's maintenance department under the supervision of the building engineer. In the event that the windows were to break, they would look at whether parts could be manufactured by the maintenance department or sourced by the engineering firm, or alternatively, whether parts from old windows could be recirculated or reused. Mr. Schafer said that the new windows for these units have been purchased and are in storage in the complex. It is the Board's intention that when the Complainants move, the existing windows will be replaced, at the cost of the Respondent.

[128] The Pollocks therefore continue to have the original, clear-glass, slider windows in their unit. Mr. Pollock acknowledged, on cross-examination, that the Respondent did not at any time try to force its way in to replace those windows.

[129] As previously indicated, Mr. Pollock testified that he became concerned, then convinced, after seeing the Respondent's Reply and Mr. Schafer's Affidavit of May 11, 2007, that they could not keep the old windows in their unit. (see above,

para. 119) He said that the Respondent knew, from submissions he made in or around 2009, that he wanted to modify the windows. Mr. Pollock agreed, on cross-examination, that he had no direct discussions with the Respondent with respect to having his windows replaced after the Complaint was filed, and that although there was an investigation and ongoing discussions, any discussions after the Complaint was filed were through the Commission.

[130] Mr. Schafer's evidence was that he has not been involved in any discussions with the Pollocks or the other Complainants with respect to other options for their windows. He acknowledged, on cross-examination, that at some point as this matter progressed through the Commission process, he became aware that Mr. Pollock had moved away from the idea of keeping the old windows to wanting new ones.

[131] There was no dispute that the Pollocks had now paid the special assessment in respect of their unit, in full.

[132] With respect to the costs of replacing the windows in the Pollock, Gordon and Renard units, as estimated by Mr. Wells (see below, para. 154), Mr. Schafer stated that the Board sees it as a very large item. He said that the Board prepares a five-year capital budget, which is amended throughout the year as projects are completed and as other projects become apparent, and that they are spending every penny they have, and more, over the next five years on their primary concern, that being the building envelope. He said that they cannot delay any work that would affect the integrity of this 38-storey structure, because if they fall behind, it only costs more and more to catch up. They had just completed an elevator upgrade and replaced the cooling system, and had various other projects ongoing, including upgrading and repairing the plumbing system and doing repairs to the parkade.

[133] On cross-examination, Mr. Schafer said that in colloquial terms, they would be "in the rhubarb" if they took on additional expenditures of the size stated by Mr. Wells. He acknowledged that the Board could decide to raise condominium fees,

but said that he would be hesitant to support such a special assessment in these circumstances because of how it would be perceived by the other unit owners.

[134] 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.

[135] Documentary evidence which was filed at the hearing indicates that there has been a significant reduction in energy consumption at 55 Nassau since the new windows were installed.

Dr. Furer

[136] As stated previously, on or about September 19, 2006, Ms Pollock delivered a letter to the Respondent from her psychologist, Dr. Furer, dated September 15, 2006. (see above, para. 88) Dr. Furer is a registered clinical psychologist with the WRHA and an associate professor in the Department of Clinical Psychology, at the University of Manitoba's Faculty of Medicine.

[137] At the hearing, Dr. Furer testified that Ms Pollock has suffered anxiety issues since childhood, and that she has continued to see her on a regular basis since 1997 to address those issues.

[138] With respect to her letter of September 15, 2006, Dr. Furer's evidence, on cross-examination, was that Ms Pollock asked her to write a letter in support of her concerns, but that it was her own decision what to write. She disagreed with the suggestion that she was repeating what Ms Pollock told her to write, although she conceded that her letter was perhaps less clear than it could have been in that regard.

[139] Dr. Furer acknowledged that she had never been in the Pollocks' condominium or seen their windows, but said she understood that the existing

arrangement of the windows was adequate for their needs. As a comparison point, she said that she understood that they have vertical slider windows like those in her own office. She said that when she meets with Ms Pollock, Ms Pollock always opens the window in her office at least a foot, so that she does not have panic attacks during their meetings.

[140] Dr. Furer agreed that her comments regarding air circulation were based on Ms Pollock's impression that the existing windows provide good air circulation and Ms Pollock's expressed concern that the new windows would not provide adequate ventilation as they would not open as wide. Dr. Furer acknowledged that she had not had occasion to see Ms Pollock in a room with awning windows, or to observe how she would react in a room with such windows.

[141] Dr. Furer testified that Ms Pollock had also been diagnosed with episodic depression. Asked if it would be fair to say that it is hard to know how Ms Pollock would be affected by tinted windows, Dr. Furer responded that her best guess, as her clinical psychologist, was that it would not be a positive thing for her, that Ms Pollock does better when she is able to have fresh air and sunlight, and her mood and anxiety would be better served if the windows were not tinted.

Art Braid

[142] Art Braid was called to testify as a lay witness and friend of the Pollocks, and not as an expert.

[143] Dean Braid stated that he and the Pollocks had been friends for at least 30 years. Ms Pollock used to drop in and visit him in his office at the university and would always require that he open a window or leave the door slightly ajar, about 6 to 8 inches, while she was there. He said that he had seen Ms Pollock perhaps only once in the last 10 years, but before that, she would visit every 6 weeks or so when she was at the university, and had visited him maybe 30 or 40 times over a 20-year period. He described it as standard practice when she visited that they would just open a window

or a door. When he asked her about this, she said she felt very uncomfortable in a closed space.

Kent Woloschuk

[144] 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.

[145] For the purpose of providing his opinion, Mr. Woloschuk had viewed the windows in the Pollocks' and Mr. Gordon's 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 a 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. He noted that there are an incredible number of possible tints, depending on different manufacturers and coatings, and that he had not seen the technical specifications of the glazing which would indicate the amount of light transmitted through it.

[146] 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.

[147] Mr. Woloschuk stated 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.

[148] In his evidence, Mr. Schafer agreed with this last statement by Mr. Woloschuk, but added that was only half the picture; it spoke to installing the clear glass, but did not take into account the additional cost of replacing the glass with tinted glass when the person eventually moved.

[149] Mr. Woloschuk said that on the assumption that the Respondent already had the windows constructed, his office had estimated that the probable construction cost for changing the glass from tinted to clear and installing the windows in the building, would be $4,000 per window: $2,500 for the installation of clear glazing instead of tinted glazing, and $1,500 for the frame installation. The construction cost was calculated based on the average size of the windows in the three affected units, and took into account material and labour. On this basis, and as the Pollocks have three windows, the probable cost for installing the new windows, with clear glass, in the Pollocks' unit would be $12,000.

[150] Mr. Woloschuk stated that this estimate was based on the work being done in conjunction with the original installation, similar to the other windows in the building. He noted that there is an economy of scale in doing the entire project all at once, as part of a large scale window renovation, where no additional craning or complications are involved.

[151] Mr. Woloschuk commented that there were a lot of variables involved in this case that his office was not aware of. If they had to come back after the fact and install the windows as a one-off or stand-alone project, significant other costs would be involved. These might include additional mobilization costs, and costs for such things as insurance, building permits and overhead. Mr. Woloschuk could not say, off the top of his head and without doing some research, what the stand-alone costs to replace the windows would be. He noted that without knowing the full scope of the work, there were too many variables involved.

[152] Mr. Woloschuk stated that with the new windows, the change to the operable portion of the window system would result in less ventilation being available to the condominium unit. Mr. Woloschuk testified that a new window could be designed that would be of a similar configuration to the new windows and allow for the ventilation that Ms Pollock was used to, while still meeting the building code requirements. The building code requires that anything within 1,070 millimetres from the floor be equipped with a guard, as a safety feature to prevent people from falling out. To meet these guard requirements, the window would have to be equipped with appropriate guards or screens up to that height, such as a metal grill or perforated metal sheet. Mr. Woloschuk estimated that the probable cost of designing an alternate window configuration for the Pollocks' unit, as a stand-alone project, would total $2,500 to $3,000 for all three windows in that unit. The total estimated cost of the window installation for the three windows in the Pollocks' unit, based on the work being done in conjunction with the original construction, would therefore be $14,500 to $15,000.

John Wells

[153] John Wells testified as the engineer on the window replacement project.

[154] Mr. Wells' evidence was that to develop a window system as requested for the Pollock unit would require redesign of the window. A horizontal mullion would be required to raise the bottom of the operable window to 41 inches above the finished floor. That would enable unrestricted window opening size above that height. A vertical slider could be introduced. The framing assembly would have to be modified and a vertical mullion introduced to incorporate the slider assembly. Mr. Wells estimated that the cost to incorporate this design would be $8,500 per living room window, and $6,500 per bedroom window, for a total of $23,500. His estimate of the cost to change out the glass at a later date was $4,800 per living room window, and $3,600 per bedroom window, for a total of $13,200.

Remedies

[155] The Complaint which Mr. Pollock filed did not address the remedies being sought. The remedies he was seeking on behalf of his sister were set out in an email dated February 8, 2012, and referred to more fully at paragraph 176 below.

[156] 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.

[157] 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.

<u>The Positions of the Parties</u>

<u>The Complainant</u>

[158] With the agreement of the parties, Mr. Pollock proceeded first with his final submission.

[159] Mr. Pollock submitted that he and Ms Pollock notified the Board of Ms Pollock's concerns with respect to the windows on several occasions, but they did not receive any response. He said that Mr. Sakowski testified that Ms Pollock went to him early in the process, and talked about her medical issues relating to the windows, but there was no follow-up from the Board with respect to that discussion "and her early requests".

[160] Ms Pollock made a second attempt to communicate with the Board, by personally delivering the letter of September 15, 2006 from Dr. Furer, her psychologist, to the Board office, advising of Ms Pollock's disorders and problems with awning and tinted windows. The Respondent refused, however, to acknowledge that letter or that there was a problem.

[161] With reference to Mr. Schafer's comment that Dr. Furer's letter did not include the word "accommodate" and did not ask for accommodation, Mr. Pollock submitted that even though the word "accommodation" was not used, the words "Thank you for your attention to these concerns" could be a request for accommodation, and that the overall pattern of the letter would suggest that accommodation was being sought. Further, he argued, there would have been no point in sending the letter to the Board if it was not a request for accommodation.

[162] According to Mr. Pollock, the Board and Mr. Schafer were also notified of the Pollocks' desires or concerns when they received and read Mr. Pollock's submissions on window modifications in 2009. There was no evidence, however, that the Board followed-up on any of these notifications.

[163] It was submitted that the Respondent had a duty in these circumstances to make inquiries, to investigate and to try to find a solution. If the Board found that the letter from Dr. Furer was unclear or inadequate, it had a responsibility to make further

inquiries by, for example, asking for more detail. Instead, the Board simply chose to ignore Ms Pollock, and appears to have felt justified in doing so.

[164] According to Mr. Pollock, the Respondent had expressed the view that because Ms Pollock did not raise these disability-related concerns earlier, such as before the contract for the windows was signed, it did not have to address them. In Mr. Pollock's submission, the time for raising such concerns is not limited under the *Code*. In any event, he said, Mr. Sakowski testified that Ms Pollock had talked to him about her medical issues relating to the windows early in the process.

[165] Mr. Pollock submitted that the Respondent's position, as set out in paragraph 22 of its Reply, that a condominium complex is not a context where one owner can make decisions that affect the whole group, is totally wrong. The effect of such a reading of the *Act* and of the Respondent's own Declaration would be discriminatory and unconstitutional. It would preclude a person with a disability from having any say at all. The Respondent cannot make a blanket statement or decision, as it did in this case, for everybody.

[166] In Mr. Pollock's submission, any unit owner who is disabled certainly can make a decision that will affect the whole group, as the *Code* clearly trumps the *Act*. Thus, a person with a disability can clearly "opt out" of a decision by the Board, except with respect to "the money part" of such a decision, under the *Code* and the *Charter*.

[167] Mr. Pollock submitted that according to the tests enunciated by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), both the process employed to address accommodation and the substantive content of the accommodation offered must be considered when assessing accommodation. In his submission, the jurisprudence says that attempts to accommodate must be serious and substantial; that a respondent must demonstrate that it used its best efforts.

[168] In terms of process, Mr. Pollock argued that the Respondent, by its own admission, did nothing to assess the issue of accommodation. It clearly did not search for or consider possible accommodations. It took no steps to seek assistance from those who are obliged to assist in the search for a possible accommodation or those with expertise in the particular needs of individuals who could be adversely affected by the choice of windows. In Mr. Pollock's submission, there was no reason the Respondent could not have done such an assessment. He and his sister repeatedly asked the Respondent to engage with them in the search for reasonable accommodation, but the Respondent chose to ignore their request for dialogue in accommodation, and purposefully turned away from its obligation under the *Code*.

[169] Regarding the substantive content of any effort to accommodate, Mr. Pollock submitted that there is no evidence that the Respondent offered any accommodation at all, and thus no substantive content to evaluate. The Respondent did not consider any requests for modifications or alterations of any kind. Again, there was no reason that the Respondent could not have accommodated Ms Pollock's disability. There is no evidence that doing so would have resulted in undue hardship.

[170] Mr. Pollock submitted that it is not open to the Respondent to now argue that the old windows should be left in place, and that repairing and leaving the windows in the Complainants' units constituted reasonable accommodation. In his view, the Respondent is attempting to reargue an issue which was conclusively decided in the Briggs proceedings. In those proceedings, the Respondent had said that the windows were beyond repair, and argued for their total replacement. It could have, but did not, argue that repairs should be made. Based on that, Justice Jewers ordered that all of the windows were to be replaced, stating, among other things, that the "existing windows are ancient, obsolete and, if not wholly worn out, are in the process of wearing out" and that the "only way to preserve and prevent a decline in the condition of the windows is to replace them".

[171] Referring to the decision of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board)* v. *Figliola*, 2011 SCC 52, [2011] 3 S.C.R.

422 ("*Figliola*") and the principles set out therein, Mr. Pollock argued that it is an abuse of process to try to relitigate an issue which has already been decided by a tribunal within its jurisdiction, because the finality of issues is important to justice and fairness. The decision of the Court was that the windows were beyond repair and that the only way to preserve and prevent a decline in the condition of the windows was to replace them. In his submission, that decision was final, and it would be outside the jurisdiction of a human rights adjudicator to revisit that issue.

[172] Mr. Pollock also referred to subsection 7(3) of the *Act*, which provides that "[n]o condition shall be permitted to exist . . . in any unit or the common elements that is likely to damage the property." He suggested, based on evidence of the generally deplorable and dangerous condition of the old windows, that it would not only be unacceptable, but also contrary to subsection 7(3) of the *Act* to keep those old windows.

[173] Mr. Pollock pointed out that the assessment letter of May 19, 2006 talks about new windows for the entire building; it does not contemplate leaving in old windows. In his submission, this was almost like a contract, an agreement that they would get new windows if they paid. There is no question that they have paid. It is not Ms Pollock's fault that she needs modified windows. The fact remains that they have paid the assessed amount and are supposed to be getting new windows.

[174] Mr. Pollock went on to argue that to claim that the Complainants should receive something different, that they should be left with the old windows, is in itself discrimination. The result would be that the majority of the residents, the able-bodied people, would have the new windows, which Justice Jewers indicated in the decision in the Briggs proceedings were better, more expensive and completely superior, while the disabled group would be left with windows which are inferior.

[175] Mr. Pollock argued that his testimony and that of Dr. Furer and Dean Braid establish that Ms Pollock needs to be accommodated with new windows which are tailor-made to her disabilities. In his submission, accommodating Ms Pollock's disabilities at this point in time would not result in undue hardship. On the evidence, the

cost of doing so would be relatively small. While Mr. Schafer said that they would “be in the rhubarb” if they paid for modified windows from the reserve fund, that was not concrete evidence. He said that other projects were important, but did not say that any of them were an emergency. In any case, Mr. Schafer also said that it would be doable to pay for the windows with condo fees. He did not say that paying with condo fees would cause undue hardship. He did not say that the Board could not do another assessment, only that he would not do it. Whether the money came from a further small assessment or from condo fees, there was no concrete evidence that this would result in undue financial hardship or business inconvenience. The Respondent’s purpose of bettering the building with new windows could be accomplished through less discriminatory means, by putting in a modified window design.

[176] At the end of his submission, Mr. Pollock confirmed that the remedies that he was seeking in this Complaint, on behalf of his sister, were as set out in the original part of his email of February 8, 2012. In addition to damages and costs, the primary remedy, as set out in that email, consisted of:

> (a) that the window design and openings be identical or as close to the original windows as possible in conjunction with reasonably accommodating [Ms Pollock’s] disabilities in accordance with her needs to feel the air, and visually see the open window space . . .

including:

> (b) no tint/colour or anything to reduce natural light to be placed in the proposed new windows,
>
> (c) windows without awnings, and
>
> (d) notwithstanding anything else, that the entire physical process with the workers doing the window replacement take into account [Ms Pollock’s] disabilities . . . .

Alternative remedies were also set out in that email, which contemplated the Board modifying or redoing the design of the three proposed windows to accommodate Ms Pollock’s disabilities, as indicated therein.

[177] With respect to the design of the windows, Mr. Pollock had stated at the beginning of his submission and confirmed that if it was decided that new windows were to be installed, he was of the view that Mr. Wells' design was less claustrophobic or obstructive and would be preferable to that of Mr. Woloschuk.

[178] Mr. Pollock also asked that if it was decided that new windows were to be installed, a monitoring order be granted because of the difficulties that have been encountered so far, and that I retain jurisdiction until the windows are satisfactorily installed.

[179] As for damages, Mr. Pollock indicated that he was seeking general damages, for injury to dignity, feelings and self-respect, similar to those which were awarded in *Di Salvo* v. *Halton Condominium Corporation No. 186*, 2009 HRTO 2120, in the amount of $11,000 to $12,000.

<u>The Commission</u>

[180] 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.

[181] 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.

[182] 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.

[183] 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 and/or slider 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 and/or slider 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.

[184] 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.

[185] In the Commission's submission, it is necessary to determine first whether such a nexus is 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 awning 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 awning windows in all units in the building.

[186] 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 *Meiorin* decision, 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.

[187] In terms of procedure, factors to be considered would include whether alternative approaches to accommodation have been 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 that 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.

[188] 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.

[189] 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 those in these cases, and urged me to consider that decision in its entirety.

[190] 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).

[191] 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.

[192] 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 the 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

[193] At the commencement of her submission, Ms Grammond stated that she did not disagree with the applicable tests as articulated by Ms Khan. To begin with, it is clear that the Complainant bears the onus of establishing a *prima facie* case, consisting of three components.

[194] With respect to the first component, that is, whether Ms Pollock has a disability, Ms Grammond stated that the Respondent has not disputed that there are disabilities. The diagnoses are in evidence. The Respondent has not taken issue with this from the beginning.

[195] The Respondent has, however, taken issue with the second and third questions, namely whether Ms Pollock and the other Complainants have special needs based on their disabilities, and if so, whether the Respondent was aware or ought to have been aware of such special needs.

[196] With respect to the second question, Ms Grammond stated that to be clear, the Respondent recognizes that Ms Pollock appears to have some special needs based on her diagnoses. The Respondent's issue in respect of this component, right from the beginning, has been whether slider (as opposed to awning) windows and/or clear-glass windows were special needs which were linked to Ms Pollock's disabilities.

[197] 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 events is of particular significance in each case.

[198] Ms Grammond submitted that from the beginning of 2004 up until April 13, 2006 when the contract was signed, the Pollocks had the opportunity to involve themselves and express a view with respect to the replacement of the windows through a variety of means, but did not do so. Ms Grammond noted that, among other things, minutes of Board meetings, which were available to unit owners, repeatedly referred to the window replacement project; a window information meeting was held in June 2005; a test window was installed in unit 406; and a sample piece of tinted glass was placed in the lobby for residents to see.

[199] In Ms Grammond's submission, the evidence 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.

[200] On May 19, 2006, the Respondent issued letters to owners reflecting the special assessment, and details with respect to the windows and the heating and

cooling lines. Mr. Pollock said that he was concerned when he received the letter, because he was having to pay for an illegal contract and thought that there needed to be a vote.

[201] In July 2006, Mr. Pollock filed a claim against the Respondent in court, in which he raised issues of his own relative to a disability and human rights. There was no mention of his sister in that claim. Mr. Pollock acknowledged that at that time he was trying to stop the project as a whole. Mr. Schafer testified that the Respondent saw the Pollock Claim as an extension of opposition to the project because of finances and costs; as another step in the opposition process.

[202] In mid-September 2006, the Respondent made rooms available at Place Louis Riel for viewing and continued to keep the owners updated as to the status of the project. Mr. Pollock testified that he and his sister attended at Place Louis Riel and looked at the windows, but did not actually go into the rooms.

[203] Dr. Furer's note was delivered to the Respondent on September 19, 2006. Ms Grammond noted that there was no covering letter and no request for anything specific, and that the Pollock Claim was still pending at that time. Mr. Schafer testified that the note was received not as containing an opinion, but as an extension of the opposition to the project for financial reasons and of that claim. In Ms Grammond's submission, that note must be viewed in the context of the broader dispute that was going on at that time with respect to the cost of the project, and in particular, the Pollock Claim.

[204] On September 29, 2006, the Pollock Claim was struck out by the Master for a number of reasons, one of which was that, in the Master's view, the claim was frivolous.

[205] The next very significant date, in Ms Grammond's submission, was October 25, 2006, when the Respondent's lawyer wrote to the Pollocks, essentially advising them that if their outstanding special assessment, due since September 1, was

not paid, a lien would be filed against their unit. Ms Grammond noted that Mr. Pollock's evidence in court and in these proceedings, was that that was the trigger for him to file this Complaint. Thus, it was still about money at this point in time.

[206] Mr. Pollock filed an appeal from the Master's Order, but withdrew it on November 10, 2006. Then, on November 14, 2006, he filed two human rights complaints, the Complaint in these proceedings (triggered by the letter from the Respondent's lawyer) and another, which was later withdrawn. A lien was filed against the Pollocks' unit that same day.

[207] The Briggs Application, seeking a vote with respect to the window project, was filed November 21, 2006, and on February 14, 2007, Justice Jewers ordered that a vote be held.

[208] On February 23, 2007, Mr. Pollock filed his next court proceeding, the Gardon proceeding, again wanting the contract stopped. He sought a variety of forms of relief, including that he and his sister did not have to pay for their windows.

[209] The vote took place on April 11, 2007. Ms Grammond submitted that the Respondent's evidence is that all unit owners were given an opportunity to speak, though under a time limit. The vote was to either ratify the contract or not, which, as set out in Justice Jewers' decision, was what the vote was supposed to be about. 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. There was no appeal from Justice Jewers' Order, and no other proceeding was initiated alleging that the vote or the meeting was not conducted properly.

[210] The Gardon Application was decided in July 2007. Justice Simonsen ordered that the Pollocks and the other Applicants in those proceedings had to pay the special assessments, that Gardon could continue replacing the windows in the complex, including those in their units, pending the outcome of these proceedings, and that any modifications could be done later.

[211] Ms Grammond noted that although the Respondent could well have forced the windows into the Complainants' units at that point, it chose not to do so. Rather, the Respondent decided to accommodate the Complainants by allowing them to keep their old windows.

[212] It was submitted that from the point of view of the Respondent, as was borne out by the evidence over this period of time and beyond, the position of the Complainants was that they did not want their windows replaced. Window installation went on for years. The Pollocks' unit is on the east side of the building, which was the last side to be done. The Pollocks knew that the work was continuing, given that they live in the building and would have seen it, but there is no evidence that they asked to have new windows while the work was ongoing.

[213] With respect to whether the Respondent was aware of, or ought to have been aware of, some special need of the Complainants, Ms Grammond stated that it is clear from the evidence that the effect of tinting on any of the Complainants is subjective. It is also clear and important to remember that the special needs relating to the windows are subjective. In Ms Grammond's submission, a special need relating to the windows is therefore not something that the Respondent should automatically have been aware of.

[214] Ms Grammond pointed out that while the Pollocks made their issue known in September 2006, they did not ask for an accommodation, and again this must be considered in the context at the time. In Ms Grammond's submission, the timeline of events shows that medical issues were raised very late in the process. In this regard, Ms Grammond pointed out that she was not saying that there is a timeline within which such things need to be raised, but that the timing and the way in which matters have unfolded go to the credibility of the allegations herein.

[215] 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, but noted that in addition to being obvious, it represented the type of thing that an individual was not going to take months or years to come forward with, as had occurred in this case.

[216] In other words, in the absence of Ms Pollock having raised the issue of special needs due to her mental health, 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 224-5. In the Respondent's submission, this was especially so in a situation like this, where things are subjective and depend upon perception.

[217] It was submitted, therefore, that Mr. Pollock had not made out the second and third parts of a *prima facie* case.

[218] Ms Grammond acknowledged, however, that were I to find that a *prima facie* case had been established, the onus would shift to the Respondent to establish that Ms Pollock's needs had been accommodated. She therefore went on to address that onus based on the three-part test which flows from *Meiorin*.

[219] With respect to the first part of that test, Ms Grammond submitted that there is clearly a rational connection between installing new tinted windows and the Board's role, which is to provide services to the Respondent and keep the building in good condition.

[220] Ms Grammond submitted that the second part of the test, whether the Respondent chose the windows honestly and in good faith, was also clearly satisfied. In her submission, it was obvious from the Respondent's perspective that the windows in the building needed to be replaced. The existing windows were very old; they were

leaking, shaking in the wind, and not energy efficient. Thus, when unit owners were trying to stop the window replacement project from going ahead, the Respondent should have vigorously opposed it, as it did.

[221] Heat and cold were being lost through the windows, and the Board was trying to increase energy efficiency within the building. The evidence reflects that the tint was chosen for energy efficiency, to cut down on glare from the sun, to keep furniture from fading, to make temperatures within the building more consistent, and for aesthetics. Discussions with respect to such considerations were ongoing prior to the Complainants making any allegations regarding special needs. It was submitted, therefore, that the Board clearly chose the windows honestly, in good faith, and for legitimate reasons, and did so before it knew of the issues raised by the Complainants in these proceedings.

[222] As for the third part of the test, which Ms Grammond identified as being whether tinted and/or awning windows were reasonably necessary to accomplish the Board's goals, it was submitted that this too was satisfied. Ms Grammond referred to the goal of increased energy efficiency and the evidence of notable savings in actual energy consumption which had been achieved, and in the case of the awning windows, to the building code requirements which had to be met. The evidence disclosed that the Board chose the lightest tint from the options available to it, the tint which was as close to clear glass as possible.

[223] Notwithstanding all of this, the Pollocks and the other Complainants who continue to reside in the building have kept their old windows. Thus, they all still have clear windows, and slider as opposed to awning windows. In Ms Grammond's submission, this was clearly an accommodation. In essence, the Respondent has given the Complainants the opposite of what it said it would do at the outset. The evidence was that flashing and caulking were installed to try to seal the building as well as possible, and that replacement parts for the Complainants' windows, if needed, can be manufactured by the maintenance department and/or recirculated and reused from the

windows which were removed. There is no evidence that the Pollocks have had trouble with their windows.

[224] Further, in spite of the case that Mr. Pollock is trying to make with respect to the windows being hazardous, there is no evidence that the windows in Ms Pollock's unit are hazardous. Ms Grammond commented that while it was certainly true that the Respondent had raised safety concerns as matters were unfolding in the courts, those concerns related to the entire project and the building as a whole. The scale and scope of what is at issue now is much less, involving windows in only three units (or 1% as opposed to 100% of the units) in the building. Concerns were reduced accordingly.

[225] In response to Mr. Pollock's reference to *Figliola* and his comment about the Respondent having previously said that the windows needed to be replaced, Ms Grammond agreed that the Respondent had certainly said that in the Briggs proceedings. She noted, however, that that case was about the project as a whole and a vote of unit owners. The issue was not the same, and that decision was not now being relitigated, so it is not a situation of *res judicata* or abuse of process in any way.

[226] Ms Grammond noted that keeping the old windows in these units may or may not be the best accommodation, but it did not have to be the best. The test, as referred to the decision in *Morriseau* v. *Wall (c.o.b. Paisley Park)*, [2000] M.H.R.B.A.D. No. 1 is whether it was reasonable.

[227] With further reference to the *Morriseau* case, Ms Grammond noted that complainants also have a duty to assist in securing appropriate accommodation, as well as a duty to accept a reasonable accommodation (*Morriseau*, at para. 38, quoting *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970), and that the duty to accommodate requires reasonableness and a certain give-and-take on the part of those who are affected by a given situation, or "a dance of reasonableness" (*Morriseau*, at para. 39). From the Respondent's point of view, it has given by deciding to leave the existing windows in the Pollocks' and the other two units, to do the best it

could with flashing and caulking, and to deal with a breach of the building envelope in respect of these three units.

[228] With respect to the matter of remedies, it was submitted that the windows should remain as they are, and the status quo be maintained. The Respondent will deal with changing the windows at some future time, when the units are sold. In the meantime, the Respondent would like to inspect the windows twice a year. In Ms Grammond's submission, this is a reasonable accommodation, which is what is required.

[229] It was further submitted that if I was of the view that the Complainants should not have had to pay the special assessment, given that they still have their old windows, an alternative would be that the status quo be maintained and the Pollocks, the Renards and Mr. Gordon keep the windows they have and be refunded the portion of the special assessment which they paid with respect to the new windows, but not the heating and cooling lines. Ms Grammond added that this was put forward as an alternative only, and was not what the Respondent was favouring, given that virtually all of the windows in the building had been replaced, and all of the unit owners, including these Complainants, were benefitting from, among other things, the improvements to the building envelope and the energy savings.

[230] In terms of damages, the Respondent's position was that no damages should be awarded to Ms Pollock or the other 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 Mr. Pollock is claiming on his sister's behalf, and should be considerably less than the $4,000 awarded in the *Budge* decision which Ms Khan referred to in her submission.

[231] Ms Grammond went on to state that if I were to decide that the windows in the three units in question should be replaced, she had some additional comments. She stated that according to Mr. Wells' estimates, the replacement costs for these

windows totalled at least $85,900. While an alternative pricing scheme had been put forward by Mr. Woloschuk, he acknowledged that there would be significant other costs involved. Mr. Wells' costing should therefore be accepted.

[232] She noted that Mr. Schafer had testified that the reserve fund was spoken for, that a number of other projects were ongoing, and they would be "in the rhubarb" if such an expense had to be incurred. It was submitted that it would be an undue hardship on the Respondent at this stage to incur those costs. In this regard, Ms Grammond noted that Mr. Pollock had argued in his final submission that he no longer wanted Mr. Woloschuk's design for a revised window, that he wanted Mr. Wells' design. In her submission, that meant that he would also have to go with Mr. Wells' pricing.

[233] With respect to the public interest matters which Ms Khan had raised, Ms Grammond noted that the Respondent has put into evidence policies which it has prepared. While Ms Khan submitted that policies from the Commission website should be implemented, Ms Grammond asked that I review the policies which the Respondent has proposed and is willing to implement.

[234] As for Ms Khan's suggestion that Board members attend a workshop or course, Ms Grammond submitted that there is really no need for this. She noted that there is evidence that the Respondent understands its accommodation obligations and has had success with the elevators and interphone system in the building, and in fact, sought out assistance from the Commission with respect to those matters. In any event, she concluded, this was not a concern for the Respondent, who would certainly comply if I were to make an order to that effect.

Analysis and Decision

[235] 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 Pollock, 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.

[236] 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.

[237] "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).

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

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

[239] In assessing the evidence and making any necessary findings of credibility in this case, I have had regard to the well-known principles established 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)

[240] 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.

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

[242] As stated above, the Respondent does not dispute that Ms Pollock has a disability within the meaning of clause 9(2)(l) of the *Code*. Her disabilities, as identified

in the Complaint, are generalized anxiety disorder with panic attacks and obsessive compulsive disorder. Her diagnoses of these disabilities are in evidence.

[243] The Respondent also does not dispute, and I am prepared to accept, that Ms Pollock would appear to have some special needs based on her diagnoses.

[244] What is in dispute, at this initial stage, is whether Mr. Pollock has established that at all relevant times, Ms Pollock had a special need for slider as opposed to awning windows and/or for non-tinted or clear-glass windows based on her disability; and if so, whether Mr. Pollock 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.

[245] Ms Pollock herself did not testify in these proceedings.

[246] Mr. Pollock argued that his testimony and that of Dr. Furer and Dean Braid established that Ms Pollock had special needs, based on her disabilities, which had to be accommodated.

[247] Mr. Pollock did not point to anything in particular in his own evidence in support of his submission on this point, and based on my review of his evidence, I am not satisfied that it established that Ms Pollock had a special need for slider and/or clear-glass windows. Mr. Pollock indicated in his evidence, for example, that he and his sister did not like or want these new windows, that when they saw the windows, they both decided they could not live with them. I am not convinced that that is sufficient to trigger the duty to accommodate under the *Code*. The *Code* requires the accommodation of an individual's disability-related "needs", not his or her preferences, wants or desires. In my opinion, this is an important distinction.

[248] With respect to Dr. Furer, I am of the view that her evidence also falls short of establishing that Ms Pollock had a special need for either slider or untinted

windows. In Dr. Furer's letter of September 15, 2006, which Ms Pollock delivered to the Board on September 19, 2006, Dr. Furer wrote that Ms Pollock had requested that she inform the Board of the "importance" of her having windows that open completely so as to provide good air circulation, and that awning windows were "not an acceptable option" as they do not provide the same degree of ventilation and this would trigger panic attacks for her. The wording of this statement is not sufficient, in my view, to establish that Ms Pollock had a special need for slider, as opposed to awning windows.

[249] I note that it is alleged in the Complaint that in her letter, "Dr. Furer informs the board of [Ms Pollock's] disabilities and that Natalie needs to have windows that open completely (like the ones presently in our unit) so as to provide good air circulation." The wording in Dr. Furer's letter is, however, far less definitive and, as indicated above, I do not believe that it equates to establishing a need for slider windows.

[250] With respect to that letter, Dr. Furer testified that Ms Pollock had asked her to write a letter "in support of her concerns". She stated that her comments regarding air circulation were based on Ms Pollock's impression that the existing windows provided good air circulation and the new awning windows would not provide adequate ventilation as they would not open as wide. While this evidence indicates that Ms Pollock was concerned that awning windows were a problem and that she did not want them, I cannot accept that it establishes that she had a need for slider windows.

[251] With respect to tinting, Dr. Furer similarly wrote in her letter that tinted windows "would not be acceptable" because of Ms Pollock's tendency to depression and that Ms Pollock "benefits" from maximum sunlight. Again, in my view, this falls short of establishing a need for untinted windows.

[252] At the hearing, Dr. Furer testified that Ms Pollock has also been diagnosed with episodic depression. In terms of the effect of tinted windows on Ms Pollock, she stated that her "best guess" was that tinted windows would "not be a positive thing" as Ms Pollock does better when she is able to have sunlight, and her mood and anxiety

would be “better served” if the windows were not tinted. Again, this is far from saying that Ms Pollock had a need for untinted windows. At best, it indicates that it would seem preferable for Ms Pollock to have untinted windows.

[253] I would note that the evidence of Mr. Woloschuk was that there are an incredible number of possible tints, with different characteristics and effects, and that there is no indication that Dr. Furer had any knowledge of the particular tint in question when making that statement.

[254] Dean Braid’s evidence indicated that whenever Ms Pollock visited him in his office, either he or she would open the window or leave the door slightly ajar. Dr. Furer also indicated that Ms Pollock would always open the window in Dr. Furer’s office when she met with her. That this was their arrangement does not, in my view, mean that Ms Pollock required slider windows. I note that in both cases, the window would only be partially opened, or in the case of the door in Dean Braid’s office, slightly ajar. I also note that the evidence indicated that the new awning windows would also open, although in a different way and not as wide as the original slider windows.

[255] In light of the foregoing, I am not satisfied, on a balance of probabilities, that it has been established that Ms Pollock had or has a special need for slider and/or untinted windows.

[256] It was further argued that the Board was notified of Ms Pollock’s concerns with respect to the new windows through her conversations with Mr. Sakowski and the letter from Dr. Furer.

[257] As indicated above, I did not have the benefit of hearing evidence from Ms Pollock. Mr. Pollock testified that he had overheard the conversations between his sister and Mr. Sakowski. His evidence generally was that Ms Pollock had said that she could not handle the new windows, and that Mr. Sakowski had said that he was not going to consider or discuss the matter.

[258] Mr. Sakowski's recollection of those conversations was that there was a lot of discussion about cost, that Ms Pollock was emphatic that she did not want the windows changed, and that she liked the slider windows she had and was convinced that the air circulation would be impaired. I accept Mr. Sakowski's evidence in this regard. I note that the evidence again amounts, however, to Ms Pollock expressing a preference for her existing windows, as opposed to a need for slider as opposed to awning windows.

[259] While Mr. Pollock argued that these conversations with Mr. Sakowski constituted notice to the Board of his sister's disability and a need for accommodation, I would note that Mr. Sakowski was only one of the members of the Board, and that these were casual or informal conversations between Mr. Sakowski and Ms Pollock. Further, his evidence with respect to these conversations was very vague and general. In the circumstances, I am unable to find that the evidence supports that what was said during these conversations constituted notice to the Board of any disability-related special need with respect to the window replacement project. I further accept Mr. Sakowski's evidence that his response in such a situation would have been to suggest that Ms Pollock write to the Board.

[260] With respect to the September 15, 2006 letter from Dr. Furer, I have already stated that I do not consider that letter to constitute notice of a disability-related special need for slider and/or untinted windows. Mr. Pollock argued that if the Respondent considered the letter to be unclear or inadequate, it had an obligation to make inquiries. It chose, however, to ignore Ms Pollock and its obligations.

[261] In my view, Mr. Pollock's submission that the letter from Dr. Furer would in any event have given rise to a duty to make inquiries, must be considered in context and in light of the surrounding circumstances.

[262] An obligation to investigate arises where a respondent has received sufficient notice of, or there has been sufficient indication of, a special disability-related need for accommodation.

[263] While Mr. Pollock said that he raised the issue of his sister's mental health at the May 8, 2006 meeting, the reference in the Statement of Claim that he relied on in making that statement referred only to his having asked if the Board would allow "exceptions" to the window project for "personal reasons". There was no indication that he referred to his sister or her mental health or disabilities at that meeting, or any suggestion that he raised the matter of accommodation, as opposed to whether exceptions would be allowed. When pressed, he agreed that he referred to "personal reasons" and said that he used those words because he did not want to talk about his sister's mental illness in front of a group of people. Mr. Pollock further agreed that he did not mention his sister's mental problems at any other meetings he attended at that time.

[264] The evidence indicated that a number of objections and concerns were being raised at that juncture, particularly with respect to such things as the cost of the window replacement project, how people were going to be able to pay their individual assessments, and whether or why windows which were still in good condition had to be replaced.

[265] Having said that he did not want to talk about his sister's health at the meeting or in front of a group of people, there is nothing to indicate that Mr. Pollock raised or communicated any issue with respect to her mental illness or disability or made any request for accommodation from the Board following the meeting. While the Questions and Answers document which was distributed to unit owners shortly after the meeting encouraged unit owners to address their questions and concerns to the Board in writing, there is no indication that the Pollocks submitted any concerns to the Board, in writing or otherwise, with respect to Ms Pollock's disability or any special needs relating thereto.

[266] There was also evidence from Ms Kinvig that Mr. Pollock inquired at the May 8th meeting as to what would happen if people did not pay their assessment, which indicates that the Pollocks' focus was on cost, rather than seeking accommodation for any disability-related needs.

[267] Mr. Pollock filed his Statement of Claim on July 26, 2006, seeking to stop the project from proceeding. It is difficult to reconcile advancing a claim to stop the project with a suggestion that Ms Pollock was looking to be accommodated under the contract or the project based on a disability-related need.

[268] A number of allegations were raised in the Pollock Claim, including allegations that Mr. Pollock and other individuals had disabilities which ought to have been considered. There is no reference in the claim, however, to Ms Pollock or allegations with respect to her disabilities or any disability-related needs which she might have and which would require accommodation.

[269] While details with respect to project had been known for several months, the letter from Dr. Furer was not provided to the Board until 10 days before the date that the Respondent's Motion to strike the Pollock Statement of Claim was scheduled to be heard before the Master.

[270] Mr. Pollock has complained that the Board ignored Dr. Furer's letter, and took no steps to investigate or inquire. I note, however, that there is no evidence that the Pollocks themselves took any steps to follow-up on that letter with the Respondent.

[271] As indicated above, Ms Pollock had the primary obligation to ensure that the Respondent had sufficient information to trigger a duty on its part to investigate whether she required accommodation. Based on the evidence, I am not convinced that she met that obligation. I therefore conclude that a duty to investigate did not arise.

[272] Mr. Pollock also submitted that he made his or Ms Pollock's concerns and desires known in 2009. I would note, however, that the Complaint was filed over 2 years earlier, on December 5, 2006. While Mr. Pollock argued that there was no time limit for making their desires known, the allegations in the Complaint are based on the Respondent having breached the *Code* at the time the Complaint was filed.

[273] Thus, even if it could be said that Mr. Pollock has proven that Ms Pollock had a special disability-related need for slider and/or 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.

[274] In the event that I am wrong and it could be said that a *prima facie* case of discrimination has been established, the onus would shift to the Respondent to establish, again on a balance of probabilities, that it reasonably accommodated Ms Pollock's disability-related special needs. In the circumstances of this case, I am satisfied that the Respondent has discharged that onus.

[275] The obligation, as set out in clause 9(1)(d) of the *Code* is to make "reasonable accommodation" for the special needs of an individual. That obligation is described as follows by Adjudicator Suche (as she then was) in *Morriseau*, *supra*, at paragraph 37:

> It must be remembered, of course, that accommodation does not have to be absolute or "perfect" accommodation. Rather, by definition, it must be reasonable. It may be that there is more than one alternative available, and in that instance, the employer or service provider, as the case may be, has the right to choose which accommodation it shall offer.

[276] In this instance, the Respondent arranged for the Pollocks to keep their original windows, and for steps to be taken to ensure that the building envelope would be protected. The Board has proposed maintaining the original windows, with regular inspections by the Respondent's maintenance department under the supervision of the building engineer. New windows have been purchased, and would be installed to replace the original windows, at the Respondent's cost, when the Pollocks moved.

[277] Ms Pollock therefore continues to have the original, clear-glass slider windows in her condominium unit. In all of the circumstances, I am satisfied that this was a reasonable accommodation.

[278] Mr. Pollock submitted that it was not open to the Respondent to argue at this point that the old windows should be left in, and that this would constitute reasonable accommodation. Mr. Pollock suggested that the Respondent was attempting to reargue an issue that had already been decided by Justice Jewers in the Briggs proceedings. I do not agree. The issue which was before the Court in the Briggs Application, was whether the contract which the Respondent had entered into for the replacement of the windows was *ultra vires* because it had not been approved by a vote of the unit owners. As Ms Grammond stated, the case was about the project as a whole and a vote of unit owners. The Court decided that the contract was *ultra vires* but might be ratified by the requisite majority of the unit holders pursuant to the *Act*. The Court did not decide that all windows had to be replaced, as Mr. Pollock has argued.

[279] Ms Grammond agreed that the Respondent certainly said in the Briggs proceedings that the windows needed to be replaced. She went on to state, however, and I agree, that the scope and scale of what is at issue in these proceedings is entirely different. These proceedings relate to the remaining original windows in 3 units, as opposed to the contract to replace the windows in 300 units which was at issue in the Briggs proceedings.

[280] While the evidence was that the original windows were obsolete, the evidence also indicated that the condition of the windows in different units varied. Some were considered to be in good shape, while others were said to be in horrible shape. With respect to the windows in the Pollocks' unit specifically, Mr. Sakowski's evidence at the hearing was that Ms Pollock was really emphatic that she did not want the windows changed, that she liked her windows and felt that they were not ready to be replaced. It was specifically plead in the Complaint that the Pollocks' windows "are not broken." A Window Repairs Summary (2001-2011) which was filed as an exhibit at the hearing showed that no repairs were required to the windows in the Pollocks' unit during that period of time.

[281] With respect to Mr. Pollock's reference to subsection 7(3) of the *Act*, I would note that there is no evidence and nothing to suggest that the windows in the

Pollocks' unit are dangerous. I would also note that, as indicated above, the Respondent's evidence was that subsequent to the release of Justice Simonsen's decision in the Gardon proceedings, the Respondent took steps to address the concerns that had previously been identified regarding water damage and a breach of the building envelope, and to mitigate any water damage and protect the building envelope while maintaining the original windows in the Pollock, Gordon and Renard units.

[282] Mr. Pollock has also argued that the assessment letter of May 19, 2006 contemplates replacing all of the windows for the building, and that having paid the assessed amount, they are entitled to new windows. The Pollocks were required to pay common element fees and special assessment amounts pursuant to the *Act*. Mr. Pollock is seeking reasonable accommodation for his sister under the *Code*, based on her disability-related needs. While the *Code* is paramount legislation, that does not give a complainant the right to veto a decision by the Board, as Mr. Pollock has suggested, or to decide how he or she must be accommodated under the *Code*. A complainant has a duty to cooperate in determining reasonable accommodation, but it is the responsibility of a respondent to identify what would be reasonable accommodation in accordance with the *Code*.

[283] Mr. Pollock had maintained throughout much of the process relating to the window replacement project that he did not want the new windows. As previously stated, Mr. Sakowski's evidence, which I have accepted, was that Ms Pollock liked her windows and that they were not ready to be replaced. The evidence indicates that Mr. Pollock changed his position at some point in time, and subsequently argued that he wanted new windows. As indicated above, it was not up to Mr. Pollock (or Ms Pollock) to direct or decide what accommodation would be reasonable and appropriate.

Conclusion

[284] In the result, based on the foregoing, I am satisfied, on the balance of probabilities, and have determined 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