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 Doug Gordon against Winnipeg Condominium Corporation No. 30, alleging a breach of section 13 of *The Human Rights Code*.

BETWEEN:

DOUG GORDON,

Complainant,

- and -

WINNIPEG CONDOMINIUM CORPORATION NO. 30,

Respondent.

Appearances: Doug Gordon, 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, Doug Gordon, is a unit owner and resident in the complex. In his Complaint, he has alleged that the

Respondent Winnipeg Condominium Corporation No. 30 (the "Respondent") discriminated against him in the provision of services relating to the window replacement project, and failed to reasonably accommodate his special needs based on his disability (legally blind, with some limited vision), contrary to section 13 of *The Human Rights Code*, C.C.S.M. c. H175 (the "*Code*"). Mr. Gordon's Complaint relates, in particular, to the Respondent's decision to replace the original clear glass windows in his condominium unit with tinted windows.

[2] Mr. Gordon's Complaint is one of four Complaints which were filed against the Respondent by four separate Complainants with respect to the same window replacement project, the other three complainants being Ronald Franklin Pollock, 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 of the four Complaints on the merits thus continued in Winnipeg over a period of 11 days between March 5 and 23, 2012, with submissions being heard on April 13, 2012. 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 necessary or appropriate.

[13] Mr. Gordon testified on his own behalf, and called seven other individuals as witnesses, namely:

1. Susan Renard, one of the other Complainants;
2. Roy Fondse, a Winnipeg real estate agent;
3. Kent Woloschuk, an architect;
4. Dr. Richard Leicht, an ophthalmologist and specialist in diseases of the eye;
5. Delphine Kinvig, another one of the Complainants;
6. Krystyna Briggs, another unit owner in the condominium complex;

7. Judith Christopherson, an interior designer and Delphine Kinvig's sister.

[14] The Respondent called four witnesses to testify with respect to Mr. Gordon's Complaint, namely:

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

Expert Evidence

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

[16] The Complainants sought to call Judith 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.

[17] 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.

[18] 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 permitted to give opinion evidence where it would have an effect on Ms Kinvig's case as well. Ms Grammnd 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.

[19] 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 were: (1) a properly qualified expert; (2) relevance; (3) necessity; 4) reliability; (5) prejudice / probative analysis; and (6) the absence of an exclusionary rule.

[20] Ms Christopherson is Ms Kinvig's sister, and whether these are separate complaints or not, Ms Kinvig is involved in these proceedings. In the circumstances, this gave rise to 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. Mr. Gordon referred to it adding value to his, but that is not the role entirely of an expert. I could appreciate that it might be helpful to the Complainants, but being helpful is not enough. The evidence has to be necessary, and I was not persuaded that it was. This was not to be critical of Ms Christopherson's expertise in any way. I was simply not convinced that the criteria of objectivity, independence and necessity existed here.

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

[22] Ms Grammond sought to call John 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.

[23] 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.

[24] I had no doubt with respect to 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 is the subject of these Complaints, and on that basis, I was not sure that he could be said to be independent or unbiased. 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. In the circumstances, I determined that Mr. Wells could not testify as an expert witness in respect of these Complaints.

Facts

[25] 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.

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

[27] Mr. Gordon is the registered owner of one of the condominium units in 55 Nassau, together with a 0.2749% interest in the common elements. Mr. Gordon moved into 55 Nassau in or about 1986, and has lived in the same unit since then. His unit is on the fifth floor of the building and has two windows: a window in the living room and a smaller window in the bedroom, both facing east.

[28] Mr. Gordon testified that he has two eye conditions and is registered with the Canadian National Institute for the Blind (CNIB) as legally blind.

[29] 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.

[30] Mr. Gordon testified that he had heard about certain issues or difficulties with respect to windows over the years, particularly starting in about the mid-1990's. He himself, however, had had no significant problems with respect to his windows.

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

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

[33] The first reference to tinting appears in the Minutes of a Special Meeting of the Board on December 13, 2004, which states, *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.

[34] Commenting on the above excerpt from the December 13 Minutes, Mr. Wells stated that the Board was considering whether they would go for clear glass, as they currently had, or incorporate a tint, both for aesthetics and performance. Advantages and disadvantages of tinted glass were discussed. One of the advantages, which Mr. Wells said he discussed with the Board was that tinted glass would reduce the amount of glare and result in reduced cooling costs in the summer and reduced heating costs in the winter. A potential disadvantage, as indicated in the above excerpt, was that people might see their reflections in the glass more at certain times of the day.

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

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

[37] The Board communicates with unit owners in a number of ways. Minutes of monthly Board meetings are available to unit owners, on request. The evidence indicates, however, that at all relevant times, the minutes would not have been distributed on a monthly basis, but would have been packaged and sent to those who requested them three or four times a year. Minutes of special Board meetings are not available to unit owners.

[38] Mr. Gordon would not receive copies of the minutes of Board meetings. He was aware that the Board would make those minutes available to unit owners on request, but had never asked to receive them.

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

[40] 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. It is unclear whether Mr. Gordon was aware of that meeting. Mr. Schafer attended the meeting, and 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.

[41] The Board had also discussed and arranged for the preparation of a mock-up test window, with the proposed tint, to be installed in the living room in one of the condominium units. The mock-up window was installed in unit 406 on June 14,

2005. The Board's objective and understanding when it arranged to have that window installed was that this would provide an opportunity for the Board and unit owners to walk through a unit, and physically see, from both inside and out, what the proposed new window would look like. After the window was installed, however, the unit owner advised that she did not want people coming into her suite.

[42] As a result, the Board arranged for a notice with a digital photo of the test window in unit 406 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. Gordon testified that he heard about the test window, and went to look at it, but was only able to see it from the outside.

[43] 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.

[44] 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.

[45] Mr. Schafer testified that the Board did not receive any feedback or responses after this Memorandum was posted. Mr. Gordon's evidence was that he only heard about this sample later, after the contract had been signed.

[46] 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."

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

[48] The Minutes of the March 21 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."

[49] 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.

[50] 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.

[51] 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.

[52] 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.

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

[54] 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, for example, 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.

[55] Mr. Gordon testified that there were a number of objections at the May 8th meeting, although he did not specify the nature of those objections. He indicated that at the end of the meeting, he and one or more of the other Complainants went up to the front of the room and were trying to express concerns about the windows, but that the Board members did not listen. Mr. Schafer recalled having had only one conversation after the meeting, which was with someone other than the Complainants. Asked if any of the Complainants approached him to discuss tinting, he said no.

[56] 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.

[57] 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."

[58] Mr. Schafer testified that copies of the document would have been mailed to unit owners or left at the security office, with a notice on the bulletin boards or in mailboxes stating that there was an important document for residents to pick up. Mr. Gordon could not recall whether he had received or seen the Questions and Answers document or not. There is nothing to indicate that Mr. Gordon came forward with, or sent any questions to, the Board.

[59] As indicated previously, 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 the each unit's allocated share of the common expenses. Assessments for each unit were split up into four one-time payments over a period of three and a half years.

[60] By letter dated May 19, 2006, Mr. Gordon was advised that the estimated total amount of the special assessment for his unit, based on his proportionate share of the common expenses, was $11,378.00. The letter indicated that the first part of his share of that assessment, in the amount of $3,161.00, was due September 1, 2006.

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

[62] In or about August 2006, the Concerned Owners Committee prepared a petition to the Board, seeking a vote on the project and the removal of the entire Board, the property manager and legal counsel. Mr. Gordon was involved in the petition going forward. He went around the building and had some people sign it. The petition was presented to the Board, but the Board refused to accept it.

[63] In late July 2006, Mr. Pollock had filed a 25-page Statement of 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 Statement of Claim, the first of which was for an order that the Respondent "stop from proceeding, or . . . continuing with the new 'window project'".

[64] 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.

[65] On August 18, 2006, Mr. Gordon filed a Notice of Motion to be added as a co-plaintiff in the Pollock proceeding, and an Affidavit in support of that Motion. The Affidavit stated, in part, as follows:

> 5. I want to protect my interests in this litigation. I believe I may have some different concerns that are not addressed in the Statement of Claim in addition to the same concerns already pleaded, and in regards to the existing pleadings, I believe I may wish to argue them differently.
>
> . . . .
>
> 7. I am most concerned with the proposed tinting of the windows as I have a serious visual impairment. I am registered blind with some limited vision. Tinting of the windows will affect how well I will be able to see within my unit. Normally, with sunlight, I have difficulties seeing and the tinting will only aggravate the problem immensely. I have lived at 55 Nassau for 20 years with clear (untinted) windows and a change is undesirable for me.

[66] In his evidence at the hearing before me, Mr. Gordon referred to this Affidavit as his "official notification" to the Respondent of his "disability and opposition to the tinted windows". Mr. Gordon went on to say that he has never had a response from the Respondent to his Affidavit, nor has the Respondent ever contacted him in any attempt to accommodate his disability or try to investigate his human rights claims.

[67] Mr. Gordon agreed, on cross-examination, that he did not make any other written request for accommodation with respect to the windows, or submit any medical evidence with respect to this issue until after his human rights complaint had been filed. The Complaint was filed on May 2, 2007.

[68] Mr. Schafer testified that the Respondent viewed the Pollock Statement of Claim and Mr. Gordon's Affidavit as an extension of the opposition to the windows for financial reasons. He noted that there was no request for accommodation in the Affidavit, and that it would have been left with and handled by the Respondent's solicitors as part of the court proceedings. He said that "the group" had stated that they

wanted to get rid of the Board, to get rid of management, and to nullify the contract, and that this was just seen as another step in the process.

[69] On or about August 24, 2006, the Board circulated a Memorandum to Unit Owners regarding the window project. Mr. Schafer described the Memorandum as further explanation from the Board regarding the project, and dealing with issues brought forward by the group opposed to the windows, specifically items or misinformation in the petition they had circulated. Attached to the Memorandum were two legal opinions relating to the Board's obligation to maintain the common elements and its authority with respect to the window replacement project. Mr. Gordon said that he may have received this Memorandum, but could not say that he did.

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

[71] 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.

[72] Following up on the August 24th Memorandum, the Board held a third information meeting, on August 30, 2006. Mr. Gordon attended, but there was no evidence that he raised any questions or spoke at that meeting. 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.

[73] Mr. Gordon did not pay the first instalment of the special assessment when it came due on September 1, 2006.

[74] 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.

[75] The Board posted a second Memorandum to the unit owners of 55 Nassau on September 11, 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.

[76] Mr. Gordon did not go to see the windows at Place Louis Riel. He said that he did not need to go because he had already seen the windows in one of the other units in 55 Nassau, unit 203, where they had been installed. Asked if the first time he had seen the new windows was when he saw them in unit 203, he said that he believed so. It is unclear from the evidence whether the windows had actually been installed in unit 203 at that time. Correspondence filed as an Exhibit indicates that the new windows were not installed in unit 203 until sometime after September 12, 2006.

[77] 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:

> 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?
>
> (page 3)

[78] 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.

[79] On October 4, 2006, the Board gave notice of an information meeting to take place on October 11, 2006, to discuss financing options for the special assessment payments. Mr. Gordon had still not paid the first instalment of the special assessment. He thought that he attended the meeting, and believed that the discussion was restricted to financing.

[80] On October 24, 2006, Mr. Pollock filed an appeal from the Master's decision. That appeal and Mr. Gordon's Motion to be added as a plaintiff were abandoned on or about November 10, 2006.

[81] On October 25, 2006, the Board issued a Memorandum to unit holders advising that there was a delay due to some testing issues with respect to the windows, and indicating that windows would first be installed on the northeast corner. Mr. Gordon's unit faces east on the northerly half of building. He recalled that he received that memo on or about that date.

[82] 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.

[83] In or around November 14, 2006, the Respondent caused a lien to be registered in the Winnipeg Land Titles Office ("WLTO") against title to Mr. Gordon's unit with respect to non-payment of the special assessment.

[84] On November 16, 2006, a Notice to Residents of 55 Nassau was posted, advising that installation of the windows on the Main floor had begun November 15, 2006, and that once the Main floor was completed, the contractor would begin installing windows in the units located on the north east side. Mr. Gordon said that he likely received that notice, but could not recall it.

[85] 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. Again, Mr. Gordon said that he did not particularly remember this.

[86] On November 21, 2006, Krystyna Briggs, another unit owner who testified at the hearing but is not a party to any of the Complaints which are 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. Ms Briggs was one of the members of the Concerned Owners Committee. Mr. Gordon was not named as a party in those proceedings, but was involved with it as one

of three people dealing with the lawyer working for them. Mr. Gordon confirmed that when the Respondent would not accept the Concerned Owners Committee's petition, they decided to go with this Application in lieu of the petition.

[87] On November 22, 2006, the Respondent held its 2006 Annual General Meeting ("AGM"). The meeting was chaired by Michael Kay. Mr. Schafer testified that the Board had decided to bring Mr. Kay in as an independent chair to run meetings, after the Respondent's 2003 AGM had lasted for just over six hours, due to people monopolizing the meeting, throwing it off the agenda and speaking out of turn.

[88] The Minutes of the 2006 AGM refer to the election of the Board of Directors. Mr. Schafer said that the AGM was "in the middle of the window debate" and that the group opposed to the windows had put forth two candidates for the board. He said that prior to the election, he 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.

[89] 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.

[90] 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.

[91] Mr. Gordon sought to introduce recordings of the 2006 AGM which Mrs. Renard had made, and of a subsequent meeting on April 11, 2007 which he had made. Neither Mrs. Renard nor Mr. Gordon had requested permission to tape those meetings. After hearing submissions from all of the parties on this matter, I ruled that the tape

recordings would not be admitted into evidence. 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 the evidence is given under oath or affirmation and whether or not it would be admissible in a court of law", 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 and had testified with respect what took place at those meetings.

[92] On December 15, 2006, the Respondent distributed or posted a "Window Update" advising that the contractor would be installing windows in the small bedrooms of units that had balcony enclosures during the month of January 2007. Mr. Gordon's unit would have been one of those units. Mr. Gordon did not specifically recall seeing this Update.

[93] On or about January 5, 2007, a new tinted window was installed in Mr. Gordon's bedroom. Mr. Gordon did not dispute that he would have received advance notice that the contractors were coming to change the window in his bedroom or that he let them in. He recognized and acknowledged that he received a sheet of "Window Replacement Instructions" prior to work being done on his unit, and thought that this came with a notice as to when the contractor would be working in his unit. He also acknowledged that he was able to take the steps reflected in that document prior to the replacement of his bedroom window, including removing draperies and hardware on windows, removing pictures, and moving furniture, adding that he had to get help with some of it.

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

[95] 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*.

[96] 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 Ms Briggs' units only; it did not apply to Mr. Gordon's unit. No steps were taken to set aside or appeal that Order.

[97] On April 3, 2007, a lawyer acting for Mr. Gordon sent a letter to the Respondent's Property Manager, stating as follows:

> We have reviewed the decision of Justice Jewers pronounced February 14, 2007, declaring the underlying contract *ultra vires* until ratified by the tenants. We have advised Mr. Gordon that, based upon this decision, he does not have a legal obligation to, nor does he intend to, provide access to his condo for any work under the contract.

The evidence shows that the Respondent abided by that letter.

[98] On April 3 and 5, 2007, the Respondent held window information meetings to answer questions on the windows. Mr. Gordon could not remember those meetings taking place, or attending either of those meetings. Mr. Schafer remembered Mr.

Gordon having attended at least one of those meetings and chiding him about certain costs that had not been paid.

[99] On April 11, 2007, the Respondent held a special meeting of the unit owners, chaired by Mr. Kay, 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.

[100] 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.

[101] 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.

[102] On February 23, 2007, Mr. Pollock had filed a Notice of Application against Gardon, the Respondent and the Government of Manitoba in the Court of Queen's Bench, File No. CI 07-01-50819 (the "Gardon 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, and an order that Gardon halt all work until a decision has been made as to whether the contract is ratified by law. He also sought an order that Gardon was not allowed to do any work in his unit until the Human Rights Commission had made a decision in respect of a complaint which he had filed with the Commission in December 2006.

[103] 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 Mr. Pollock and four others, including Mr. Gordon, who had indicated that they would be applying to be added as Applicants.

[104] As previously mentioned, Mr. Gordon filed his Complaint in these proceedings on May 2, 2007. His Complaint, consisting of six numbered paragraphs, states, *inter alia*, as follows:

> 3. On August 18, 2006 I served the [Respondent] Board of Directors with the following in writing:
>
> *"I am concerned with the proposed tinting of the windows as I have a serious visual impairment. I am registered blind with some limited vision. Tinting of*

> *the windows will affect how well I will be able to see within my unit. Normally, with sunlight, I have difficulties seeing and the tinting will only aggravate the problem immensely. I have lived at 55 Nassau for 20 years with clear (untinted) windows and a change is undesirable for me."*
>
> The Board of Directors has never responded to that concern.
>
> 4. On January 5, 2007, when I was not home, the [Respondent] and Gardon . . . installed a tinted window in my bedroom, although I had disagreed with the entire window project. The new window affected my room by making it darker, which makes it harder for me to see in there than before.
>
> 5. The [Respondent] has put a lien and Notice of Sale on my unit in retaliation for my refusing to co-operate with their project.
>
> 6. On April 11, 2007, [the Respondent] held a meeting with the members to vote on the contract to install the new tinted windows. The vote was 69% in favour of the installation.]
>
> (Italics in original)

[105] On May 7, 2007, Mr. Gordon filed his Motion to be added as an Applicant in the Gardon proceeding.

[106] The Gardon Application came on for hearing before Justice Simonsen on May 18, 2007, at which time Mr. Gordon, Mrs. Renard and one other individual were added as Applicants to the proceedings. 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 replacement of the windows in the Applicants' units.

[107] 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 *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[108] 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."

[109] On July 30, 2007, the Respondent filed its Reply to Mr. Gordon's Complaint.

[110] The Respondent did not replace the window in Mr. Gordon's living room subsequent to the release of Justice Simonsen's decision. Mr. Schafer testified that the Board decided to let the Complainants keep their windows, and to devise a plan which would ensure that the building envelope would be inspected and maintained in a satisfactory manner.

[111] Between mid-2007 and the date of the hearing, crews continued replacing the windows in the other units at 55 Nassau, including those around Mr. Gordon's unit[and the two units owned by the Pollocks and the Renards. With respect to Mr. Gordon's and the other two units, new metal flashing has been installed, and attached to the building and sealed with caulking, in order to protect the building envelope while maintaining the original windows. The metal panels have also been replaced. No significant changes have been made, however, to the windows themselves. Mr. Gordon therefore continues to have the tinted window in his bedroom, as installed in January 2007, and the original window, with clear glass, in his living room.

[112] Mr. Gordon was asked on cross-examination whether he had had discussions with the Respondent or made a request of the Respondent, over the number of years while the windows were being replaced, from 2007 on, to have new windows put into his unit. His response was that the filing of his human rights complaint made it clear that he wanted windows with no tint and that he wanted new windows. Mr. Schafer's evidence was that he has not been involved in any discussions with Mr. Gordon with respect to other options for his windows.

[113] The Board has proposed maintaining the existing original window in Mr. Gordon's unit and those in 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 would be replaced, at the cost of the Respondent.

[114] There was no dispute that Mr. Gordon had since paid the special assessment in respect of his unit, in full.

[115] With respect to the costs of replacing the windows, as estimated by Mr. Wells, 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.

[116] 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.

[117] 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. Mr. Gordon agreed, on cross-examination, that the new tinted windows cut down on glare coming in from outside and are energy efficient.

Dr. Leicht

[118] Dr. Richard Leicht is a retina specialist within the specialty of ophthalmology at the Winnipeg Clinic. In a report dated November 20, 2007 and addressed to "To Whom It May Concern", Dr. Leicht wrote:

> I have seen Mr. Gordon in consultation. He has visual impairment. A recognized treatment for low vision is to increase illumination. It is reasonable that he would function better without tinted windows.

[119] On cross-examination, Dr. Leicht stated that he saw Mr. Gordon as a patient only once, as a referral, in his office. He said that typically individuals with the type of condition that Mr. Gordon has would want to take steps to maximize light. Dr. Leicht acknowledged that there could be situations where one would want to decrease light, including, for example, if it was causing unwanted glare. He also acknowledged that his use of the word "reasonable" in his report is less than a certainty, and that it was fair to say that tinted windows are not necessarily a problem for every person with low vision. Dr. Leicht said that there is an element of subjectivity in terms of what the individual is comfortable with.

[120] Dr. Leicht referred to a note he had made on his file to the effect that Mr. Gordon believed that tinting of windows would make it harder for him to see. He agreed that it was fair to say that his comment that it was reasonable that Mr. Gordon would

function better without tinted windows was based, at least in part, on his conversation with Mr. Gordon and what Mr. Gordon had expressed to him about his own views.

Kent Woloschuk

[121] 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.

[122] For the purpose of providing his opinion, Mr. Woloschuk had viewed the windows in Mr. Gordon's and the Pollocks' units, as well as the recently installed window system in another unit. Mr. Woloschuk stated that the tinted glazing on the new windows changes the quality of the natural light available in 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.

[123] 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.

[124] Mr. Woloschuk testified that it would not be too difficult to install clear, non-tinted windows as opposed to tinted ones in a unit. He concluded that if the other components with respect to the newer style of windows remained the same or similar, clear glazing would comply with the building code. In Mr. Woloschuk's opinion, it would have been cost neutral, or could have cost slightly less, to install clear glazing as opposed to tinted glazing if this had been done as part of the original installation. 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 for Mr. Gordon, but did not

take into account the additional cost of replacing the glass with tinted glass when Mr. Gordon eventually moved.

[125] Mr. Woloschuk said that on the assumption that the Respondent already had the windows constructed, his office had estimated the probable construction cost for changing the glass from tinted to clear and installing the windows in the building to 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 Mr. Gordon has two windows, the probable cost for installing the new windows, with clear glass, in Mr. Gordon's unit would be $8,000.

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

[127] 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 could 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 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.

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

now, however, the window insert would have to be modified with the locks lower on the frame. Again, Mr. Woloschuk was not in a position to estimate, off the top of his head, how much it would cost to change the locks.

John Wells

[129] Mr. Wells testified as the engineer on the window replacement project.

[130] He calculated the cost, including labour and materials, of supplying and installing a new living room window frame/glazing assembly and one bedroom glazing unit into the existing frame in Mr. Gordon's unit would be $10,300. To change out the glass later, replacing the clear glass with the tinted glass, would be $8,400.

Remedies

[131] The Complaint which Mr. Gordon filed did not address the remedies he was seeking. In an email dated February 11, 2012, Mr. Gordon set out the remedies he was seeking. Four additional remedies were listed in a subsequent email dated April 11, 2012.

[132] As indicated above, at the date of the hearing, Mr. Gordon still had the original window, with clear glass, in his living room, and the new tinted window in his bedroom.

[133] In response to certain allegations in the Respondent's Reply to his Complaint, Mr. Gordon stated that he had never said that he wanted to have the other owners pay for his windows or to retain his old windows in his unit. On cross-examination, Mr. Gordon was asked if he would agree that he and the other Applicants were asking the court in the Gardon proceedings to find that they did not owe any money on the assessment and that no work be done in his unit. His response was that he did not agree, adding:

> At this point the contract was not ratified. Yes, we wanted to stop it. If I had my way, I would have stopped the contract entirely because I didn't agree with the contract . . . -- we were

> holding back the monies because basically we didn't agree with the contract and I didn't agree with the contract at all. I think it was a very poor contract and it was very poorly represented to the owners.
>
> But having said that, once Justice Simonsen had made that decision and whatever decision she was going to make, I was always willing to pay what every other owner paid, but my view on the thing is if they would have defeated -- if we would have defeated that contract and if the owners had, in my view, been wise enough to vote down that contract, we would have had probably a better contract and I would have gladly paid any monies that the owners were going to pay.

[134] With respect to how this matter has affected him, Mr. Gordon testified that the meetings, the attempted communications with the Respondent, the legal proceedings, the Respondent's never dealing with the merits of the issues, the reaction of other owners and the Respondent, mocking him and others, singling them out as bothersome and saying that they should not be heard, were certainly insulting and unnecessarily long and tedious. He said that a lot of the owners are friendly, but some will not speak to him and treat him like he is "kind of a disease". He is afraid to talk at meetings because of how people reacted negatively when he tried to do so in the past.

[135] Mr. Gordon stated that his concern over the past number of years about having tinted windows had added a considerable amount of stress or distress to his life. The work he has had to do to address these issues, taking into account that he tends to do things more slowly because of his disability, has also interfered to some extent with his work. Mr. Gordon said that he is an information technology professional, and that dealing with the human rights issues has played havoc with his ability to pursue work, and put a tremendous amount of pressure on him. Mr. Gordon also expressed great concern with the fact that the Commission was not there to carry the case, as he thought they should be.

[136] With respect to indications by the Commission that it might be seeking an order that the Respondent implement certain policies and what the Respondent has itself 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.

[137] Asked about any 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 they discussed not only the elevators, but also the interphone or intercom system and other more general matters with him. The Board then posted notices, listing buildings where residents could go and see various types of features which had been installed in elevators, such as lighting and buttons, which might be appropriate for residents with any kind of problem. Ms. Kula said that the elevators which were eventually installed at 55 Nassau have a number of features, including bright lighting, different buttons, and voice enunciation, and in her view, are the best in the city.

The Positions of the Parties

The Complainant

[138] With the agreement of the parties, Mr. Pollock proceeded first with his final submission, and Mr. Gordon second. Mr. Gordon thus began his submission by stating that he adopted the arguments and principles which Mr. Pollock had advanced in his submission.

[139] With respect to his own Complaint, Mr. Gordon submitted that the evidence of several witnesses clearly established that he had a disability and special needs. In his submission, Dr. Leicht made it clear that he has a visual impairment, that

increased illumination is a recognized treatment, and that a reasonable solution for him is not to have tinted windows in his condominium. Mr. Woloschuk, the architect, also testified that tinted windows will affect the quality of light in rooms. Mr. Gordon argued that his own evidence confirmed Dr. Leicht's statements, that he made it clear that he observed the windows at a friend's place, unit 203, and would have difficulty with the tinted windows, that it was obvious that tinted windows would only enhance his disability-related difficulties, and that non-tinted windows would leave him in the exact same situation as before, living with a visual impairment at a manageable level.

[140] It was submitted that his evidence showed that he must make significant adjustments to enable him to participate fully in society. He has developed techniques and mechanisms for coping with his condition, and having tinted windows runs counter to the recommended methods he generally employs to adapt his environment to his needs. Whether subjective or objective, his strategies for coping with his disability would be diminished with tinted windows.

[141] Mr. Gordon submitted that the Respondent failed to prove that he did not have a disability. Ms Grammond had in fact said that the Respondent did not dispute that he had a disability. In Mr. Gordon's submission, the Respondent was clearly aware of his disability and his concerns stemming from it with respect to the proposed windows through more than one channel. Thus, he argued, he had publicly voiced his "disability-related concerns with the tint" at the meeting on May 8, 2006. Further, the Respondent was made aware of this formally, through the court documents he filed and some of the court cases related to the window project, and specifically his Affidavit of August 18, 2006. If the Respondent was not satisfied that he had adequately proven his disability or associated needs, it was obliged to inquire further or ask him to substantiate his claim verbally or in writing.

[142] Mr. Gordon argued that the Respondent failed to reasonably accommodate him and the other Complainants and their disabilities. Even though he had made his need for accommodation clear to the Respondent, through comments he

made at public owners' meetings and affidavits he filed in court, the Respondent did not act on this information, other than to ignore or dismiss it.

[143] In Mr. Gordon's submission, the Respondent did not follow any process, or at least any sufficient one, for considering his disabilities, and for considering whether accommodation was warranted, or whether reasonable accommodation was possible. He argued that the Respondent had an obligation to initiate an accommodation search on receiving a request for accommodation, and to conduct that search in a manner that was respectful of the person's dignity. He added that the person making the request must also participate in the process, and cannot refuse a reasonable accommodation offer. Mr. Gordon submitted that he never had the opportunity to engage in the process due to the Respondent's refusal to consider any options.

[144] Mr. Gordon argued that there was no substantive content to evaluate in this case. From the outset, the Respondent was convinced that no deviation from the planned project could be accepted. It demanded full compliance with its plan for the windows, and did not allow any dissent or entertain any requests for modifications or alterations of any kind.

[145] He said that at one point, the Respondent declared undue hardship on the basis that having different windows would result in decreased property values, but had since abandoned that position. The Respondent also cited the cost of modifications. Mr. Woloschuk's evidence made it clear, however, that it was possible to install clear windows. In Mr. Gordon's submission, if the Respondent had acted when the windows were being installed for the other owners, the cost factor would have been neutral.

[146] Mr. Gordon submitted that the evidence does not establish that replacing his windows at this time would result in undue hardship to the Respondent. He argued that the estimated cost for replacing all of the Complainants' windows was approximately $40,000. He noted that Mr. Schafer had said that increased condominium fees could pay for the cost of their new windows. In his submission, this nullified any argument of undue hardship in terms of costs.

[147] Mr. Gordon submitted that as a last resort, in the last week of hearings in these proceedings, the Respondent suggested that it had accommodated him and the other Complainants by having them keep their old windows. He noted that Mr. Pollock had shown in his submission why this was unacceptable, and referred me to that submission. He also pointed to the fact that he has a tinted window in his bedroom as evidence that the Respondent never intended leaving the old windows in as an accommodation. That window, he said, was put in before he was able to stop it. He submitted that his testimony shows that he never said that he wanted the old windows.

[148] Mr. Gordon further submitted that the Respondent had attempted to suggest that modifications were subject to undue hardship because the Complainants were so difficult to get along with and made it impossible for the Respondent to respond to them. Mr. Gordon stated that there had been lots of issues over the years at 55 Nassau, including issues which neither he nor the rest of the Complainants were involved in. He observed that 55 Nassau is a bit of a contentious place, but that it goes without saying that this does not make him or the others troublemakers. They had a right to go to court, and there was really no undue hardship just because they did so.

[149] In Mr. Gordon's submission, the Respondent did not have a right to ignore notification of the Complainants' disabilities on the basis that it was part of an affidavit in a separate legal proceeding. Three legal cases were initiated after the contract was signed with Gardon, two of which dealt with disabilities, yet the Respondent claims that it did not know about such issues. In his view, it was hypocritical to argue that what happened was the fault of the Complainants because they did not make their disabilities known earlier.

[150] Mr. Gordon stated that the minutes of Board meetings which were filed as Exhibits in these proceedings were revealing. His conclusion or impression, after reviewing those minutes, was that the Board purposefully kept the window replacement project as inconspicuous as possible to keep the unit owners uninformed, and sanitized the minutes. The Board knew that the owners would object to the contract. In his view, what is interesting is not so much what is in the minutes, but what is left out. Over the

two-year period prior to the signing of the contract, the minutes make no mention of, among other things, disability issues, the cost of the project, or a design change. In his submission, the owners were blind-sided with the contract.

[151] He argued that the strategy of keeping the owners uninformed continued after the contract was signed. He said that when he and others investigated, they discovered that they could have had a contract that was much less expensive and would have dealt with their disability issues. He argued that they had a presentation by a windows expert planned for the April 11, 2007 meeting where the ratification vote was to be held. That presentation would have dealt with disability issues, but he was not allowed to make it. In his view, Justice Jewers took the decision away from the Board and gave it to the owners. The Board then arranged it so that the unit owners could have their vote, but not hear all of the information they needed to make an appropriate decision.

[152] Mr. Gordon argued that various actions of the Board, including its control over what was sent out or communicated to owners, and the actions and attitude of the Board and the chair at meetings, were adversarial and created a very prejudicial environment for bringing up disability concerns and issues. That was the adversarial environment the Complainants encountered, both prior to and after the signing of the contract, when they tried to communicate their disability concerns to the Board, and that environment has continued since then.

[153] The remedies which Mr. Gordon was seeking were set out in his email dated February 11, 2012. Those remedies, with the exception of paragraph 3 which Mr. Gordon felt was no longer necessary, are as follows:

> 1. Costs and damages.
>
> 2. As confirmed by the architect we hired, the following remedy is possible:
>
> That the windows be constructed exactly like the new windows put into the other owners' units with the following exceptions:
>
> - that the windows contain no tinting.

> - that the window locks and cranks (if used) be somehow recessed into the window frame to prevent visually impaired persons from bumping into them and harming themselves.
>
> - that the window locks and cranks are low enough to be easily accessible from a standing position on the floor to prevent possible accidents from happening when standing on a chair or ladder.
>
> All these requirements would apply to the bedroom window and living room window. The current window in my bedroom must be replaced with a new window as that window is now a tinted window installed in 2007.
>
> That the entire schedule of the window replacement project take into account my disabilities that requires a need for organization. That is, the workers will work on one room at a time from start to finish. There will be a 10 day break before they start the next room so that I can organize my furniture accordingly. Working on 2 rooms at once would be intolerable as I have such a limited space in my condo.
>
> . . . .
>
> 4. [T]hat a monitoring order be made.
>
> 5. [T]hat the adjudicator retains jurisdiction until all matters are resolved in this case and all orders implemented. This would apply to all complainants in this hearing.

[154] With respect to the matter of damages as listed in #1 above, Mr. Gordon referred to *Di Salvo* v. *Halton Condominium Corporation No. 186*, 2009 HRTO 2120, noting that it dealt with some of the same issues as the Complainants had had, and indicated that he was seeking a similar amount on account of damages as in that case, where the Ontario Human Rights Tribunal awarded $12,000 for injury to dignity, feelings and self-respect.

[155] With respect to the relief sought in #2 above, Mr. Gordon indicated, in the course of his submission, that if it would make it easier and if the Respondent would like to develop a common window which it can use in the future for persons with disabilities, he would be willing to accept the windows that Mr. Pollock was proposing. If that could not be done, he said, he would take the windows just like everyone else in the building, but without tinting. He also stated that the ten day break before starting another room,

as set out in #2, was negotiable, and that all he expected was that the Respondent would be reasonable.

[156] The updated list of remedies which Mr. Gordon had circulated by email on April 11, 2012, listed four additional forms of relief which he was seeking. Those four items mirror several of the forms of relief being sought by Ms Kinvig with respect to her Complaint, as set out in Exhibit 58, regarding steps which the Respondent's Board should be required to take, including disclosing to all unit owners the amount spent on legal and other fees fighting Mr. Gordon and others with respect to the window project, attending a reasonable accommodation seminar, adopting an operations manual to guide it in the future, and publishing a form of document absolving the Complainants from any blame for the proceedings which followed the announcement of tinted glass windows.

[157] Mr. Gordon did not elaborate in his submission on any of the four additional remedies which he had listed in his email of April 11, 2012.

The Commission

[158] 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.

[159] 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. (*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.

[160] 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.

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

[162] 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.

[163] 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 windows. It was submitted that such an assessment should be contextual, and that sifting through the evidence with respect to the litigation between certain of the Complainants and the Respondent might be difficult, given the abundance of evidence with respect to litigation that was unrelated to human rights issues specifically. In the Commission's submission, the focus should be on whether there was sufficient evidence of the possibility that the Complainants' disabilities would be impacted by the window replacement project or the decision to install tinted windows in all units in the building.

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

[165] 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.

[166] 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.

[167] 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.

[168] 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).

[169] 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.

[170] 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

[171] 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, as submitted by the Commission, it is clear that the Complainants bear the onus of establishing a *prima facie* case, consisting of three components.

[172] With respect to the first component, that is, whether the Complainants have a disability, Ms Grammond stated that it is not disputed that there are disabilities.

The diagnoses are in evidence. It is not the case, as Mr. Gordon argued, that the Respondent failed to prove that there was no disability. The Respondent has not attempted to prove that there is no disability; it has not taken issue with this from the beginning.

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

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

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

[176] Ms Grammond submitted that from the beginning of 2004 up until April 13, 2006, when the contract was signed, Mr. Gordon had the opportunity to involve himself 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.

[177] 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.

[178] Ms Grammond noted that while Mr. Gordon said that he spoke to Mr. Schafer about human rights after the meeting on May 8, 2006, Mr. Schafer said that did not occur. Mr. Gordon's evidence in this regard is not supported in writing and there is no indication that anything was submitted to the Respondent after May 8, nor is there any reference to this in Mr. Gordon's subsequent Affidavit. In Ms Grammond's submission, there is simply nothing to support that this occurred.

[179] The Respondent issued letters to owners reflecting their portion of the special assessment in May 2006, and in July 2006, Mr. Pollock filed a claim against the Respondent in court, seeking to stop the project as a whole.

[180] Mr. Gordon applied to be added as a plaintiff in that proceeding, and swore an Affidavit on August 18, 2006 in which he expressed concern about the tinting. He said that this was his official notice to the Respondent with respect to that issue. Mr. Schafer testified that the claim and the Affidavit were perceived by the Respondent as an extension of the opposition to the project because of finances and costs, and another step in the opposition process. Ms Grammond noted that Mr. Gordon was never added as a co-plaintiff in those proceedings, as the claim was struck, and that nothing further was done other than what was going on contemporaneously, that is, the petition and attempt to remove the Board.

[181] In mid-August 2006, the Board was served with the two petitions from the Concerned Owners Committee: one for a vote on the windows and one to remove the Board. Mr. Gordon's will, or the will of the Committee which Mr. Gordon was part of, was certainly that there should have been a vote of unit owners and the Board should be removed.

[182] Mr. Gordon testified that he did not attend at Place Louis Riel to see the windows in September 2006, because he had already seen the window in unit 203. It was submitted, however, that the windows had not yet been installed in that unit.

[183] Window installation started in October 2006, and the Briggs Application, seeking a vote with respect to the window project, was filed November 21, 2006. Mr. Schafer's unchallenged testimony was that he told the unit owners at the AGM on November 22, 2006 that a vote for the incumbent Board was a vote for the windows, and the Board was re-elected. The window installation continued throughout.

[184] On January 5, 2007, a new tinted window was installed in Mr. Gordon's bedroom. In Ms Grammond's submission, this was a significant event. Mr. Gordon had sought to be added to the Pollock claim, sworn an Affidavit that he was opposed to the tinted windows, been opposed to the project as a whole, and been involved in the Concerned Owners Committee's petition. Yet he was now seemingly agreeable to the window being installed in his bedroom. There is no indication that he tried to prevent the contractors from coming in. He had the space ready for them, as he had been asked to do. There was no indication that he made any noise or comments about this to the Respondent at the time. Even though the Briggs Application was pending and there could still be a vote coming with respect to the project, the window was installed and not opposed.

[185] On February 14, 2007, Justice Jewers ordered that a vote be held, and on February 23, 2007, Mr. Pollock filed another court proceeding, the Gardon proceeding, again wanting the contract stopped. Mr. Gordon sought to be added to that proceeding where specific remedies that were being sought again related to money and stopping the project. It was submitted that even through 2007, by seeking to be added as an applicant in the Gardon proceeding, Mr. Gordon was trying to stop the window project.

[186] Ms Grammond noted that while Mr. Gordon claims that he never said that he wanted to keep his old windows, that was exactly what the Gardon Application was for, to stop the project from going ahead. In her submission, Mr. Gordon had very

clearly stated in the current proceedings that he did not think that the contract should have been accepted by the unit owners, that they could have done better, and that he wanted to stop the project. In fact, she argued, his final submission showed that he is still fixated on the contract amount and the process by which the contract was undertaken by the Board.

[187] 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. In response to Mr. Gordon's submission regarding a presentation by Mr. Turner being proposed at that meeting and not allowed, Ms Grammond argued that this was not reflected in the evidence: Mr. Gordon had referred in his evidence to Mr. Turner having a different approach, but did not say that he wanted to do a presentation at the meeting and was denied; there was nothing about this in the minutes; and it was never put to the Respondent's witnesses.

[188] Ms Grammond submitted that 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. She 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.

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

[190] Ms Grammond noted that although the Respondent could 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.

[191] When the Respondent filed its Reply to Mr. Gordon's Complaint on July 30, 2007, it seemed that Mr. Gordon was looking to either not pay for the new windows or keep his old windows.

[192] 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, Mr. Gordon's position was that he did not want his windows replaced. The window installation at the building went on for years. Mr. Gordon knew that the work was continuing, but there is no evidence that he asked at any time to have new windows.

[193] Noting that Mr. Gordon had accused the Board, in his submission, of trying to keep the window replacement project a secret and sanitizing the minutes, Ms Grammond argued that there was no basis for any such allegation or accusation; this was never put to the Respondent's witnesses, and was clearly not borne out by the evidence.

[194] Ms Grammond said that she did not disagree with Ms Khan's statement, in her closing, that I should look at whether the Complainants wanted to engage in a discussion. She submitted, however, that it was clear that Mr. Gordon did not want to engage in a discussion. Rather, his actions from the beginning up to the present, as reflected in the record, showed that he wanted a different contract, that he did not like the window replacement project, and that he did not want it to proceed. In her submission, all of the details, the litigation, the petition, and more, are relevant to the Respondent's perception of Mr. Gordon's Affidavit from August 2006. The whole course of conduct and all of the proceedings need to be considered, as they are all intertwined.

[195] 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 tint on each Complainant as an individual and special needs relating thereto are subjective. The evidence showed that different people with different conditions will perceive tinting and light transmittance differently.

In Ms Grammond's submission, such a special need relating to the windows is not something that the Respondent should automatically have been aware of.

[196] Ms Grammond pointed out that while Mr. Gordon made his issue known in August 2006, he did not ask for an accommodation. One look at the timeline shows that medical issues were not raised until very late in the process, when the Complainants knew that the windows were going to be replaced. In Ms Grammond's submission, the timing and the way in which matters have unfolded go to the credibility of the allegations herein.

[197] 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 its 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.

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

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

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

[201] 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.

[202] Regarding the second part of the test, whether the Respondent chose the windows honestly and in good faith, Ms Grammond submitted that this also was 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.

[203] 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.

[204] As for the third part of the test, which Ms Grammond identified as being whether tinted windows were reasonably necessary to accomplish these goals, it was submitted that this too was satisfied. In this regard, Ms Grammond referred to the goal

of increased energy efficiency and the evidence of notable savings in actual energy consumption which had been achieved.

[205] Ms Grammond noted that the evidence showed that the Board chose the lightest tint from the options available to it, the tint which was as close to clear glass as possible.

[206] Notwithstanding all of this, Mr. Gordon and the other Complainants who continue to reside in the building still have their old, clear 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 Mr. Gordon has had trouble with his windows.

[207] Ms Grammond noted that while keeping the old windows in these units may or may not be the best accommodation, it did not have to be the best. The test, as referred to in 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.

[208] 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 ¶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 ¶39). From the Respondent's point of view, it has given by deciding to leave the existing windows in Mr. Gordon's unit 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.

[209] 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.

[210] It was further submitted that if I felt 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 that Mr. Gordon and the two other existing unit owners keep the windows they have and be refunded the portion of the special assessment which they paid with respect to the 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 the Complainants, were benefitting from, among other things, the improvements to the building envelope and the energy savings.

[211] In terms of damages, the Respondent's position was that no damages should be awarded to Mr. Gordon or any of 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. Gordon is requesting, and should be considerably less than the $4,000 awarded in the *Budge* decision which Ms Khan referred to in her submission.

[212] 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.

[213] She noted that Mr. Schafer had testified that the reserve fund was spoken for and that a number of other projects were ongoing. It was submitted that it would be an undue hardship on the Respondent at this stage if it had to incur those costs.

[214] Ms Grammond noted that Mr. Pollock had argued in his submission that he no longer wanted Mr. Woloschuk's design, that he wanted Mr. Wells' design, which meant that he would also have to go with Mr. Wells' pricing. Mr. Gordon then said that he would take the same. In Ms Grammond's submission, there is no evidence that Mr. Gordon needs slider windows, and no reason he should be getting the modified windows that the Pollocks are seeking.

[215] With respect to the public interest matters that Ms Khan had raised, Ms Grammond noted that the Respondent has put into evidence policies which it had 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.

[216] As regards Ms Khan's suggestion that Board members attend a workshop or course, Ms Grammond submitted that there really is 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. She remarked that in any event, this was not a concern for the Respondent, and that education is probably never a bad thing.

Analysis and Decision

[217] 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 Mr. Gordon, by failing to make reasonable accommodation for their (his) special needs based on disability when deciding to install or installing new windows in all condos.

[218] 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.

[219] "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).

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

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

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

> . . . . Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility . . . .
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. *In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the*

> *probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.* . . . Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.
>
> (Emphasis added)

[222] 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.

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

[224] The Respondent does not dispute that Mr. Gordon has a physical disability within the meaning of clause 9(2)(l) of the *Code*. There is no question that he is legally blind, with some limited vision.

[225] The Respondent also does not dispute, and I accept, that at all relevant times Mr. Gordon had certain special needs which were related to his visual impairment. The Respondent had in fact taken steps over the years to assist or accommodate

owners and residents who, like Mr. Gordon, are visually impaired. Thus, for example, the Respondent had seen that they were provided with large-print copies of notices which are otherwise posted in the building.

[226] What is in dispute, at this initial stage, is whether Mr. Gordon has established that at all relevant times he had a special need for clear glass or non-tinted windows based on his disability; and if so, whether Mr. Gordon 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.

[227] With respect to whether he has a special need for clear glass windows based on his disability, Mr. Gordon has argued that it was or is obvious, and that he made it clear, that tinted windows would only enhance his difficulties which are related to his visual impairment. While I accept that it is obvious that Mr. Gordon has a visual impairment and certain needs related thereto, I do not agree that it was or is obvious, or that Mr. Gordon made it clear, that tinted windows would only enhance his difficulties, or in any event, that it was or is obvious or has been established that he has a special disability-related need for non-tinted windows.

[228] In terms of whether it is obvious that Mr. Gordon has such a need, I am satisfied, based on the evidence as a whole, including that of Mr. Gordon's own witnesses, that the effect that tinting may have on an individual with a visual impairment is to at least some extent subjective; that it will depend on the particular individual, on his or her condition, on the circumstances, and on the tint itself.

[229] Thus, Dr. Leicht, who was familiar with Mr. Gordon's condition, said only that it was "reasonable" that Mr. Gordon would function better without tinted windows. Dr. Leicht confirmed on cross-examination that "reasonable" meant less than a certainty. He agreed that tinted windows would not necessarily be a problem for every person with low vision, and that there is an element of subjectivity in terms of what an individual is comfortable with.

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

[231] In light of the foregoing, I cannot conclude that it was or is obvious that tinted windows would only enhance Mr. Gordon's difficulties.

[232] Mr. Gordon also argued that he had made it clear that he would have difficulty with tinted windows, with less natural light coming into his condo. In advancing that argument, Mr. Gordon relied in particular on his own evidence and that of Dr. Leicht.

[233] In my view, the evidence of Dr. Leicht is less than definitive, and falls short of establishing that Mr. Gordon has a special need for untinted windows. As indicated above, Dr. Leicht stated only that it was "reasonable" that Mr. Gordon would "function better" without tinted windows, and agreed that "reasonable" meant less than certain. Dr. Leicht had specifically noted on his file that Mr. Gordon believed that tinting would make it harder for him to see, and acknowledged that the comment that it was reasonable that Mr. Gordon would function better without tinted windows was based, at least in part, on his conversation with Mr. Gordon and Mr. Gordon's own views on the subject.

[234] Mr. Gordon specifically referred in his submission to the statement in Dr. Leicht's report that a "recognized treatment for low vision is to increase illumination". At best, that statement and the rest of Dr. Leicht's evidence indicate that it would seem preferable or desirable for Mr. Gordon to have clear glass as opposed to tinted windows. 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 or desires. In my view, this is an important distinction.

[235] I would also note that Mr. Gordon acknowledged that he did not submit any medical evidence to the Respondent until after his Complaint had been filed. The report from Dr. Leicht is dated November 20, 2007, more than six months after Mr. Gordon filed his Complaint.

[236] With respect to his own evidence on this point, Mr. Gordon has relied in particular on his Affidavit sworn August 18, 2006, and especially paragraph 7 of that Affidavit, which was subsequently quoted in paragraph 3 of his Complaint, and is repeated below for ease of reference:

> I am most concerned with the proposed tinting of the windows as I have a serious visual impairment. I am registered blind with some limited vision. Tinting of the windows will affect how well I will be able to see within my unit. Normally, with sunlight, I have difficulties seeing and the tinting will only aggravate the problem immensely. I have lived at 55 Nassau for 20 years with clear (untinted) windows and a change is undesirable for me.

[237] That Affidavit and Mr. Gordon’s evidence in this regard must, in my view, be considered in context and in light of the surrounding circumstances.

[238] First, with respect to the effect of tinting or of the particular tint in question on Mr. Gordon’s ability to see, it is significant, in my view, that there is nothing to indicate that Mr. Gordon raised any issues or concerns with respect to the replacement of the windows, and in particular, tinting of the windows, at any time prior to the signing of the contract on April 13, 2006.

[239] The evidence of the Respondent, which was not challenged, is that the Board chose the lightest tint that was presented to it. The Board then undertook to make it possible for unit owners and residents to see and comment on the proposed windows, and the tint in particular, before the contract was signed, by arranging to have

the test window installed in unit 406 and samples of the tinted glass posted on the window in the lounge, and notifying owners and residents of those arrangements.

[240] On the evidence, it is unclear when or to what extent Mr. Gordon was aware of, or took advantage of, these opportunities. I recognize that problems developed with respect to viewing the window from inside unit 406. Mr. Gordon confirmed, however, that he at least saw the tinted window in unit 406, even if only from the outside. There was no suggestion that tinting or the particular tint caused him any concern at that point. Nor is there any evidence that he asked any questions, provided any feedback, or expressed any concern about the windows or the tinting of the windows during this period of time.

[241] Second, although Mr. Gordon deposed in his Affidavit that tinting of the windows would affect how well he could see within his unit and "aggravate the problems immensely", the evidence indicates that he had not yet seen the tinted windows from the inside of a unit, or what effect they might actually have within the unit, when he swore the Affidavit.

[242] In this regard, Mr. Gordon referred in his submission to having observed the tinted window at a friend's unit, unit 203. The evidence is unclear as to exactly when the window was installed in unit 203. I am nevertheless satisfied, on a balance of probabilities, that it was not installed until at the earliest, mid to late September 2006, or at least one month after the Affidavit was sworn. Thus, at the time Mr. Gordon swore his Affidavit, the only tinted window that he would have seen would have been the one in unit 406, which he had seen from the outside only, and as stated above, he had not raised any concerns with respect to that window.

[243] Third, the evidence establishes that after the contract was signed, Mr. Gordon's focus was on the overall cost of the project and challenging the contract itself.

[244] Thus, as a member of the Concerned Owners Committee, a group which was opposed to the contract, he was involved in circulating a petition for a vote on the contract and to remove the Board. His testimony at the hearing, where he stated that he and other members of the Committee were "just really unhappy that any kind of contract could have been signed for over $4 million that was not voted on by the owners", is telling. He did not agree with the project in its entirety and did not want it to proceed.

[245] Around the same time, Mr. Gordon filed a Motion to be added as a co-plaintiff in the claim which Mr. Pollock had commenced against the Respondent, thereby seeking "to protect [his] interests in [that] litigation". The central theme of that litigation, as described by the Master, was to stop or change the window project as a whole. Mr. Gordon's Affidavit of August 18, 2006 was filed in support of his Motion to be added as a party to that litigation.

[246] At the hearing before me, Mr. Gordon described his August 18 Affidavit as his "official notice" to the Respondent of "his disability and opposition to the tinted windows". Again, that description is telling. Mr. Gordon was opposed to the windows and the project itself. There is no mention in his Affidavit of, and no request for, accommodation. Further, to interpret it as such would, in my view, be inconsistent with the basis of the claim and of Mr. Gordon's Motion to become a co-plaintiff to that claim, in that the claim was directed towards getting rid of the contract, not seeking accommodation thereunder.

[247] Fourth, I am satisfied that the language of the Affidavit itself, including paragraph 7 thereof, falls short of identifying a special "need" for untinted windows. Mr. Gordon stated in paragraph 7 that he was "concerned" that the proposed tinting would aggravate the problem or his "difficulties" immensely. In my view, such concerns and difficulties do not equate to needs. The presence or use of the word "immensely" does not alter my conclusion in this regard. Mr. Gordon further stated, in paragraph 7, that such a change would be "undesirable" for him. In other words, Mr. Gordon was of the view that it would be preferable or better for him if he did not have the proposed tinting.

In my view, that is not enough. As previously stated, the *Code* requires the accommodation of disability-related "needs", not desires, preferences, or wants.

[248] Fifth, in considering whether Mr. Gordon has established that he has a special need for non-tinted windows, the fact that a tinted window was installed in Mr. Gordon's bedroom in January 2007, and the circumstances relating to the installation of that window are, in my view, particularly significant. The evidence discloses, and I find as a fact, that Mr. Gordon not only had advance notice that the contractors were coming to install the window, and let them in, but that he also took steps to get the room ready for them to do their work. It is difficult, if not impossible, to reconcile Mr. Gordon's claim that he has, and made clear that he has, a special disability-related need which required, and for which he was seeking, accommodation, with his actions in not only allowing the window to be installed in his bedroom, without objection, but actually facilitating its installation.

[249] I would note that Mr. Gordon alleged in his Complaint that the Respondent and Gardon installed the tinted window in his bedroom when he was not home, even though he had disagreed with the entire window project. The first part of that allegation suggests that the window was installed without his knowledge and without warning, which I have found not to be the case. The second part of that allegation further confirms that Mr. Gordon disagreed with the contract and the windows project as a whole, not that he was seeking to be accommodated thereunder.

[250] In his final submission, Mr. Gordon also argued that the Respondent and Gardon put the window in before he could stop them. There is no evidence, however, that he made any effort to stop or prevent that window being installed at that time. On the contrary, I have found that Mr. Gordon took steps to facilitate its installation.

[251] Sixth, while Mr. Gordon testified that the window which has been installed in his bedroom and those installed in other units darken the room and make it more difficult for him to see, his evidence in this regard must be weighed against the fact that he had already decided, without having actually seen the new windows, that they would

make it more difficult for him to see. By this, I am not saying that the tint had no effect in terms of the quality of the light in a room, but only that consideration should be given to the fact that Mr. Gordon had already made up his mind about the effect of the tint before even seeing the windows.

[252] Seventh, in describing the effect of the tinted window that was installed in his bedroom in more concrete terms, Mr. Gordon stated that he now has to turn on the light to go into his bedroom. While I can appreciate that he is not happy with this situation, I cannot conclude that this is sufficient to establish that he had or has a special need which required accommodation.

[253] In light of the foregoing, I am not satisfied, on a balance of probabilities, that Mr. Gordon has established that he had or has a special need for untinted windows.

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

[255] I have already concluded that the effect of tinting on an individual with a visual impairment is at least to some extent subjective, and depends on, among other things, the individual's own condition and circumstances. Thus, without sufficient notice that Mr. Gordon had a special need for clear glass windows due to his disability, which required accommodation, I cannot conclude that the Respondent would have known of this.

[256] In this regard, as stated above, the Board provided opportunities for unit owners and residents, including Mr. Gordon, to see and comment on the proposed tint prior to April 13, 2006 when the contract was signed. There is no evidence, however, that Mr. Gordon asked any questions, provided any feedback or raised any issues or concerns with respect to the windows, or the tinting of the windows, during this period of time.

[257] Mr. Gordon argued that he “voiced his disability-related concerns with the tint” at the information meeting on May 8, 2006. That argument is not supported by the evidence. Rather, Mr. Gordon’s evidence was that he went up after the meeting to try to express “concerns” about the windows, but that the Board members did not listen. Mr. Schafer denied that Mr. Gordon spoke to him, but in any event, Mr. Gordon’s own evidence indicates that whatever his concerns may have been, the Board did not hear them. In spite of that, there is no indication that Mr. Gordon made any attempt to pursue this with the Board.

[258] The Questions and Answers document which was distributed shortly after that meeting encouraged unit owners to put their questions in writing and send them to the Board. Mr. Gordon could not recall whether he had seen that document. Regardless of whether he saw it or not, there is nothing to suggest that he submitted any questions to the Board, either verbally or in writing, or that he followed up with the Board on any concerns he may have had.

[259] After he learned of the contract for the windows project and the reserve fund levy, Mr. Gordon’s involvement or activities, through the Concerned Owners Committee, were centred around the contract itself, the cost of the project and the lack of consultation with the unit owners as a whole. He was arguing against the contract and the project as opposed to seeking accommodation thereunder. The Pollock proceeding, which he was seeking to join, was similarly aimed at stopping or changing the window project as a whole.

[260] Mr. Gordon relied heavily on his Affidavit of August 18, 2006 as being his official notice to the Respondent of his disability. In all of the circumstances, and for the reasons which were set out above, I find it to be reasonable, and accept, that the Respondent viewed that Affidavit as an extension of the opposition to the contract, and not as notification of a special need and/or a request for accommodation by Mr. Gordon.

[261] As noted by the Respondent, Mr. Gordon never became a party to the Pollock proceeding, the claim having been struck out. In spite of that, Mr. Gordon made

no effort to pursue any request for accommodation based on the difficulties or concerns which he said he had raised in his Affidavit. Instead, he became involved in the Briggs proceeding, which was again in opposition to the contract and the windows project as a whole. He also allowed one of the windows to be installed in his bedroom, without objection.

[262] After Justice Jewers had ordered that a vote he held, Mr. Gordon had a lawyer write a letter indicating that he would not provide access to his condo for any work to be done until the contract had been ratified. There was no mention of any human rights concerns or issues in that letter.

[263] The evidence indicates that at the April 11 meeting to vote on the contract, Mr. Gordon sought to have a different option considered, which he said would have included untinted windows and been less expensive. Again, however, this was focused on a different contract and cost.

[264] The majority of the unit owners voted in favour of the contract, and the day after the vote, Mr. Gordon filed his Complaint.

[265] Thus, up until the time that he filed his Complaint herein, Mr. Gordon's position had been that he was opposed to the contract. Based on the evidence, I am not satisfied that he had sufficiently communicated any special need for untinted windows or any need for accommodation based on his disability.

[266] Mr. Gordon has argued that the Respondent had no right to ignore notification of his disabilities. It is not a matter of whether Mr. Gordon had a disability, but whether he had a particular need, that is, a need for clear glass windows. As previously stated, I am not satisfied that Mr. Gordon has shown that he has such a need. Moreover, Mr. Gordon had the primary obligation to ensure that the Respondent had sufficient information to trigger a duty on its part to investigate whether he required accommodation. Based on the evidence, I am not convinced that he met that obligation. Accordingly, a duty to investigate did not arise.

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

[268] 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.

[269] In this instance, the Respondent arranged for Mr. Gordon to keep the original window in his living room, and for steps to be taken to ensure that the building envelope would be protected. The Board has proposed maintaining the existing original window, with regular inspections by the Respondent's maintenance department under the supervision of the building engineer. A new window has been purchased, and would be installed to replace the existing original window, at the Respondent's cost, when Mr. Gordon moved.

[270] Mr. Gordon therefore continues to have the original, clear glass window in his living room. He also continues to have the tinted window in his bedroom, as installed in January 2007. In all of the circumstances, I am satisfied that this was a reasonable accommodation.

Conclusion

[271] In the result, and based on the foregoing, I am satisfied, on a balance of probabilities, and have determined that the Respondent did not contravene section 13 of the *Code*, as alleged or at all. The Complaint is therefore dismissed.

Dated at the City of Winnipeg, in Manitoba, this 6th day of June, 2016.

"M. Lynne Harrison"
Adjudicator