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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Mick Shannon

COMPLAINANT

A N D:

The Owners, Strata Plan KAS 1613

RESPONDENT

REASONS FOR DECISION

Tribunal Member:	Lindsay M. Lyster
Counsel for the Complainant:	John R. Cooper
On behalf of the Respondent:	Brian Amos
Dates of Hearing:	July 28 – 30, 2009

I INTRODUCTION

[1] Mick Shannon lives with his wife Naomi in the Casitas Del Sol development in Osoyoos. Casitas Del Sol is owned by a strata corporation – The Owners, Strata Plan KAS 161 (the "Strata"), and is made up of 74 manufactured homes on individual lots. Mr. and Mrs. Shannon are members of the strata, and own and reside in one of those homes.

[2] Mr. Shannon has chronic obstructive pulmonary disease ("COPD"). His symptoms are exacerbated by continuous exposure to in-home air conditioning.

[3] In order to cool their home while minimizing the use of air conditioning in the hot Osoyoos climate, the Shannons installed a solar screen on the exterior of the front window of their home in or about June 2008.

[4] The Strata Council received a complaint about the solar screen and advised the Shannons that the screen was contrary to Strata By-laws and must be removed. The Shannons sought permission to retain the screen, but the Strata Council maintained its earlier position, and the Shannons were required to remove the screen, which they did in or about November 2008.

[5] Mr. Shannon alleges that, in not allowing him to keep the solar screen on the exterior of the front window of his home, the Strata discriminated against him on the basis of physical disability, contrary to s. 8 of the *Human Rights Code*.

[6] Mr. Shannon seeks remedies for the discrimination he alleges, including amendment of the Strata's By-laws to permit alterations to the exterior of homes where required to assist a person with physical disabilities, being permitted to reinstall the solar screen, compensation for injury to dignity, and compensation for expenses incurred, including legal expenses. He also seeks costs for improper conduct.

[7] The Strata denies any discrimination. It maintains its position that the Shannons knowingly acted contrary to its By-laws in installing the solar screen without permission, and that it was entitled to require them to remove it. Further, the Strata submits that the solar screen is not necessary to accommodate Mr. Shannon's disability, as there are

alternative products available which the Shannons could install which would not be contrary to the Strata's By-laws.

II EVIDENCE

[8] Mr. and Mrs. Shannon testified as the complainant's case.

[9] Maureen Poucher, who was appointed to Strata Council in late July 2008 when another member resigned, and became its President in June 2009, was the sole witness for the respondent. Ms. Poucher is a retired Registered Nurse. Brian Amos, the Strata's Property Manager, represented the Strata in this hearing, but did not testify, despite his involvement in the events in issue in the complaint.

[10] In addition, both parties entered a number of documents into evidence. Except as indicated by square brackets or ellipses, all documents are reproduced as written.

[11] Where it has been necessary to determine facts in dispute, I have considered all relevant evidence to determine what facts are most consistent with the preponderance of the probabilities.

[12] Four evidentiary issues that arose during the hearing should be noted.

[13] First, the Strata sought to introduce letters, with attached photographs, from two owners in Casitas Del Sol. The letters were intended to demonstrate that these owners had medical conditions similar to Mr. Shannon's, but did not require the use of a solar screen. Mr. Shannon objected to the letters being entered without their authors being called to testify.

[14] The Strata stated, and I accepted, that by virtue of their medical conditions, it would be difficult for the authors to physically attend the hearing. I ruled that the letters could not be introduced without the authors being called to testify, as that would have been unfair to Mr. Shannon who would have been unable to test their evidence by cross-examination, but that the authors could testify by telephone to accommodate their medical conditions. After receiving this ruling, the Strata chose not to call the two owners as witnesses by telephone, and their letters were not entered into evidence.

[15] Second, the Strata sought to introduce two documents obtained by it from the internet. One was a printout from a BC Hydro website about window film. The other was from a manufacturer of window film. The Strata wanted to introduce these documents to show alternatives to the solar screen the Shannons installed. Mr. Shannon objected to these documents being introduced.

[16] These documents had been disclosed to Mr. Shannon only a day before the Strata sought to introduce them in the hearing. This late production was contrary to Rule 18(5) of the Tribunal's *Rules of Practice and Procedure*. Under Rule 4(3), the Strata could not introduce these documents without my leave.

[17] I denied leave for a number of reasons. First, given the late disclosure, it would not have been procedurally fair to Mr. Shannon to allow the documents to be introduced. Second, the documents had not been considered by the Strata Council when they were deciding whether to allow the Shannons to retain the solar screen. They were therefore not probative of the factors taken into account by the Strata Council in making its decisions. Other documents, which the Strata submitted were considered by the Strata Council, were introduced for this purpose. I consider these documents later in my decision. Third, the documents were hearsay, and neither their authors nor any expert witness was to be called to testify about them. There was therefore no way for Mr. Shannon to test the reliability of these documents with respect to the adequacy or suitability of window film as an alternative to a solar screen.

[18] Third, in the course of the cross-examination of Ms. Poucher, it became apparent that the Strata had not disclosed to Mr. Shannon any minutes of Strata Council meetings at which issues related to this complaint may have been discussed. Such minutes were clearly relevant, and ought to have been produced during pre-hearing disclosure. I ordered them produced, and they were brought to the hearing the next day, after both parties had closed their cases but prior to final argument. I marked them as an exhibit, and have reviewed them in writing this decision. However, given their late production, no witnesses were examined about their contents.

[19] Fourth, also on the final morning of the hearing, when the Strata produced the minutes and provided better copies of a few documents that had already been introduced,

Mr. Amos advised that, in searching for them, he had also found some other documents, relating to alternatives considered by the Strata Council. Mr. Shannon objected to these documents being introduced, given that, as already noted, both parties had already closed their cases by this time. Mr. Amos ultimately did not seek to reopen the Strata's case to introduce these documents, and they were not entered.

III FACTS

1. Mr. Shannon's personal circumstances

[20] In May 2005, at the age of 58, Mr. Shannon retired from his career as a train engineer. At the time, the Shannons lived in the Lower Mainland.

[21] Sometime shortly before his retirement, Mr. Shannon saw his doctor about bad coughing that he had been experiencing for about a year. He had also been suffering frequent lung infections in the winter for some years. He was referred to a specialist, and in April 2005 was diagnosed with emphysema, a form of COPD.

[22] An expert report in the form of a letter, dated May 14, 2009, from Dr. Clifford A. Shaw was introduced. In it, Dr. Shaw stated that Mr. Shannon has been under his care, and confirmed his diagnosis. Dr. Shaw described Mr. Shannon's symptoms as including chronic cough, exertional shortness of breath, and breathing difficulties. Dr. Shaw stated that Mr. Shannon had noted exacerbation of his chest symptoms, airway irritation, and cough by continued exposure to in-home air conditioning. Dr. Shaw stated that COPD can be significantly affected by environmental factors, including changes in temperature and humidity, and exposure to pollutants, allergens, particulate matter and gases. Dr. Shaw opined that "there is thus likely some in-home environmental factor related to the air conditioning that can potentially be causing harm." Dr. Shaw stated that Mr. Shannon needed to be able to regulate this factor.

[23] The Shannons had owned a vacation home in Osoyoos for some years, and decided to retire to the area because they thought the dryer climate would make it easier for Mr. Shannon to breathe, and because they liked the lifestyle there.

[24] The Shannons bought their home at Casitas Del Sol in November 2007, and moved in on April 15, 2008.

2. Osoyoos and Casitas Del Sol

[25] Osoyoos has a hot, dry climate. It is located at the northern tip of the Sonoran Desert. The temperature is often 30° or higher in the summer and can soar into the 40°s.

[26] Air conditioning use is common in the area. Mr. Shannon testified that he uses air conditioning in his car, typically driving with both the window down and the air conditioning on.

[27] Osoyoos is located on Osoyoos Lake. The Shannons' former vacation home was located across the street from the Lake, and enjoyed cooling offshore breezes. It was shaded, and near vineyards and orchards. Casitas Del Sol is located on the other side of, and some distance from, the Lake. It is surrounded by desert, rock and shrubbery, and on one side, a golf course. While it can be windy, it does not get a cool breeze from the Lake. It is relatively near an industrial park, and more exposed and dustier than the Shannons' former home.

[28] Numerous photographs of Casitas Del Sol were entered into evidence. They show an attractive housing development, with modular homes on individual lots. The homes are uniform in appearance, with off-white walls and red tiled roofs, and attractive desert-like landscaping.

[29] Like all strata corporations, Casitas Del Sol is governed by an elected Strata Council, which, subject to the *Strata Property Act*, regulations, and the Strata's By-laws, exercises the powers and duties of the strata corporation, including the enforcement of the By-laws: *Strata Property Act*, S.B.C. 1998, c. 43, s. 26. As Ms. Poucher testified, Casitas Del Sol's Strata Council is made up of a number of retired persons, acting on a volunteer basis.

3. Strata By-laws

[30] The Strata has By-laws, which all owners are given at time of purchase. Mr. Shannon admits that, at time of purchase, he signed an acknowledgment that he had read and approved the By-laws. The By-laws set out various rules and regulations.

[31] While there was some uncertainty about the version of the By-laws in force, no material differences in the relevant provisions were identified by the parties.

[32] Pursuant to Article 1A, occupancy in Casitas Del Sol is restricted to persons age 55 and over. It is a retirement community.

[33] Article 2 deals with "Building Scheme & Design", and sets out some detailed rules designed to ensure consistency and quality of design within the development. Article 2.A reads:

> DESIGN GUIDELINES
>
> To ensure the aesthetic quality of Casitas Del Sol, the Developer has adopted the following requirements, which will apply to all housing and structures placed upon individual lots. Consistency and quality in design and construction of the investment by each of the residents within the park. All modular units (Homes), which are brought into the park must conform to these standards. Any new changes made to these Homes or Buildings must conform to the standards contained herein. As well, if any new changes are performed on a Home or Building, the guidelines in Section B, C, D (below) will thereafter by applicable to that home or building, respectively, and will be required to be complied with....

[34] The key provision relied upon by the Strata in this dispute is Article 5, which reads:

> **5. <u>CHANGES TO MODULAR HOME</u>**
>
> A. An owner will obtain the PRIOR written consent of the Strata Council before making any changes or alterations to the exterior of his modular home. At the time an owner requests such consent, he must provide the Strata Council with detailed plans and specifications for the proposed changes or alterations.
>
> B. All changes and alterations to any modular homes must be in compliance with the Strata Council's design guidelines then in effect.

C. The Strata Council will have the right to inspect the changes and alterations during and after construction to confirm compliance to written consent.

[35] The following are the only provisions which relate specifically to windows and window coverings:

2. BUILDING SCHEME & DESIGN

D. EXTERIOR FINISHES

v. Principal window facing onto streets or drives shall have eyebrow or palladium tops.

8. USE OF PROPERTY

C. Not install or permit to be installed any awnings, cables or wires on his/her Strata Lot or common property without prior written approval of the Strata Council.

[36] The Strata Council does not have any written "design guidelines" beyond those set out in the By-laws. Nowhere, either in the By-laws or anywhere else, does it say that an owner cannot install a solar screen of the kind in issue in this dispute on their front window, or that installing such a screen is a change or alteration within the meaning of Article 5A.

[37] Section 121(1)(a) of the *Strata Property Act* provides that a by-law is not enforceable to the extent that it contravenes the *Human Rights Code* or any other enactment or law.

4. The solar screen

Veintimilla Opinion

[38] The owner of the company which installed the solar screen, Alberto Veintimilla of Alberto's Decorating Centre, wrote a letter, dated May 7, 2009, about the solar screen.

[39] The letter was introduced as an expert report. While I accept the letter as such, I have exercised some caution in relying on it, given the fact that Mr. Veintimilla is in the business of selling solar screens, and the partisan nature of some of the opinions expressed by him. In particular, Mr. Veintimilla extols the benefits of solar screens, in

respects not directly related to this complaint. He expresses the view that he is "absolutely astonished at the ignorance of some who continue to choose trivial unifying esthetics over the health and longevity of our planet, not to mention the health and longevity of its citizens". Except insofar as the Strata relies on aesthetic concerns to justify its refusal to allow Mr. Shannon to retain the solar screen, such opinions are irrelevant to this complaint, and I disregard them.

[40] Turning to the portions of the report relevant to the complaint, Mr. Veintimilla states that, by positioning the solar screen on the exterior of a window, 85-90% of the sun's UV rays are effectively stopped from entering the home, and the heat gain caused by direct sunlight is reduced by 80-90%.

[41] Mr. Veintimilla provided a manufacturer's information sheet about SunTex 90, the solar screen installed on the Shannons' home. It indicates that the SunTex 90 blocks up to 90% of the sun's heat.

[42] Mr. Veintimilla's evidence about the effect of solar screens on UV rays and heat gain reduction are uncontradicted, and are consistent with the manufacturer's information sheet. I accept this evidence.

Installation of the solar screen

[43] Mrs. Shannon had noticed that a number of homes in the development had screens on their palladium windows. These are half-moon shaped windows that surmount the main front windows on the modular homes. Mrs. Shannon testified that she asked Jean Ward, the Strata Council Vice President, about them, and Ms. Ward referred her to Mr. Veintimilla's company. His agent came to the Shannons' home, and talked to them about the possibility of putting a screen up, not only on the palladium, but also on the main front window, which the agent recommended as a solution to Mr. Shannon's problems with air conditioning.

[44] The Shannons decided to have solar screens installed on both the exterior of the front window, and the palladium above it, in or about late June 2008. Photographs entered into evidence show that the screens fit the windows precisely, and appear dark in

colour. The screen on the front window was approximately 1'½" deep, and protruded only slightly from the window frame. It could not be called an awning.

[45] While the evidence was not exact, it appears that the front of the Shannons' home, where the window in issue is located, faces approximately north-west. Mr. Shannon testified that it gets the late afternoon sun. There was no reliable evidence about the amount of sun the window gets, or the temperatures inside the home with or without the screen.

[46] When asked by me, Mrs. Shannon indicated that the screen cost approximately $600 - $800. It was not clear if this included the cost of the palladium screen as well as the front window screen. This amount was paid by the Shannons.

[47] The Shannons did not seek or obtain the approval of the Strata Council prior to installing the screens.

[48] Mr. Shannon testified, and I accept, that while he had probably skimmed Article 5 of the By-laws when they purchased their home, he never considered that the screens were an "alteration" requiring Council approval. Mrs. Shannon's evidence was to similar effect. To the extent they thought about it, they both thought that an "alteration" was a structural change. Mrs. Shannon testified that, had she thought that the installation of a screen was an "alteration", she would have applied to Council. I accept this evidence. It is not probable that the Shannons would have gone to the time and expense of installing the solar screen if they knew that they were required to apply to Strata Council first, and bore the risk of being required to take the screen down because they had failed to do so.

5. Dispute arises about the solar screen

[49] On July 24, 2008, the Strata Council wrote the Shannons a letter, stating that it had received a letter of concern about the installation of the screens on the exterior of the windows on the front of their home. The Council went on to state:

> Any change to the exterior of a home is subject to strata council approval and when we checked your file, there was no such request.
>
> Regrettably we must ask you to remove the screens from the main window but the one screen on the palladium portion of the window may stay.

> Should you wish to install the screen on the interior of the window, that would be a decision on your part and the strata council would have no opinion as to the installation.
>
> This is not a new issue to the strata and we the strata council are following decisions made by past strata councils in maintain a level of conformity within the strata.
>
> We request that you remove the screen within 60 days of receipt of this letter.

[50] I note that this letter, like much of the correspondence which passed between the parties about the solar screen, was headed "without prejudice". Neither this letter, nor any of the other letters entered into evidence with this heading were, as a matter of law, truly "without prejudice". They were properly admissible.

[51] No one who was on Strata Council at the time this letter was written testified. Ms. Poucher, who came on Council shortly thereafter, testified that she thought Council acted correctly in writing it.

[52] The letter of concern, dated June 25, 2008, referred to by Strata Council was from an owner, who wrote:

> This letter is to advise you of our concern about the screens on the front of [the Shannons' home]. When we first moved here we inquired about screens for the front window and were told a screen can only be put on the half moon at the top of the window but other screens were not allowed. Screens and awnings are only allowed on side windows. When I was on council other individuals inquired about screens for the front window and all were told that a screen on the half moon top portion was all that was allowed.
>
> Would you please advise if the screening policy has changed. If it has not please have the situation at [the Shannons' home] rectified.

[53] The Shannons did not immediately remove the screen in response to the Council's letter. First, Mrs. Shannon spoke to Ms. Ward, the Strata Vice President who had told her about Mr. Veintimilla's company in the first place. Mrs. Shannon testified that she asked Ms. Ward if there was anything they could do about the Council's letter, and Ms. Ward told her that she had no idea they were considering a screen for the large front window or she would have told her they could not put one up. According to Mrs. Shannon, she

asked Ms. Ward if it was too late to apply, and Ms. Ward told her that it wouldn't do any good, as the Council was dead set against solar screens. She told her that others had applied in the past, and had been turned down. Mrs. Shannon told Ms. Ward that her husband had a significant breathing problem, and asked if they would consider a doctor's letter. Ms. Ward told her that she did not think it would do much good, but Mrs. Shannon said she would do it anyway.

[54] Ms. Ward did not testify, and I accept Mrs. Shannon's recollection of their conversation. In this and in all matters, Mrs. Shannon testified in a careful and fair manner which persuades me that her evidence is reliable.

[55] Mrs. Shannon testified that she thought that, if the Strata Council could see that her husband needed the solar screen, they would be reasonable, and take his medical needs into consideration.

[56] Accordingly, on or about August 29, 2008, Mr. Shannon wrote a letter to Marge Trosky, the then President of the Strata Council. He wrote:

> ...
>
> As you and the President, Jean Ward know, I was totally unaware of the procedure set out in the Casitas Del Sol By-Laws when I installed the solar screen on my window.
>
> I installed this screen to alleviate a medical condition that I have with my breathing. This medical condition is exacerbated and aggravated by the use of air-conditioning over a continued period. In fact, I have a letter from my doctor, Dr. C. Shaw, confirming this. It is for this medical reason that I am respectfully requesting that the Strata Council provide its written consent to my sola-screen [*sic*]. This would not create a precedent, since you would have made this decision based upon my medical condition, which would be supported by Dr. Shaw's letter.
>
> I would be willing to send you a copy of Dr. Shaw's letter, on the condition that, since this letter contains confidential and personal information about me, its contents are not divulged to anyone outside of the members of the Strata Council, and that they will not reveal its contents to any other persons.
>
> Please contact me if you wish to receive a copy of my doctor's letter, subject to these conditions.

> Also, I have contacted the installer of the screen, and he has told me that he can install white mullions to make the screen resemble the pattern of the original window.

[57] Mrs. Shannon testified that she delivered this letter to Ms. Trosky by hand. According to Mrs. Shannon, she told Ms. Trosky that they would do whatever they could, such as putting mullions on the screen. The mullions in question would be white vertical lines that would divide the screen into panels. Ms. Trosky asked her if she had any pictures of what the mullions would look like, and she told her she did not. Ms. Trosky told Mrs. Shannon that she did not know what Council could do.

[58] Ms. Trosky did not testify. I accept Mrs. Shannon's recollection of their conversation.

[59] In his evidence, Mr. Shannon explained that he put the conditions on disclosure of Dr. Shaw's letter because he did not feel that his medical condition was anyone's business but his own, and did not want it spread about. Mr. Shannon introduced into evidence a hand-written letter, written by Dr. Shaw, dated August 7, 2008, stating Mr. Shannon's diagnosis and symptoms, and Dr. Shaw's opinion that his symptoms were exacerbated by exposure to in-home air conditioning.

[60] The Council did not take Mr. Shannon up on his offer to provide a letter from his doctor, and accordingly, this letter was not given to the Strata Council at this time. Mr. Shannon later disclosed it to the Strata on March 26, 2009 as part of pre-hearing document disclosure.

[61] I note parenthetically that, during final argument, I indicated to the parties that I would review the Tribunal's files, and determine if Dr. Shaw's letter was submitted on the pre-hearing application to dismiss, advise them whether it was, and give them an opportunity to make further submissions. I have reviewed the Tribunal's files, and have determined that the letter was not submitted during the application to dismiss. In reviewing the materials filed during the hearing, however, it was apparent, as I have stated, that it was disclosed by Mr. Shannon to the Strata in pre-hearing document disclosure on March 26, 2009. I have determined that no further submissions are required on this point.

[62] Mr. Shannon also introduced into evidence a letter from Mr. Veintimilla, dated August 13, 2008, describing, as in his subsequent May 7, 2009 letter, the effect of the solar screen in reducing UV rays and heat gain. Mr. Veintimilla stated that the fabric in the screen had "not been tested for interior use and therefore exterior installation is recommended." Mr. Veintimilla also stated that he could install white mullions that would make the screen look more like the window it covered. This letter was not provided to the Strata Council at this time, nor did the Council ever ask for it. The Strata Council never contacted Mr. Veintimilla to make any inquiries about the solar screen, including whether it could be installed on the interior of the window, or the possibility of installing white mullions. This letter was also provided to the Strata by Mr. Shannon as part of pre-hearing document disclosure.

[63] Ms. Poucher's first Strata Council meeting was in August 2008. She testified that, at that time, she was briefed on this situation. She testified that it was the general view on Council that the Shannons had failed to comply with Article 5 of the By-laws by not seeking permission for a change to the exterior of their home. She also testified that, in forming this opinion, they relied on Mr. Amos' advice.

[64] When asked in both direct and cross-examination, Ms. Poucher testified that she believed what was written in the second paragraph of Mr. Shannon's letter, that is that he was totally unaware of the procedure set out in the By-laws when he installed the solar screen. She testified that she thought he acted without malice.

[65] While, as will be described in some detail later, Ms. Poucher was not as careful in some aspects of her evidence as she ought to have been, I found that she generally sought to tell the truth to the best of her ability. She also attempted to be fair and reasonable in her observations about the Shannons.

[66] In cross-examination, Ms. Poucher agreed that she, and she thought other members of Council, were concerned that, if the Shannons were allowed to keep the solar screen up, it would create a precedent. She said it was a "hot issue". Ms. Poucher also testified that, one month after having become President in June 2009, she still had that concern. She said that, in her experience and that of the Council before her, allowing any change always creates a precedent.

[67] Ms. Poucher testified that, except for the fact that it had never been allowed before, she saw nothing unreasonable in the Shannons' request to be allowed to retain the solar screen.

[68] Ms. Poucher testified that Council did not ask for Mr. Shannon's doctor's letter because it decided that, in order to preserve confidentiality, it would just take Mr. Shannon's word for it that he had a medical condition as described in his letter. In cross-examination, she agreed that the letter stated that Mr. Shannon had a breathing problem that was exacerbated by air conditioning, and that, while it could be a matter of degree, she had no reason not to think it was a physical disability.

[69] In cross-examination, Ms. Poucher said that, because screens are not allowed, Mr. Shannon's offer to have white mullions added was considered irrelevant by the Council. It was for this reason that Council never asked for a copy of Mr. Veintimilla's August 13 letter, or made any other inquiries about the offer to add mullions. I note that, while it is not clear if the Council specifically knew about Mr. Veintimilla's in August, it certainly knew about it after Mr. Shannon told them about it during the November 27 meeting described below.

[70] While Ms. Poucher testified that these discussions occurred at the August Strata Council meeting, it is likely that the majority of whatever discussions the Council had about the matter were at the September 18 meeting. The *in camera* minutes from August 28 record that that the minutes of the July 24 *in camera* meeting were reviewed, including the item about the complaint about the Shannons' screens and a letter having been sent to the Shannons. There is no record of any discussion about the matter at that time.

[71] By contrast, the September 18 *in camera* meeting minutes indicate that, on that date, the situation with the Shannons' screens was discussed. This was because they had received Mr. Shannon's August 29 letter. The minutes indicate that his letter was read to Council. A motion was made and carried that Mr. Amos "re-send letter stating that installation blinds should be inside according strata by-laws".

[72] Accordingly, the Strata Council responded to Mr. Shannon's August 29 letter by letter, dated September 19, 2008. The Council indicated that it had reviewed Mr. Shannon's letter at its meeting the previous day, and stated:

> With the greatest of respect to your medical situation, the strata council is charged with the responsibility to maintain the strata in its design format and stands by its original decision not to allow exterior screens. The strata council is unanimous in its opinion that the screen can be installed on the interior of the window which would meet the needed function with reference to your medical condition and conform with the strata design.

[73] The Council went on to state that it anticipated that the screen would be removed by October 6, 2008.

[74] Ms. Poucher testified about the Council meeting at which the decision was made to write the September 19 letter. She said that the Council took the matter seriously, and reviewed Mr. Shannon's request without any prejudice. According to Ms. Poucher, the Council was of the view that, in the history of the development, everyone had adapted to the By-laws to maintain the aesthetics. They did not think that the Shannons' window got all that much sunlight. They thought there were alternatives the Shannons could use. I deal below with the evidence about those alternatives and the Strata Council's consideration of them.

[75] In cross-examination, Ms. Poucher agreed that the Council had essentially three reasons for the decision communicated in its September 19 letter: (1) the Shannons had not sought prior consent; (2) the Council had always refused requests to put up screens in the past; and (3) the screen did not conform to the Strata's design guidelines. So far as the reference in the letter to the Council being unanimous in its opinion that the screen could be installed on this inside of the window, "which would meet the needed function with reference to your medical condition", Ms. Poucher agreed that Council knew only that Mr. Shannon had a breathing condition which was exacerbated by air conditioning, and did not know his precise symptoms or how air conditioning affected him.

[76] On the evidence, I find that the Council had no basis for its stated belief that Mr. Shannon could install the screen on the inside of the window, or that doing so would meet "the needed function".

[77] In response to the Strata Council's September 19 letter, Mr. Shannon instructed his counsel, John Cooper, to write the Council a letter, which he did on September 22, 2008. In it, Mr. Cooper advised the Council that he represented the Shannons. He informed the Council that Mr. Shannon viewed the Council's refusal to permit him to keep the screen in place to be discrimination contrary to the *Code*, and put it on notice that, unless the Council provided written permission for Mr. Shannon to keep the screen in place, by September 30, Mr. Shannon would be filing a complaint with the Tribunal. Mr. Cooper informed the Council that, in that event, Mr. Shannon would be seeking orders allowing him to retain the screen, and for costs incurred in filing the complaint. Mr. Cooper closed by stating that he trusted the matter could be resolved without these steps being taken.

[78] Ms. Poucher testified about the Strata Council meeting at which Mr. Cooper's letter was discussed. She said that the Council was shocked, dismayed, upset and surprised. They did not feel that they had breached Mr. Shannon's human rights. In cross-examination, Ms. Poucher testified that Mr. Cooper's September 22 letter was the first time Strata Council learned of the provision of the *Code* protecting persons with disabilities. Council had no training in dealing with issues under the *Code*.

[79] The Strata Council responded to Mr. Cooper on October 1, 2008. The Council indicated that it continue to stand by its original decision requiring the removal of the screen, for the following reasons:

> 1. By their own admission, Mr. & Mrs. Shannon failed to comply with Casitas Del Sol strata bylaw "5. A. Changes to Modular Home"
>
> **Bylaw 5.A – Changes to Modular Home**
>
> An owner will obtain the PRIOR written consent of the Strata Council before making any changes or alterations to the exterior of his modular home. At the time an owner requests such consent, he must provide the Strata Council with detailed plans and specifications for the proposed changes or alterations.
>
> 2. If Mr. and Mrs. Shannon had followed the procedure set out in the strata bylaws, they would have been informed that the sun screen that they have had installed on their modular home are not acceptable and should they wish to install a sun screen, it must be on

the interior of the window. This is to preserve the building scheme and design of the strata.

3. It is the Strata Councils opinion that Mr. and Mrs. Shannon have not been denied their rights under ... the Human Rights Act. Had Mr. and Mrs. Shannon applied to the Strata Council prior to the installation of the sun screen as per Casitas Del Sol Strata Bylaw 5 (A), they would have been told that sun screens mounted on the exterior of their modular home are not permitted. They would also have been advised that there are a myriad of alternative products on the market place included sun screens that could be installed on the interior of the widow which would meet their needs and keep them within the strata bylaws.

[80] The Council closed by extending the date for removal of the screen to October 15, 2008. Ms. Poucher testified that the Council was unanimous in the views expressed in this letter. When asked in cross-examination when the Council informed Mr. Shannon of "the myriad of alternative products" that could be installed on the interior of the window, Ms. Poucher said that she did not know, and queried whether "it is our job to" do so. When asked if the Council ever did so, Ms. Poucher first said that she believed they did. In fact, as she later admitted, the Council never, prior to hearing, informed Mr. Shannon of any alternatives that it thought would meet his needs, other than the suggestion to install the screen on the interior of the window.

[81] On October 27, 2008, the Strata Council wrote the Shannons a letter in which, after referring to the previous correspondence, it advised them that:

> The Strata Council will be reviewing your "refusal to comply" with their request to remove your screen at their regularly scheduled strata council meeting on November 27, 2008 at 11:00 a.m. in the Casitas del Sol clubhouse.
>
> As per 135(1)(e) of the "Strata Property Act of British Columbia"
>
> (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant.
>
> This will provide you with an opportunity to address the Strata Council as to why you should be allowed to keep the screen on your front window in contravention of Strata Bylaw 5.A.

[82] The Council's request that the Shannons appear at the November 27 meeting was its first request to have either one of them attend in person to discuss this issue. Ms. Poucher testified that, in writing this letter, the Council was trying to get a dialogue going with Mr. Shannon, and obtain a further explanation as to why he felt the solar screen was so necessary.

[83] In cross-examination, Ms. Poucher acknowledged that she did not know what s. 135 of the *Strata Property Act* deals with. When it was put in front of, it was clear she was not familiar with it.

[84] Section 135 of the *Strata Property Act*, referred to in the Council's letter, imposes certain procedural requirements on a strata corporation with which it must comply before it imposes a fine or takes other punitive action against a person in response to a complaint against that person. As a matter of law, what the Council was doing in sending the October 27 letter, was giving the Shannons notice and an opportunity to be heard before it fined then, required them to pay the costs to remedy the situation, or denied them the use of a facility. Such a notice is not a means to open a dialogue or to provide an owner with an opportunity to provide further information in support of a request.

[85] It is apparent that, in giving the Shannons the s. 135 notice, the Council was acting on Mr. Amos' advice.

[86] Mr. Shannon introduced into evidence a letter, dated November 5, 2008, which he testified he and his wife sent to the Strata Council to inform it they would attend the November 27 meeting. While the Strata Corporation questioned whether this letter was received by the Strata Council, there was no evidence to contradict Mr. Shannon's evidence that it was sent. I accept that it was.

[87] On or about November 9, 2008, the Shannons' son helped them remove the solar screen from the front window. It has not been up again since that time.

[88] The Shannons attended the November 27 meeting, as did most members of Council. Mr. Amos did not attend due to a family emergency, and sent an employee, Kevin, in his stead. The Shannons brought with them a document, very similar in content to their letter of August 29, 2008, explaining their reasons for installing the solar screen.

It reiterated the offer to provide a letter from Dr. Shaw, on the condition that its contents be kept confidential In addition, the document stated that they had a letter from the screen's manufacturer stating that he could not guarantee the cooling effect if the screen was installed on the interior. Further, the document included the statement that Mr. Shannon needed to be able to open the front windows for fresh air and breeze. The Shannons gave the Strata Council a copy of this document.

[89] Mr. Shannon testified that he basically told the Strata Council the same things contained in the document he provided, and that no one at the meeting asked for a copy of either Dr. Shaw's or the installer's letter. Nor did anyone ask to meet with him or view the house. No one suggested any concrete alternatives.

[90] In cross-examination, Mr. Shannon admitted that he brought a recording device with him to this meeting. Both Mr. and Mrs. Shannon testified that they brought the recording device so that they would be able to remember what was said. Mr. Shannon testified that, when he and his wife came into the meeting, they advised the Council they had the recording device with them. Ms. Poucher confirmed this evidence. If a recording was made, no one sought to enter into evidence.

[91] The Strata suggested that Mr. Shannon behaved inappropriately in this meeting.

[92] In this regard, in cross-examination, both Mr. and Mrs. Shannon were asked questions about how Mr. Shannon addressed the members of the Council at the meeting. Neither could remember anything unusual about how Mr. Shannon had addressed the Council members, and no specific suggestions were made to them as to how he might have done so.

[93] Ms. Poucher testified that Mr. Shannon referred to the Council members as "you people", and shook his finger at them. She said he was not "very nice". He tried to verbally attack a member for a By-law infraction. He was upset that the Council had not asked for a copy of his doctor's letter, and the Council explained that they had taken his word for it that he had a medical condition. Ms. Poucher said that the Council members were taken aback by Mr. Shannon's aggressive and hostile behaviour, and "clammed up" in response. She said she personally felt somewhat intimidated.

[94] In cross-examination, Mr. Shannon was asked whether, in the meeting, he said that, if he did not get to put the screen up, he would die, and asked the members of Council whether they were prepared to take care of his wife. He denied making this statement. When Mrs. Shannon was asked whether Mr. Shannon made such a statement, she said that she did not remember it, but that he could have, as he was upset. She did remember him saying that they would have to take the matter beyond the Strata Council if they did not agree. Ms. Poucher was not asked about this alleged comment in direct or cross-examination. In re-examination, she added that he made some comment about if he was to die. Given the way this evidence was adduced, I place little weight on it.

[95] Mrs. Shannon agreed in cross-examination that the Council treated them courteously at the November 27 meeting. The Council was, she said, very polite, and said they would think it over.

[96] The Council's minutes of the *in camera* November 27 meeting confirm that Mr. Shannon stated he would be taping the meeting for future reference, and that the recorder remained on for the duration. The minutes state that Mr. Shannon restated his request to retain the solar screen, and said he had letters from his lawyer, his doctor, and the installer. He also told Council he had filed a human rights complaint, but that he would withdraw it if Council reversed its decision. At Ms. Trosky's request, Mr. Shannon gave Council a copy of the document already referred to. According to the minutes, Council did not offer any opinion. Mr. Shannon was informed that Mr. Amos was absent and that Council would notify him as soon as they had an *in camera* meeting with Mr. Amos to discuss the situation.

[97] Considering the evidence about this meeting as a whole, I find that there was a certain degree of frustration exhibited by Mr. Shannon. I do not find that he behaved inappropriately. He told the Council he was recording the meeting, and Council did not refuse to meet under those circumstances. Had he behaved in the hostile and belligerent manner described by Ms. Poucher, some mention would likely have been made of that in the minutes. There is no indication of such behaviour in the minutes. Mr. Shannon was frustrated by the Council's decision, twice reaffirmed by this point, that he had to remove the solar screen, which he had in fact done not long before. He was suspicious of the

Council, whom it must be remembered had convened this meeting to address his "failure to comply". The Council likely overreacted to Mr. Shannon's frustration. It knew, by this point, that it was facing legal action. It met his frustration with passive politeness.

[98] In cross-examination, Ms. Poucher was asked about whether the Council sought Mr. Amos' advice after the November 27 meeting. She said that it had.

[99] Counsel for Mr. Shannon then put to Ms. Poucher a document which had come into Mr. Shannon's possession, although it had not been disclosed by the Strata. It was a November 28, 2008 letter from Mr. Amos to the Council. While headed "Without Prejudice", it is not a without prejudice document, and the Strata did not object to its introduction. The letter is, in effect, an opinion letter, albeit one not written by a lawyer. It is therefore not subject to solicitor-client privilege.

[100] I quote parts of Mr. Amos' letter:

> Mr. & Mrs. Shannon - ... Request to install exterior screens based on a medical condition
>
> Qualification:
>
> My opinion is as your strata manager, not a lawyer and I advise you that should you have any doubts as to the strata's position in this matter that you seek legal council.
>
> ... [a portion follows dealing with Mr. Shannon having tape-recorded the meeting]
>
> That all said –
>
> It is my opinion that the strata council has acted correctly and within the realm of your authority in your past decision not to allow exterior screens on [the Shannons' home]. And you are not under any obligation to allow the installation of exterior blinds as there are alternatives to the screens that were installed that would meet [the Shannons'] needs.
>
> My thoughts:
>
> 1) In the original situation, [the Shannons] did not seek strata council permission as per strata bylaw 5 A. to install the exterior blinds.
>
> In all situation like this there is a protocol that must be followed and [the Shannons] did not follow that protocol which is strata bylaw 5 A.

so the strata council was forced to act as it received a written complaint.

The strata council reviewed the situation, asked [the Shannons] to remove the exterior blinds and the result was a letter from a lawyer claiming a medical condition.

The strata council reviewed its decision based on alternative window screens and confirmed their decision was the right one as there were alternative solutions to the screens that were installed. You advised [the Shannons'] lawyer that your decision stands. [The Shannons] removed the blinds. Good, we have an understanding.

2) Now [the Shannons are] petitioning the strata council to allow him to install the exterior blinds that he had originally installed because of a medical condition. I reference his letter date November 27th/2008.

   (a) *I was totally unaware of the procedure set out in the Casitas Del Sol bylaws* – As they say, "Ignorance of the law is not an acceptable excuse."

   (b) *I have a letter from my doctor, Dr. Shaw* – [Mr. Shannon] is not supplying it for confirmation but is issuing a veiled threat about giving it to the strata council should the strata council not be able to keep his confidence. They way [Mr. Shannon] worded his conditions should the strata council receive the letter from Dr. Shaw, in my opinion is an open ended invitation to a law suite. Should the strata council want the letter, I would recommend that [Mr. Shannon] be told to get a letter from Dr. Shaw without all the "Confidential information" and address the point singularly.

   (c) On the aforementioned letter of [Mr. Shannon], Kevin informs me that [Mr. Shannon's] primary complaint is that he can not physically handle "Air Conditioned Air" – His lungs react and that is the reason for the blinds. I was under the impression that [Mr. Shannon] had a reaction to the UV in the sunlight and that was the reason for the sun screens. If the A/C is the problem, why is [Mr. Shannon] not investigating a swamp cooper that uses water to cool the air which would meet his need? A swamp cooler is a far more practical solution then opening your windows to allow 40 degree Celsius air into your strata unit. [Mr. Shannon] has many alternatives to the screens that I feel he has not investigated.

(d) The "Human Rights Code"

> Under the "Human Rights Code", a case of discrimination on the basis of a physical disability must be demonstrated to create a prima facie case of discrimination.
>
> [a case, *Ross v. Strata Plan NW 608*, 2007 BCHRT 80, is referred to and compared with Mr. Shannon's] ...
>
> In [Mr. Shannon's] case, there are many alternatives to the screens he installed from different designed interior screens to a swamp cooler which is a known alternative to A/C.
>
> In conclusion, the Human Rights Tribunal determined that the complainant's (Ross) request was a matter of convenience and not necessary to accommodate his disability. I believe that a Human Rights Tribunal would view [Mr. Shannon's] request for exterior blinds in the same manner – A matter of convenience not discrimination as there are many alternatives to the exterior screens which would accomplish what [Mr. Shannon] is requesting and meet the strata bylaws at the same time.
>
> ....

[101] Ms. Poucher testified that she found Mr. Amos' thoughts, as stated in this letter, interesting. She agreed that, given his experience as compared to her then four months on Council, his opinion carried considerable weight.

[102] In general, Ms. Poucher agreed with what Mr. Amos had written. In relation to Dr. Shaw's letter, she testified that they did not ask for it because they did not want to take the risk of information being revealed. This is a different explanation than she initially gave for the Council not asking Mr. Shannon for the letter.

[103] Ms. Poucher agreed that Council never suggested any of the alternatives referred to in Mr. Amos' letter to Mr. Shannon. When asked why the swamp cooler in particular was not suggested to him, nor his opinion asked as to why it would not work, she said that no one had even met Mr. Shannon before the November 27 meeting. This begs the question as to why no one from Strata Council ever sat down with Mr. Shannon to discuss the matter.

[104] Ms. Poucher testified that Mr. Amos' opinion letter was unsolicited by the Strata Council. When it was suggested to her in re-examination that Council had requested it, she said she did not know that. Given the statement in the November 27 *in camera* minutes that Council would be seeking Mr. Amos' opinion, I conclude that it is likely that the letter was requested by Council.

[105] In re-examination, Ms. Poucher was asked about her understanding of Mr. Amos' qualifications. She understood that he is not a lawyer, and if in doubt, the Council should seek legal advice. There is no evidence that the Strata Council then, or at any point in these events, sought legal advice. It relied on Mr. Amos' advice throughout.

[106] On December 11, 2008, the Strata Council wrote the Shannons a letter reiterating their original decision that the solar screen must be removed. The Council stated that:

> We feel that you have other interior window applications or options which would duplicate the function of the exterior mounted screen, and be within the boundaries of the strata bylaws.

[107] The Council went on to suggest two procedural options the Shannons might wish to explore. One was to submit a motion for a By-law change to allow external sun screens at the Strata's next Annual General Meeting ("AGM"). The other was to petition the Strata Council for a Special General Meeting ("SGM").

[108] The Shannons did not take up either suggestion. So far as the first was concerned, Mr. Shannon testified that they did not want to change the By-law, just get permission to use the solar screen because of his medical condition. They wanted an exemption, not an amendment. As for the second, Mr. Shannon testified that every time they tried anything they were shot down with no explanation other than that the solar screen did not fit the design of the development. It would be safe to infer that the Shannons saw no point in attempting to petition the Council for a SGM.

[109] Meanwhile, on October 21, 2008, Mr. Shannon had filed his complaint with the Tribunal. He filed an amendment on December 10, 2008. The Tribunal gave the Strata notice of the amended complaint on December 31, 2008. By this time, Mr. Shannon had already advised the Council that a complaint had been filed at the November 27, 2008 meeting.

6. Meetings in the spring of 2009 and related issues

[110] As indicated earlier, the Shannons did not try to amend the Strata's By-laws or petition the Strata Council to hold a SGM to attempt to address their concerns.

[111] However, on March 28, 2009, another owner wrote a letter to Council seeking to amend the By-law. The proposed motion was to:

> allow window "sun control" screens on the exterior of the front windows facing the street, same type as the palladium window shades currently installed in the complex... they should be bronze mesh which does appear dark but casts a more pleasing light in the interior of the home...
>
> We should become a little more environmentally friendly by not having to run our air conditioners continuously during the extreme heat of summer. And these shades keep out 85-90% of the suns rays....

[112] Sometime in April 2009, the Strata Corporation provided its members with notice of a SGM to be held in the clubhouse on April 25. The agenda attached to the notice indicated that the new business to be dealt with was that the Strata had been named as a respondent to a complaint with the Tribunal about "the Council's refusal to grant a change or alteration to the exterior of his modular home due to his physical disabilities". The agenda indicated that "full disclosure of said including documentation" would be made available at the meeting. The agenda went on to state that:

> The Strata Council is looking for guidance from the strata as to how the strata wish to proceed.
>
> The motion will be:
>
> a) Does the strata wish to succumb to the "Complainants" demand
>
> Or
>
> b) Allow the complaint to move forward to the "Human Rights Tribunal."

[113] The Shannons were not given notice of the SGM, did not receive a copy of the notice and agenda, and were not invited to attend. The Shannons believe that, as owners, they ought to have been given notice and have been allowed to attend the SGM, while the Strata takes the position, relying on s. 169(1)(c) of the *Strata Property Act*, that, having launched legal proceedings against it, they were not entitled to attend. I return to this

issue below in my analysis. In any event, a neighbour gave the Shannons a copy of the notice and agenda, and they later heard from another neighbour that the meeting was held.

[114] Minutes of the SGM indicate that 33 owners were present, along with nine proxies, for a total of 42 votes present. The minutes indicate that the following discussion occurred:

> **Motion from agenda**
>
> ...
>
> a) Does the strata wish to succumb to the "Complainants" demand
>
> or
>
> b) Allow the complaint to move forward to the "Human Rights Tribunal."
>
> **Presentation of situation with reference to the "Shannon's", strata unit ... taking the strata to the "Human Rights Tribunal" because the strata council refused to allow the installation of exterior screens on their home as he has C.O.P.D.**
>
> Jean asked Brian Amos, Strata Manager to present the situation as it unfolded so that all strata owners present could understand the situation.
>
> Brian made a 30 minute presentation starting from when the "Shannon's" purchased their strata unit to the alternatives the "Shannon's have to the exterior screens that they wish to install. Please see attached outline supplied to all strata owners present.
>
> When Brian finished, he turned the floor back to Jean who opened the floor to questions.
>
> The questions were numerous and mostly asking for clarification or expressing their personal opinion as to the situation. It was a lively discussion with most strata owners present expressing opinions.
>
> **Motion to amend the motion on the floor**
>
> ...
>
> "Allow the complaint to move forward to the "Human Rights Tribunal", Yes or No.

All were in agreement.

A call for the vote was made:

Ballets cast: 40 Yes/2 No

Motion passes. The Strata Council will proceed with the case to the "Human Rights Tribunal".

[115] Ms. Poucher testified that the Strata Council decided to hold this SGM in order to receive guidance from the owners as to how to proceed, and that having done so, the Council acted in accordance with the owners' wishes.

[116] Owners attending the SGM were given a package of information relating to the complaint. The front page of the package stated that "due to this information and that this is an ongoing situation where the Strata Council is seeking your guidance; we request that you view this as 'CONFIDENTIAL INFORMATION' not to be shared or discussed with anyone other then fellow strata owners till this issue is settled."

[117] Included in the package were a variety of documents related to the complaint. In particular, Dr. Shaw's August 7, 2008 letter stating Mr. Shannon's diagnosis and symptoms, was included. This was the letter which Mr. Shannon had twice offered to the Council, but been unwilling to disclose without conditions to protect confidentiality.

[118] It is Mr. Shannon's position that his doctor's letter ought not have been disclosed to the membership of the Strata, while the Strata takes the position that, given the legal proceedings against it, it was entitled, and even obligated, to disclose the letter to the members. Ms. Poucher testified that the Council arrived at this position on the basis of Mr. Amos' advice. I return to this issue in my analysis.

[119] The SGM was held in the Clubhouse, which is located in the centre of the development. Every owner has a key to the Clubhouse, and it is used by both owners and guests for a variety of recreational activities.

[120] The evidence, including photographs taken by Mr. Shannon, established that a box containing multiple copies of the package of documents, including Dr. Shaw's letter, was left in the Clubhouse after the SGM. This was of significant concern to Mr. Shannon, as any owner or guest having access to the Clubhouse could have read Dr.

Shaw's letter. He testified, and I accept, that he found this embarrassing, as he is not one to talk about his health issues to anybody.

[121] Ms. Poucher testified that it was Mr. Amos' idea to leave these packages of documents in the Clubhouse. She also testified, and I accept, that after she became Council President at the end of June 2009, she removed the box from the Clubhouse in order to prevent anyone else from having access to the documents. She felt uncomfortable with the fact they had been left there since April.

[122] There is no evidence as to whether anyone took copies of the packages of materials left in the Clubhouse before Ms. Poucher had them removed. Ms. Poucher testified that she did not know how many copies were left in the box after the meeting, or remained in the box when she had them removed.

[123] The Strata's AGM was held on May 30, 2009. Mr. Shannon did not attend, but his wife did. The motion to amend the By-laws referred to in the neighbour's letter of March 28, 2009, was put forward and defeated.

[124] At the AGM, Mrs. Shannon was asked to run for Strata Council. Mrs. Shannon testified that she was "not dumb enough" not to run, with the complaint going on, but did not expect to be elected. Nor was she.

[125] Mrs. Shannon testified that she was really upset about having not been invited to the April 25 SGM so that she could give the Shannons' side of things. Mrs. Shannon testified that Ms. Poucher called her aside at the AGM, and very nicely explained that the Strata was not required to invite the Shannons to attend a meeting where they were discussing strategy. Ms. Poucher compared it to the Shannons being required to invite the Strata to attend a meeting with their lawyer. Mrs. Shannon told Ms. Poucher that, so far as she was concerned, they could come with them to meet their lawyer if they wanted to. I accept Mrs. Shannon's evidence about this conversation.

[126] Ms. Poucher testified in cross-examination that the Strata has never amended nor modified a by-law to accommodate an owner's disability. She agreed it could be reasonable to do so in some cases. For example, she said that it would be reasonable to

do so if a blind person needed a seeing eye dog. In re-examination, she distinguished the necessity of a seeing eye dog from Mr. Shannon's request to install the solar screen.

7. Evidence about the effects of the solar screen and of its removal

[127] This hearing occurred in late July 2009, in the heat of summer and after the Shannons had been required to remove the solar screen, which they had had the use of in the summer of 2008.

[128] Mr. Shannon testified that, when the solar screen was in place, their in-home air conditioning did not kick in as much, and they very seldom used it. They would turn it on when they left the house to cool the house down, and then turn it off on their return. If there was a breeze, they would open their sliding windows. They were able to do this on the window covered by the solar screen, but would not have been able to do so had it been installed, as suggested by the Strata, on this inside of the window.

[129] Mr. Shannon found that his symptoms seemed to ease up quite a bit during the summer of 2008 while the solar screen was in place.

[130] Mr. Shannon testified that he had been coughing more since about the first week of June 2009. He said that he could not lie down because it would initiate a coughing attack, meaning that he had to sleep upright in a chair, apart from his wife. This was clearly upsetting to both Mr. and Mrs. Shannon. Mr. Shannon said that his feet were swollen as a result of sleeping upright, making it difficult and painful to walk. He also stated that his breathing was laboured, and he felt "down" and lethargic. All of this, Mr. Shannon testified, was frustrating, to say the least.

[131] Mr. Shannon contrasted this with his experience during the summer of 2008, when the solar screen was in place. He attributed his current symptoms to the absence of the solar screen, and the Shannons' resulting increased use of air conditioning.

[132] For her part, Mrs. Shannon said that 2009 was the worst year her husband had experienced with respect to his symptoms. In general, she confirmed her husband's evidence about his symptoms, and how they worsen when exposed to air conditioning for any length of time. She said that his symptoms were much better in the summer of 2008 while screen was in place.

[133] I accept the Shannon's evidence about the nature of Mr. Shannon's symptoms in 2008 and 2009, with and without the solar screen. I return to the question of the screen's effect on Mr. Shannon's symptoms in my analysis below.

8. Evidence about the Strata's aesthetic concerns and the use of screens by other owners

[134] Photographs of other homes in the development show that other owners have solar screens similar in appearance to the Shannons' on their palladiums. There are no other homes with solar screens on their front windows.

[135] Other photographs show screens on other windows and doors on homes in Casitas del Sol.

[136] The parties agreed that other owners had, in the past, requested permission of the Strata Council to install solar screens on their front windows, and been denied. There was no evidence that any owners making such a request had done so on the basis of or supported by medical evidence.

[137] In re-examination, Ms. Poucher testified, with some vigour, that the primary reason the Strata Council denied Mr. Shannon's request to retain the solar screen was the aesthetic appearance of the development. She said that the beauty of the development is preserved by keeping all the homes similar in appearance. She added that they thought Mr. Shannon had alternatives, but that "we didn't think we had to do all the research for him".

9. Evidence about possible alternatives to the solar screen

[138] In cross-examination, Mr. Shannon admitted that he and his wife had not tried any alternatives to the solar screen to keep their home cool.

[139] The Shannons' former Osoyoos vacation home was a park model trailer, located across the street from the Lake. They used it quite frequently between March and November of each year, including during hot summer weather. Because it was located on the water, the home enjoyed a cooling breeze, and the Shannons spent much of their time out of doors in a camping atmosphere.

[140] Casitas Del Sol, by contrast, is located some distance from the water, and does not benefit from a cooling breeze. It is likely dustier as well.

[141] The Shannons' park model trailer had "Low E" windows, which were supposed to reduce UV rays and heat, but did not perform as well as the Shannons had hoped. On the recommendation of a neighbour, the Shannons installed bronze reflective glass, which was quite expensive, but helped quite a lot.

[142] Mr. Shannon was asked if he considered installing reflective glass similar to what he had installed in the Shannons' former home in their home at Casitas Del Sol. He said that he had not because of the price. Mrs. Shannon's evidence on this point was to the same effect.

[143] While they did not price the cost of installing reflective glass windows in their home at Casitas Del Sol, Mrs. Shannon testified that the reflective glass windows in their park model trailer cost approximately $3600, plus shipping and installation. While the evidence was not entirely clear, it appears that that price was for several windows. Nonetheless, I accept that the solar screen, at $600 - $800, was a cheaper alternative than a bronze reflective window.

[144] Further, both Mr. and Mrs. Shannon testified that a neighbour at Casitas Del Sol had recommended installing a solar screen for the palladium. When Mr. Veintimilla's agent came to the home to discuss doing so, she told the Shannons that a solar screen on the main front window was a better option to cool the house.

[145] The Shannons also admitted that, at least in hindsight, they realized they could have applied to the Strata Council to replace the front window with a bronze reflective window similar to what they had in their previous summer home. However, both Shannons thought that installing reflective windows, unlike installing the screen, would have been an alteration requiring approval by Council. Further, Mrs. Shannon testified that she was under the impression the Council would have turned down an application to install bronze windows, as it would have made the windows appear completely black from the outside.

[146] There was no evidence that anyone at Casitas Del Sol had installed, or that the Strata Council had ever permitted anyone to install, reflective windows. Mrs. Shannon testified that she had not seen any reflective windows in the development.

[147] The Shannons were both asked about the use of a "swamp cooler", which they had in their home in the Lower Mainland. Neither one thought it would be an acceptable alternative.

[148] The suggestion was made that screens could have been installed on the interior of the window. There was no evidence led by the Strata to substantiate its suggestion that the screen purchased by the Shannons could have been installed on the interior of their window, or what its heat reducing effect would have been if so installed. The best evidence on this point is contained in Mr. Veintimilla's August 13, 2008 letter, in which he stated that the fabric in the screen had "not been tested for interior use and therefore exterior installation is recommended", which I accept. The Shannons both testified, and I accept, that they could not have opened their window if the screen had been installed on the inside, which would have meant they could not get any breeze.

10. The Strata Council's consideration of Mr. Shannon's medical condition and of other alternatives to the solar screen

[149] It was a central part of the Strata's case that there were reasonable alternatives available to Mr. Shannon which would have addressed his medical condition. It was also part of its case that the Strata Council itself considered some of these alternatives in making its decisions about the Shannons' request to keep the solar screen up.

[150] There were significant difficulties with the Strata's evidence on these points.

[151] In direct examination, Ms. Poucher was asked to and did identify three printouts from internet websites about COPD. She was asked if they were part of the research information the Council discussed about COPD to bring itself up to speed. She answered that they reviewed these documents to give themselves some idea of what they were facing in order to come to a compromise.

[152] If the Strata Council did review these three printouts about COPD, they did so after March 30, 2009, the date on which they were printed. This is long after the Council

had made, and thrice reaffirmed, its decision not to allow the Shannons to retain the solar screen. They were included in the package of materials provided to owners attending the April 25, 2009 SGM, and any review of them likely occurred in that context.

[153] So far as the contents of these three printouts are concerned, the Strata also sought to rely on them to prove the nature of COPD, its symptoms, and how it is treated, including the effect of air conditioning. Mr. Shannon objected to any use of these documents for the proof of the truth of their contents. The Strata then resiled from seeking to use them for that purpose. Had it not done so, I would not have allowed them to be used for that purpose, as it would be wrong for me to rely on such documents to find facts about COPD, its symptoms or treatment. Such evidence should properly have come in through an expert's report filed by the Strata, subject to potential cross-examination. Alternatively, the Strata could have required Dr. Shaw to attend, and cross-examined him about these issues. The Strata did neither.

[154] Also in direct examination, Ms. Poucher was asked about alternatives considered by the Strata Council at its meeting prior to writing the September 19, 2008 letter denying Mr. Shannon's request to be allowed to retain the solar screen. Ms. Poucher identified four printouts from the internet from companies selling window films, shades, screen fabric, and Low E glass. She testified that she had seen these documents at Strata Council meetings when discussing alternatives available to Mr. Shannon. She said that they were alternatives they researched that were available. In reference to each one, she testified that the Strata Council thought these were viable alternatives Mr. Shannon could consider. She repeatedly testified that these were alternatives taken into account by the Strata Council.

[155] In cross-examination, Ms. Poucher testified that these documents were the exact documents considered by the Strata Council before writing the October 1 letter in response to Mr. Cooper. She reaffirmed this points several times.

[156] The explicit import of Ms. Poucher's testimony on this point was that the Strata Council took into account these particular documents, and the products described in them, in considering what alternatives Mr. Shannon had available to him at the meeting

[157] The difficulty for the Strata is that the four documents identified by Ms. Poucher as having been reviewed and considered by the Strata Council before writing the September 19 and October 1, 2008 letters, and being the basis for the decision communicated in those letters, are all dated as having been printed on March 30, 2009. These documents cannot have been reviewed by the Strata Council before writing the September 19 and October 1 letters. Again, these documents were included in the package provided to members at the April 25 SGM.

[158] When the date these documents were printed was pointed out to Ms. Poucher in cross-examination, she initially said that they needed several copies, and these were not "lifted" until March. She then admitted that it was possible that these were not even copies of the documents considered by the Strata Council in September 2008. Ultimately, and to her credit, she admitted that they were not the documents reviewed by the Council at that time.

[159] Ms. Poucher was then asked if she had copies of whatever the Council looked at in September 2008. She said that she would have to look at her records. She said that the documents she had wrongly identified as being those considered by the Council in September looked similar to ones she remembered looking at. Then she admitted that she could not remember the exact documents she reviewed in September.

[160] Neither Ms. Poucher nor the Strata produced the documents, if any, which were reviewed by the Council in September 2008.

[161] There is simply no reliable evidence that the Strata Council considered any documents containing information about alternatives at any time prior to the date these documents were printed, March 30, 2009.

[162] Further, there is no evidence whatsoever that the Strata Council suggested any alternatives to Mr. Shannon, with the exception of installing the screen on the interior of the window, at any time prior to the hearing.

11. Effects of dispute on the parties

[163] Disputes of this sort may have negative effects on relations between the parties, who are required to live in proximity, while involved in adversarial proceedings.

[164] The evidence before me indicated that this was true to some extent in this case. The Shannons testified that they knew few of their neighbours, although those that they did they got along fine with. The impression left was that they are somewhat socially isolated at Casitas Del Sol.

[165] Mrs. Shannon testified that she did not think that the Strata Council or the Strata itself was prejudiced against them. Nor did she feel any animosity towards her or her husband. She just thought the Council was "pig-headed" and stubborn. She said that she still liked living at Casitas Del Sol.

[166] At the conclusion of the hearing, I suggested to the parties that they might wish to consider talking to one another, to see if there was a way to resolve this complaint without the necessity of me rendering a decision.

[167] I am aware that the parties took up my suggestion, and engaged in some talks. While the Strata sent me some materials related to those discussions, I did not read them, as it would have been improper for me to do so, given that these were without prejudice settlement discussions. I am aware, however, that the parties were not able to resolve the complaint, and asked me to render a decision.

[168] While it is unfortunate that the parties were unable to resolve this complaint through their discussions, it is to their mutual credit that they attempted to do so.

IV ANALYSIS

1. Has Mr. Shannon established *prima facie* discrimination?

[169] In *Mahoney obo Holowaychuk v. The Owners, Strata Plan #NW332 and others*, 2008 BCHRT 274, the Tribunal set out the analytical structure that applies in a complaint of this kind:

> In a human rights complaint under s. 8 of the *Code*, the initial burden is on the complainant to establish, on a balance of probabilities, that the

> respondents discriminated against her with respect to an accommodation, service or facility customarily available to the public because of the grounds alleged in the complaint.
>
> As set out by the Supreme Court of Canada in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 526, a *prima facie* case of discrimination is one which covers the allegations made and which, if the allegations are believed, is sufficient to justify a finding in the complainant's favour, absent an answer or justification from the respondent: p. 558.
>
> In this case, a *prima facie* case of discrimination may be made out if it is established: (1) that the complainant suffers from a physical disability; (2) that she received differential treatment with respect to an accommodation, service or facility customarily available to the public, and; (3) that her disability was a factor in that differential treatment.
>
> If the complainant does establish a *prima facie* case of discrimination, the onus shifts to the respondents to establish, on the balance of probabilities, that their conduct was justified. (paras. 77 – 80)

[170] This is the analytical structure that I will employ in this case.

[171] The first question that must be answered, then, is whether Mr. Shannon has established that he has a physical disability. I have no difficulty in concluding that he has. Dr. Shaw's expert report establishes that Mr. Shannon has COPD. That letter, together with the evidence of Mr. and Mrs. Shannon, establishes that that medical condition has a significant effect on Mr. Shannon's ability to carry out the activities of daily living. He has a physical disability for the purposes of the *Code*.

[172] Further, the Strata Council, and the Strata as a whole, were aware of the fact that Mr. Shannon has a physical disability. While the Strata Council did not ask for the letter from Dr. Shaw that Mr. Shannon offered, the evidence was clear that the Council accepted that Mr. Shannon has a medical problem which affects his breathing, and is exacerbated by the use of in-home air conditioning. Dr. Shaw's letter was later disclosed by Mr. Shannon in the course of pre-hearing disclosure, and made available to all members of the Strata who attended the April 25, 2009 SGM, or later picked up a package of the materials provided at that meeting.

[173] To the extent the Strata Council was not aware of the details of Mr. Shannon's disability, or the effect of in-home air conditioning on his symptoms, it is the author of its

own ignorance, as Mr. Shannon offered Dr. Shaw's letter, and Council chose not to accept it.

[174] The second question is whether Mr. Shannon received differential treatment with respect to an accommodation, service or facility customarily available to the public.

[175] Tribunal case law, including *Holowaychuk* and *Ross*, drawing on *Konieczna v. The Owners Strata Plan NW2489*, 2003 BCHRT 38, paras. 12 – 37, and *Williams v. Strata Council #768*, 2003 BCHRT 17, paras. 59 – 62, has firmly established that strata corporations are, in some respects, in a service relationship with the owners who make up their membership. In providing services to their members, strata corporations are subject to the requirement, contained in s. 8 of the *Code*, not to discriminate.

[176] In the present case, the specific service provided by the Strata was that of considering, and either approving or rejecting, a request to install a solar screen on the front window of the Shannons' home. This was a particular example of the Strata's more general service of enforcing and applying its By-laws, including Article 5A.

[177] The parties are in some disagreement as to whether Article 5A applies to the installation of such a screen. That is, whether the installation of such a screen is a change or alteration to the exterior of the home such that Council's prior approval must be obtained.

[178] This is a question of the interpretation of the Strata's By-laws which I need not decide for the purposes of this complaint. I assume, without deciding, that the Strata is correct in its interpretation that the installation of a solar screen is a change or alteration requiring Strata Council approval. Accepting that interpretation as correct for the purposes of this decision, the Strata, through the Council, was offering the service of considering applications for such approval.

[179] The evidence is clear that the Strata has rejected all requests for approval to install a solar screen on the front window of homes. In this regard, Mr. Shannon was treated the same way as all other owners.

[180] The fact that Mr. Shannon was treated the same way as all other owners does not mean that he has failed to establish differential or adverse treatment. This was explained

in *Holowaychuk*, in which the complainant had decreased mobility as a result of a physical disability, and requested that the strata install a ramp to provide her with access to the building:

> The second question is whether Ms. Holowaychuk has experienced adverse treatment with respect to a service customarily available to the public. I find that she has.
>
> As noted by the Tribunal in *Williams v. Strata Plan LMS 768*, para. 62, the Owners provide a variety of services to the complainant as one of the owners of the strata property. It is the Owners who control access to the building, and thus to Ms. Holowaychuk's residence.
>
> Further, owners of a strata property are a subset of the general public referred to in s. 8(1)(a) of the *Code*. One such service is the provision of safe and effective access to an owner's residence.
>
> I further find that Ms. Holowaychuk has received adverse treatment with respect to this service. The Owners argue that Ms. Holowaychuk has not been denied access to the building: she is provided with such access on the same basis as all of the residents. Further, there is no evidence that the presence of the stairs prevents Ms. Holowaychuk from going about her daily routine.
>
> However, in *Turnbull v. Famous Players Inc.*, [2001] O.H.R.B.I.D. No. 20, a case which involved the issue of wheelchair access to movie theatres, the Ontario Board of Inquiry held that "equal treatment based on disability means that persons with disabilities have a right to the provision of services and facilities in as dignified and full a way as able-bodied individuals". (para. 201) I agree with this statement, and find that it applies to the case before me. In this case, Ms. Holowaychuk is required to use the stairs each time she wishes to enter and leave her suite to the outside of the building. This is a physically demanding and tiring task for Ms. Holowaychuk, and one that has led to falls on several occasions. See also: *Moser v. District of Sechelt*, 2004 BCHRT 72, paras. 62-66.
>
> ...
>
> In all of the circumstances of this case, I find that Ms. Holowaychuk's ability to access her suite, and to leave her suite to go outside, in as dignified and full a way as able-bodied individuals, is adversely affected by the presence of stairs between the lobby and the elevators. (paras. 90 – 96)

[181] Likewise in this case, the Strata Council's refusal to allow Mr. Shannon to retain the solar screen, while consistent with its past practice, had a differential and adverse impact on Mr. Shannon by virtue of his disability.

[182] Dr. Shaw's expert report, taken together with Mr. and Mrs. Shannons' evidence, establishes that Mr. Shannon is adversely affected by continuous exposure to in-home air conditioning. Further, Mr. and Mrs. Shannons' uncontradicted evidence was that the use of the solar screen reduced their use of in-home air conditioning, and an accompanying reduction in Mr. Shannon's negative symptoms. While expert evidence directly on the point of the effect of the solar screen on Mr. Shannon's symptoms would have been helpful, its absence is not fatal to Mr. Shannon's case. His and his wife's uncontradicted evidence, together with Mr. Veintimilla's report about the effect of the solar screen in reducing heat gain, is sufficient to allow me to conclude that being required to remove the screen had an adverse impact on Mr. Shannon's physical disability.

[183] The third question is whether Mr. Shannon's physical disability was a factor in the differential treatment he experienced. As in *Holowaychuk*, the answer to this question is clear. The differential and adverse effect of the Strata Council's decision to refuse to allow Mr. Shannon to retain the solar screen was inextricably related to his physical disability.

[184] I have considered Ms. Poucher's evidence that the Strata Council considered Mr. Shannons' request to retain the screen without prejudice against him. Mrs. Shannon agreed that the Strata was not prejudiced against them. I accept that this is so. However, it is a fundamental principle of human rights law that an intention to discriminate is not necessary to establish discrimination: *Code*, s. 2. The focus is on the effect of a respondent's actions, not its intention. Here, the effect of the Strata's actions was *prima facie* discriminatory, as they had an adverse effect on Mr. Shannon because of his physical disability.

[185] I therefore conclude that Mr. Shannon has established a *prima facie* case of discrimination on the ground of physical disability.

2. Has the Strata established a *bona fide* and reasonable justification for not allowing Mr. Shannon to retain the solar screen?

[186] Having found that Mr. Shannon has established a *prima facie* case of discrimination based on physical disability, the burden shifts to the Strata to show that it had a *bona fide* and reasonable justification ("BFRJ") for its conduct.

[187] In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R 868 ("*Grismer*"), the Supreme Court of Canada established a three-stage analysis for determining whether a standard is a BFRJ: (para. 20):

> In order to establish this justification, the defendant must prove that:
>
> 1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> 2) it adopted the standard in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
>
> 3) the standard is reasonably necessary to accomplish its purpose or goals, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship.

[188] Here, the standard adopted and applied by the Strata is clear – owners are not permitted to install a solar screen on the front window of their home (the "Standard").

[189] The first question that must be answered is whether the Strata adopted the Standard for a purpose or goal rationally connected to the function being performed.

[190] On the evidence before me, it is clear that the Standard was adopted for aesthetic purposes. As set out in the By-laws, the Strata intends to maintain design consistency. The Standard ensures consistency in this respect. The aesthetic qualities of solar screens on front windows may be a matter of personal opinion, and open to legitimate debate. However, I accept that the rule which prohibits them is rationally connected to the Strata's function of maintaining design consistency.

[191] The second question is whether the Standard was adopted in good faith and in the belief it was necessary to the fulfilment of the purpose or goal.

[192] On the evidence before me, I have no basis for questioning the good faith of the Strata in adopting the Standard. From Ms. Poucher's evidence, it was clear that the Strata takes pride in the beauty of Casitas Del Sol. I accept that the Strata Council acted in good faith and in the honest belief that the consistent application of the Standard is necessary to the maintenance of the beauty of the development.

[193] The third question is whether the Standard is reasonably necessary to accomplish its purpose or goals, in the sense that the Strata cannot accommodate the complainant and others adversely affected by the Standard without incurring undue hardship.

[194] It is here that the Strata runs into difficulty in justifying its conduct.

[195] There are a number of reasons put forth by the Strata for why the Strata Council insisted on the application of the Standard to Mr. Shannon. These include: maintenance of design consistency; fear of setting a precedent; the Shannons' failure to comply with Article 5A before installing the solar screen; and the position that there were reasonable alternatives available to Mr. Shannon which would adequately address his medical condition.

[196] I deal with each of these.

[197] First, while I accept that the Standard was adopted in good faith for the purpose of maintaining design consistency, the screen the Shannons installed did not represent a radical departure from the design prevailing in the development. Nor is it unsightly. Photographs of the house with the screen in place indicate that the window appeared dark. But the screen was well-built and made to measure for the window. Further, the Shannons offered to have white mullions added, which would have reduced the degree to which the screen would have differed in appearance from the windows of their neighbours. In addition, the fact that the Strata is prepared to permit owners to install exactly the same kind of screen on the palladium window above the front window, as well as windows on the side of homes, tends to show that the screens are neither inherently unattractive nor inconsistent with the development's design.

[198] Second, the Strata Council's fear of setting a precedent was unfounded. Mr. Shannon was quite clear that he was not seeking to amend the By-laws to permit solar

screens; rather, he was seeking an exemption from the Standard on the basis of a medical condition. Mr. Shannon was seeking an accommodation within the By-laws, not the negation of the By-laws. The Council seems not to have appreciated that an exemption from its generally applicable Standard on medical grounds would not mean that anyone who wanted to could install a solar screen. It would be a precedent only for the fact that the Council was willing to grant an exemption where supported by medical evidence.

[199] On the evidence, the Strata Council was never open, in fact, to the possibility of permitting Mr. Shannon to retain the solar screen. As Mrs. Shannon testified Ms. Ward stated, the Council was dead set against solar screens. Council's fear of setting a precedent prevented it from giving Mr. Shannon's request to retain the screen the consideration it deserved.

[200] Third, it is true that, on the Strata's interpretation, the Shannons failed to comply with Article 5A by not seeking Council approval prior to installing the screen. This failure was explained by the Shannons as early as August 2008, when they explained that they had not realized they were required to seek approval, and sought to do so retroactively.

[201] Ms. Poucher testified that she believed that the Shannons told the truth about not realizing they required prior approval. So do I. I conclude that, had the Shannons believed that prior approval was necessary, they would have sought it.

[202] In the circumstances, where the Shannons promptly explained and apologized for not having sought prior approval, and their request to be allowed to retain the solar screen was supported by medical evidence, it was not reasonable for the Strata to continue to hold their earlier failure to seek prior approval against them as a basis for not granting their request to be allowed to retain the screen.

[203] Fourth, the Strata has failed to establish that there are reasonable alternatives to the solar screen.

[204] In this regard, the Strata relied on *Ross*, in which the Tribunal dismissed a complaint on a preliminary basis because it was not satisfied that the accommodation

sought by the complainant was necessary; rather, it was a mere convenience or matter of personal preference.

[205] It may be that there are alternatives which would provide the Shannons with a cooling effect similar to the solar screen. If there are, the Strata has not met its burden of establishing that they exist. The Strata therefore cannot show that the solar screen was not necessary, or was a mere convenience or matter of personal preference.

[206] Further, the evidence does not substantiate that the Strata considered any concrete information relating to possible alternatives prior to March 30, 2009, the date the documents about some possibilities were printed from the internet.

[207] Nor did the Strata ever suggest any alternatives to Mr. Shannon, other than installing the screen on the interior of the window. If there were alternatives known to the Strata, it was incumbent on it to share them with Mr. Shannon so that they could be considered in a cooperative manner. The Strata did not do this.

[208] So far as the suggestion that the screen be installed on the interior of the window is concerned, the evidence does not establish that the screen would have performed effectively if installed in this manner, and it would have meant that the Shannons could not open their front window to get ventilation. It was not a reasonable alternative.

[209] In the circumstances, where the Strata Council was informed and accepted that Mr. Shannon had a breathing condition which was exacerbated by continuous exposure to in-home air conditioning, and had a request from him to retain the solar screen to reduce his exposure to air conditioning, it was incumbent on the Council, at a minimum, to explore any possible alternatives with Mr. Shannon. This the Council failed to do.

[210] Overall, the Strata Council seems not have appreciated that it was under a duty to accommodate Mr. Shannon's disability to the point of undue hardship. As the Supreme Court of Canada has made clear, the duty to accommodate is a multi-party process, in which all parties are under a legal obligation to act reasonably and cooperatively, working together to find a reasonable solution: *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425, paras. 43 – 44. Ms. Poucher's rhetorical question, asking whether the Council was required to do Mr. Shannon's research for him, is

reflective of this lack of understanding. Mr. Shannon had, in requesting to be allowed to retain the solar screen, made a reasonable proposal to accommodate his disability. It was incumbent on the Strata Council, if it thought there was another, more reasonable solution, to propose it. Its failure to do so was a breach of the duty to accommodate.

[211] The burden of establishing that it had a BFRJ for its conduct lies on the Strata. The Strata has not shown that it would have caused it undue hardship to grant Mr. Shannon an exemption from the Standard. Nor has it shown that there were, in fact, any reasonable alternatives to the solar screen. Whatever alternatives the Strata Council might have believed existed were not shared or explored with Mr. Shannon.

[212] I conclude that the Strata has failed to establish a BFRJ for its conduct.

[213] I therefore find the complaint justified.

3. Remedies

[214] Having found the complaint justified, I turn to a consideration of the appropriate remedies. The Tribunal's remedial jurisdiction is found in s. 37 of the *Code*:

> 37(1) If the member or panel designated to hear a complaint determines that the complaint is not justified, the member or panel must dismiss the complaint.
>
> (2) If the member or panel determines that the complaint is justified, the member or panel
>
> (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
>
> (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
>
> (c) may order the person that contravened this Code to do one or both of the following:
>
> (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
>
> (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at

the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and

(d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:

(i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;

(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

(3) An order made under subsection (2) may require the person against whom the order is made to provide any person designated in the order with information respecting the implementation of the order.

(4) The member or panel may award costs

(a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and

(b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3 (2) or an order under section 27.3 (3).

(5) A decision or order of a member or panel is a decision or order of the tribunal for the purposes of this Code.

(6) The member or panel must inform the parties and any intervenor in writing of the decision made under this section and give reasons for the decision.

[215] Mr. Shannon seeks a number of remedies, each of which I consider below. The Strata's submissions on remedy were limited to the submission that Council acted in good faith throughout. On behalf of the Strata, Ms. Poucher stated that it expected no

compensation to it, regardless of the result, and that if I found against the Strata, it would find a way to deal with it.

[216] Pursuant to s. 37(1)(a), Mr. Shannon seeks an order that the Strata consider the requirements of persons with physical disabilities when considering any application that requires "changes or alterations to the exterior of his modular home" as set out in Article 5A of the By-laws. In the alternative, pursuant to s. 37(2)(c)(i), Mr. Shannon seeks an order that Article 5A be amended so that written consent by the Strata is not required for "changes or alterations to the exterior of his modular home" for a person with physical disabilities, if the change or alteration is required to assist the person with physical disabilities to alleviate the effects of his disabilities, provided that such physically disabled person substantiates the existence of his disabilities to the Council by providing the Council with a medical opinion confirming the existence of the disabilities.

[217] In light of my findings, no amendment to Article 5A is necessary or appropriate. There is nothing inherently discriminatory about the requirement that Council approve changes and alterations to the exterior of homes in the development, and there are likely, in many cases, good reasons for requiring such approval. What is necessary is that the Strata Council, in considering applications for changes and alterations, do so consistently with its obligations under the *Code*, including considering whether such changes and alterations are required to accommodate a person's physical disability.

[218] The usual mandatory order under s. 37(2)(a), that "the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention", should be sufficient to achieve this end. I therefore order the Strata to cease and refrain from committing the same or a similar contravention to the one found in this decision.

[219] To be clear, this order means that Mr. Shannon is entitled to reinstall the solar screen on the front window of his home. It also means that future applications from owners for permission to makes changes or alterations to the exterior of their homes must be dealt with in accordance with the Strata's obligation not to discriminate contrary to s. 8 of the *Code*.

[220] Pursuant to s. 37(2)(b), Mr. Shannon seeks a declaration that a policy of refusing changes or alterations to the exterior of modular homes without consideration of the requirements of physically disabled persons is discrimination contrary to the *Code*.

[221] Such a declaration is consistent with the discrimination I have found, and I consider it appropriate to make it. I so order.

[222] Pursuant to s. 37(2)(c)(i), Mr. Shannon seeks an order that By-law 5B be modified to the extent that the design guidelines do not prevent a "change or alteration to the exterior of a modular home" as is required by a person with disabilities in assisting that person to deal with his disabilities.

[223] Such an order is unnecessary in light of the cease and refrain and declaratory orders I have made, and I decline to make it.

[224] Pursuant to s. 37(2)(d)(ii), Mr. Shannon seeks an order for compensation for legal fees and Dr. Shaw's medical opinion. The cost of the latter was $30.00. The legal fees incurred to the date of the statement of remedy (June 4, 2009) were in the amount of $1,537.21, but Mr. Shannon sought his entire legal fees up to and including the hearing. The parties agreed that, if I ordered compensation for legal expenses incurred, I would remain seized in the event they could not agree on the sum payable.

[225] Pursuant to s. 37(4)(a) and (b), Mr. Shannon also seeks an order for costs for improper conduct, including both the Strata's failure to negotiate in good faith prior to hearing, and the Strata's failure to comply with the Tribunal's *Rules of Practice and Procedure*.

[226] There is a certain degree of overlap between these two remedial requests, and I consider them together.

[227] First, it is apparent that Mr. Shannon is entitled to compensation for the expense incurred by him in obtaining Dr. Shaw's report, and, pursuant to s. 37(2)(d)(ii), I order the Strata to pay the amount requested, $30.00.

[228] Second, I consider Mr. Shannon's claim for compensation for legal expenses. The Tribunal has, in appropriate cases, ordered respondents to pay a successful complainant's reasonable legal expenses under s. 37(2)(d)(ii) as an expense incurred by

the contravention: *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376, paras. 471 – 504; and *Harrison v. Nixon Safety Consulting and others (No. 3)*, 2008 BCHRT 462, paras. 338 – 348.

[229] Since *Senyk* and *Harrison* were decided, one of the authorities relied upon by the Tribunal in concluding it has the jurisdiction under s. 37(2)(d)(ii) to award compensation for legal expenses incurred, *Canada (Attorney General) v. Mowat*, 2008 FC 118, has been overturned by the Federal Court of Appeal: *Canada (Attorney General) v. Mowat*, 2009 FCA 309.

[230] There are other cases pending before the Tribunal in which the question of the effect, if any, of the Federal Court of Appeal's decision in *Mowat* has been fully argued and will be considered.

[231] I have considered whether it would be either helpful or necessary to seek the parties' submissions in this case with respect to the possible effect of the Court of Appeal's decision in *Mowat* on Mr. Shannon's claim for compensation for legal expenses. I have concluded that it would not be. It would be unlikely to be helpful given that the Tribunal's jurisdiction to award compensation for legal expenses, and the Tribunal's case law on that point, were not addressed by either party in argument before me in the first place. Further, I would prefer to avoid putting the parties to the time and expense of further submissions, unless they are necessary.

[232] Such submissions are not necessary, because in my view, whatever the effect of the Federal Court of Appeal's decision on *Mowat* on the Tribunal's case law on its jurisdiction to award compensation for legal expenses under s. 37(2)(d)(ii), I am persuaded that this is an appropriate case to award compensation for legal expenses as costs for improper conduct under s. 37(4).

[233] The Tribunal's jurisdiction to order costs for improper conduct under s. 37(4) is clear. There are two species of improper conduct specified in that section: first, the general concept of improper conduct in the course of the complaint; and second, the particular example of contravening a rule or order.

[234] In *McLean v. B.C. (Min. of Public Safety and Sol. Gen.) (No. 3)*, 2006 BCHRT 103, the Tribunal held that improper conduct need not necessarily be intentional in order to come within s. 37(4):

> For example, where a party contravenes a rule or an order, such conduct may, under the express terms of s. 37(4)(b), constitute improper conduct. While a party's intention in doing so may be relevant, no specific intention is necessary for the breach of a rule or order to be improper. More generally, while conduct which is the result of intentional wrongdoing may certainly be "improper", in my view, improper conduct is not necessarily limited to intentional wrongdoing. Any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party, may constitute improper conduct within the meaning of s. 37(4). (para. 8)

[235] In the present case, I am satisfied that the Strata has engaged in a number of forms and instances of improper conduct.

[236] First, I am satisfied that, in the particular circumstances of the case, the Strata's adamant refusal to reconsider its position after it was advised by Mr. Shannon's counsel that its conduct was contrary to the *Code* was improper. Through Mr. Cooper's September 22, 2008 letter, Mr. Shannon put the Strata on notice that its conduct was, in his opinion, contrary to the *Code*, and further put the Strata on notice that, if he was not permitted to retain the solar screen, he would be filing a complaint with the Tribunal, in which case he would be seeking an order for any costs incurred. While putting the Strata on notice of this intention, the tone and contents of the letter were reasonable and conciliatory, with the hope expressed that the matter could be resolved simply by him being allowed to retain the screen.

[237] Had the Strata responded favourably to the proposal contained in Mr. Cooper's letter, much time, expense and unhappiness would have been avoided. Mr. Cooper's letter was correct in stating that the Strata's refusal to permit Mr. Shannon to retain the solar screen was discriminatory. Had the Strata sought competent legal advice in response to Mr. Cooper's letter, they should have received advice to the same effect. The proposal to resolve the dispute by Mr. Shannon being allowed to retain the screen was reasonable. And the Strata was clearly put on notice that they would be facing a claim

[238] In short, Mr. Cooper's September 22, 2008 letter was a reasonable, with prejudice offer of settlement. The Strata's refusal to accept it has resulted in an unnecessary complaint to the Tribunal, an unsuccessful application to dismiss, and a three day hearing.

[239] In final argument, the Strata submitted that Mr. Shannon did not know the meaning of negotiate or compromise. In light of the Strata's response to the reasonable proposal contained in Mr. Cooper's September 22 letter, and its continued refusal to allow Mr. Shannon to retain the solar screen, it seems to me that that statement more aptly describes the Strata than Mr. Shannon.

[240] The Tribunal not infrequently dismisses complaints under s. 27(1)(d)(ii) of the *Code*, on the basis that the complainant has refused a reasonable offer of settlement, leading to the conclusion that it would not further the purposes of the *Code* to allow the complaint to proceed: see *Carter v. Travelex Canada Limited*, 2009 BCCA 180, paras. 28 – 42, where the Court of Appeal upheld the Tribunal's jurisdiction to dismiss complaints on this basis.

[241] In coming to this conclusion, the Court of Appeal noted the absence of explicit legislative authority to dismiss a complaint due to a complainant's failure to accept a reasonable offer of settlement: para. 32. But the Court nonetheless accepted the Tribunal's jurisdiction to do so, stating:

> In my opinion, common sense dictates that the Tribunal is within its jurisdiction to dismiss a claim if, to proceed with it, would result in the same or nearly same award but with the inevitable attendant costs to the Tribunal and the parties. This interpretation is also supported by my reading of s. 27(1)(d)(ii) in relation to the scheme and object of the *Code* and the intent reflected therein. To find otherwise would burden the Tribunal and parties willing to settle with unnecessary expenditures of time and money. That cannot have been the legislator's intent. (para. 42)

[242] Similarly, where a complainant makes a reasonable offer of settlement, which is rejected by the respondent, common sense dictates that the Tribunal is within its jurisdiction to penalize that respondent through an order for costs for improper conduct.

Such a conclusion is consistent with the scheme and purpose of the *Code* and the intent reflected therein. To conclude otherwise would burden the Tribunal and parties willing to settle with unnecessary expenditures of time and money. This cannot have been the legislator's intent.

[243] This conclusion is consistent with the Tribunal's decisions in which it has ordered costs against complainants who have withdrawn their complaints on the eve of hearing, thereby forcing respondents, and the Tribunal, to incur unnecessary expenses, and in particular in the case of respondents, legal expenses, in dealing with their complaints: see *Samuda v. Olympic Industries*, 2009 BCHRT 65; and *Richardson v. Strata Plan NW1020 (No. 3)*, 2009 BCHRT 158. By parity of reasoning, a respondent who forces a complainant, and the Tribunal, to incur unnecessary expenses in dealing with a complaint, deserves to have costs ordered against them.

[244] I therefore conclude that the Strata engaged in improper conduct in rejecting the proposal contained in Mr. Cooper's September 28, 2008 letter, thereby necessitating nearly a year's worth of unnecessary and expensive legal proceedings.

[245] Second, the Strata has engaged in improper conduct in relation to its treatment of Dr. Shaw's letter, and in particular, in leaving the packages of material including copies of that letter unattended in the Clubhouse for approximately two months following the April 25, 2009 SGM.

[246] In this regard, I am unable to conclude, as submitted by Mr. Shannon, that the Strata's conduct in disclosing this letter to the owners at the SGM was, in and of itself, improper. While it may not have been strictly necessary to disclose the letter to the owners in order to obtain their guidance with how to proceed with the complaint, I cannot say it was improper, particularly in light of ss. 35(2)(k) and 36(1)(a) of the *Strata Property Act*, which appear to obligate a strata to provide such documents to owners on request.

[247] Further, the Strata acted appropriately in the statement made on the front of the package, advising owners to treat the information contained in the package as confidential.

[248] What was improper, in my view, was leaving the materials, including copies of the letter, in the Clubhouse after the SGM. There was no proper purpose for doing so, as the only justification for disclosing the letter was to obtain guidance at the SGM. The result of the Strata's carelessness was that any owner or guest could have had access to Mr. Shannon's personal medical information for a period of two months. The Strata did so despite knowing, by virtue of Mr. Shannon's two letters offering the letter on conditions to protect confidentiality, that he was concerned about the privacy of his personal medical information. Given that the letter was disclosed to the Strata through pre-hearing document disclosure, I conclude that this careless handling of the letter, and the confidential medical information contained in it, was improper conduct in the course of the complaint.

[249] Third, the Strata has engaged in improper conduct in the course of the complaint through its conduct of the April 25, 2009 SGM. As owners, under s. 45(1)(a) of the *Strata Property Act*, Mr. and Mrs. Shannon were entitled to notice of the meeting. They were also entitled to attend the meeting, up to the point at which the complaint came under discussion: s. 169(1)(c). While, given the fact that the human rights complaint appears to have been the only topic of discussion at the SGM, the Shannons' rights to notice and to attend may not have been very meaningful in practice, the fact remains that they had those rights, which were taken from them by the Strata because they had filed this complaint. The failure of the Strata to respect the Shannons' rights to notice and to attend the SGM could have been the basis for a complaint of retaliation, contrary to s. 43 of the *Code*. It is certainly improper conduct in the course of the complaint.

[250] Fourth, the Strata has engaged in improper conduct under s. 37(4)(ii) through failing to disclose potentially relevant documents to Mr. Shannon in a timely fashion as required under Rule 18(5). As outlined elsewhere in this decision, this includes all Strata Council minutes relating to the complaint; Mr. Amos' November 28, 2008 opinion letter; documents printed from the internet with respect to window films; and documents about alternatives to the solar screen allegedly considered by the Strata Council. All of these documents were clearly relevant, and should have been disclosed in a timely fashion. They were not, and were only disclosed on the eve of or in the course of the hearing, which both unnecessarily lengthened the hearing in order for the parties to make

submissions and for me to make rulings about them, and was inherently prejudicial to Mr. Shannon.

[251] Fifth, the Strata has engaged in improper conduct in the course of the complaint through the wholly inaccurate evidence given by Ms. Poucher about the documents allegedly considered by the Strata Council in September 2008. In cross-examination, it was revealed that the documents she said the Council had considered at that time could not have been, as they were not printed until March 30, 2009.

[252] Providing misleading evidence has, on a number of occasions, been the basis for an award of costs for improper conduct: *Bains v. Metro College Inc. and others (No. 2)*, 2004 BCHRT 7; and *Jiwany and Jiwany v. West Vancouver Municipal Transit*, 2005 BCHRT 172, paras. 119 – 133.

[253] The evidence about the documents purportedly considered by the Council in September 2008 was misleading, and was clearly introduced with the intention of showing that the Council had acted reasonably in September 2008 by considering alternatives to the solar screen. This was a key element of the Strata's defence to this complaint.

[254] In making this finding, I wish to emphasize that I do not think that Ms. Poucher herself intended to mislead the Tribunal. While she may be criticized for not having been as careful as she should have been in her evidence, I do not find that she intended to mislead. The fact that she admitted her error when the date on the documents was put to her in cross-examination is indicative of the absence of an intention to mislead on her part. Rather, I hold the Strata's representative, Mr. Amos, responsible for having intentionally introduced this evidence through Ms. Poucher when he knew or ought to have known that it was inaccurate.

[255] In all of these respects, I find that the Strata has engaged in improper conduct contrary to s. 37(4). In reaching this conclusion, I am not positing bad faith on the part of the Strata Council. It was apparent that the Council, throughout, relied on and acted on the advice of their Property Manager. While I do not find that the Strata Council acted in bad faith, its conduct, as described, had a significant impact on the integrity of the

Tribunal's processes, including a significant prejudicial impact on Mr. Shannon, and constitutes improper conduct within the meaning of s. 37(4).

[256] Having found that the Strata engaged in improper conduct warranting an award of costs, it remains to be determined what quantum of costs should be ordered. While orders for costs for improper conduct are primarily punitive rather than compensatory, parties' reasonably incurred legal expenses have been used as a basis for determining quantum in some cases: see *C.S.W.U. Local 1611 v. SELI Canada and others (No. 9)*, 2009 BCHRT 161; and *Chaudhary v. Smoother Movers (No. 2)*, 2009 BCHRT 176. Basing costs orders on a party's legal expenses is particularly appropriate where, as here, the improper conduct has been the cause of the expenditure of those funds. The Strata did not submit that it lacked the ability to pay a costs award. In the circumstances of this case, where the Strata's improper conduct spanned the length of the proceedings, and unnecessarily caused Mr. Shannon to incur legal expenses to take the matter through to hearing, I conclude that it is appropriate to order the Strata to pay Mr. Shannon's reasonable legal expenses.

[257] I leave it to the parties to attempt to determine the amount of costs payable. Should they be unable to agree on the amount, they are to advise me in writing by January 15, 2010, in which case I shall determine a process to fix the amount.

[258] Finally, pursuant to s. 37(2)(d)(iii), Mr. Shannon seeks compensation in an amount I consider appropriate for injury to his dignity, feelings and self-respect. Neither party made any submissions on the quantum of compensation payable under this head.

[259] In considering an appropriate award for injury to dignity, feelings and self-respect, I have taken into account Mr. and Mrs. Shannons' evidence about the impact of the discrimination on Mr. Shannon. I have also taken into account Mr. Shannon's evident frustration with these events, and the impact these events likely have had and may continue to have on his relations with his neighbours in the Strata. I have also taken into account that, through the other remedies ordered, Mr. Shannon has been made whole in terms of being permitted to reinstall the solar screen and being compensated for his legal expenses arising from the Strata's improper conduct.

[260] I have also considered awards made by the Tribunal in other strata cases involving a failure to accommodate an owner's disabilities, in particular: *Holowaychuk* (none sought or ordered); *Williams* ($1,500); and *Konieczna* ($3,500). In the latter case, the Tribunal noted a degree of inflexibility and aggression on the respondent's part, including through attempting to charge its legal expenses to the complainant's strata account, which increased the damages. While the Strata here may accurately be said to have been inflexible, its conduct cannot be characterized as aggressive.

[261] Considering the matter as a whole, I conclude that an award for compensation for injury to dignity, feelings and self-respect in the amount of $2,500 is appropriate.

V CONCLUSION

[262] I have found Mr. Shannon's complaint of discrimination on the basis of physical disability to be justified. The Strata discriminated against Mr. Shannon in not allowing him to retain the solar screen to reduce the use of in-home air conditioning, which exacerbated his physical disability. The Strata has not justified its conduct, as it would not have caused it undue hardship to allow Mr. Shannon to retain the solar screen.

[263] I have made a number of remedial orders, including: an order that the Strata cease and refrain from the discriminatory conduct; a declaration; an order for compensation for the expense incurred in obtaining an expert report; an order for costs for improper conduct equivalent to Mr. Shannon's reasonable legal expenses; and an order for compensation for injury to dignity in the amount of $2,500.

Lindsay M. Lyster, Tribunal Member