COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kassam v. 1129728 B.C. Ltd,* 2026 BCCA 33

Date: 20260130
Docket: CA50418

Between:

Tariq Kassam

Appellant
(Respondent)

And

1129728 B.C. Ltd.

Respondent
(Petitioner)

And

The Director of the Residential Tenancy Branch

Respondent

Before: The Honourable Mr. Justice Abrioux
The Honourable Justice Gomery
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated January 31, 2025 (*1129728 B.C. Ltd. v. Kassam*, 2025 BCSC 160, Vancouver Docket S241321).

Counsel for the Appellant:	N.J. Muirhead F. Karimi
Counsel for the Respondent:	W. Zhang Y. Wong
Counsel for the Director of the Residential Tenancy Branch	J.M. Patrick C.M. Clemente
Place and Date of Hearing:	Vancouver, British Columbia November 17, 2025
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2026

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Justice Gomery
The Honourable Justice Warren

Summary:

The appellant tenant was required to vacate a residential unit for the purpose of the respondent landlord living in the unit. The landlord did not do so for 14 months. As a result, the appellant applied to the Residential Tenancy Branch (RTB) for 12 months' rent as compensation under s. 51(2) of the Residential Tenancy Act. The arbitrator found the landlord liable. In doing so, she found that the landlord had not established "exceptional circumstances" resulting in their failure to occupy the unit. On judicial review, the judge found the arbitrator's decision to be patently unreasonable, and remitted the decision to the RTB.

Held: Appeal allowed on the sole issue that the decision should be remitted to the British Columbia Supreme Court, not the RTB. The arbitrator was confused about the correct statutory test, referring to "exceptional circumstances" on multiple instances, indicating she viewed it as synonymous with the correct test of "extenuating circumstances". She also grounded her finding that "exceptional circumstances" did not exist on irrelevant grounds, related to whether the tenancy was ended in good faith. Her findings of fact were undermined by her references to good faith, which resulted in her failure to apply the relevant legal framework.

The Director of the RTB is properly a respondent on appeal but was required to apply under the Court of Appeal Rules to be added as a party. Due to amendments to the Residential Tenancy Act, this matter is no longer within the monetary jurisdiction of the Director, and should be remitted to the Supreme Court, not the RTB.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This is an appeal from an order on judicial review setting aside a Residential Tenancy Branch ("RTB") arbitrator's decision under the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*], on the grounds it was patently unreasonable.

[2] The appellant-tenant, Mr. Kassam, vacated his apartment for the purpose of his landlord, the respondent 1129728 B.C. Ltd. (the "Landlord") occupying the unit. The Landlord's principal did not do so until 14 months after Mr. Kassam was required to vacate.

[3] Mr. Kassam did not challenge the Landlord's good faith in issuing the notice to end tenancy under s. 49(4) of the *RTA* and vacated the rental unit in compliance with the notice. The arbitrator framed the issue to be decided as:

> Is the Tenant entitled to a Monetary Order for compensation from the Landlord for the Landlord failing to accomplish the stated purpose on a notice to end tenancy?

[4] The arbitrator found that Mr. Kassam was entitled to compensation for 12 months' rent at $8,500 per month, being $102,000.

[5] The Landlord applied to the Supreme Court of British Columbia for judicial review of that decision. The judge found that the arbitrator's decision was patently unreasonable—the standard of review mandated by s. 58(2)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]. She remitted the matter back to the RTB for a rehearing.

[6] Mr. Kassam now appeals. As I shall explain, reading the decision as a whole, the arbitrator conflated two different tests in her analysis. Section 51(3) of the *RTA* required her to decide whether there were "extenuating circumstances" justifying the landlord's failure to occupy the rental until within a reasonable period following termination of the tenancy. The arbitrator quoted s. 51(3) but then applied a test of "exceptional circumstances". Extenuating circumstances are not inherently exceptional. These are different tests. At critical points in her reasoning, the arbitrator either failed to turn her mind to the correct test or, having done so, she assumed that she could treat "extenuating" and "exceptional" as synonyms. Either way, she made an obvious legal error.

[7] Accordingly, the issues on appeal are whether the judge erred in concluding that the decision was patently unreasonable and remitting the matter to the RTB for a rehearing because:

a) the arbitrator found the Landlord had not established "exceptional", as opposed to "extenuating", circumstances for failing to occupy the unit within a reasonable period of time after the notice of termination came into effect; and

b) the compensation awarded to Mr. Kassam was excessive.

[8] The Landlord also argues, for the first time on appeal, that the decision arose from a hearing that was procedurally unfair.

[9] This appeal also engages the question as to whether it was open to the judge—in light of recent amendments to the *RTA*—to remit the decision for reconsideration to the Director of the RTB (the "Director"), as opposed to the Supreme Court. I observe that, although the Director was a respondent in the Supreme Court proceeding, they did not appear at the hearing before the judge in that proceeding. Consequently, none of the parties advised the judge that the *RTA* had been amended.

[10] A preliminary point of practice also arises, being whether the Director, having not been named by Mr. Kassam in the Notice of Appeal, was required to bring an application to be added as a respondent. At the commencement of the hearing, following submissions, we concluded that an application was required and granted that application. These reasons will also outline the basis for that conclusion.

[11] In my view, the decision of the RTB arbitrator was patently unreasonable because the arbitrator's repeated references to the wrong legal test in the analysis caused her not to address the Landlord's onus under s. 51(3) of the *RTA*. I would grant the appeal to the limited extent of remitting the matter to the Supreme Court for a rehearing. Accordingly, I do not need to address the additional grounds of appeal—being an alleged lack of procedural fairness or the reasonableness of the arbitrator's calculation of the compensation awarded to Mr. Kassam.

Background

[12] The Landlord is a family-owned company, held in part by Ms. Yi He. It owns a residential apartment on West Cordova Street in Vancouver (the "Unit"), which Mr. Kassam occupied as a tenant. The initial term of the tenancy was from November 1, 2019 until October 31, 2021. Thereafter, the tenancy continued on a month-to-month basis.

[13] Before the arbitrator, the parties disputed the amount of monthly rent that was payable by Mr. Kassam. Pursuant to an unsigned tenancy agreement, it was $8,500 but the Landlord contended that it never exceeded $8,400.

[14] In late 2021, Ms. He and her husband, Fuhan Zhang, decided to demolish and rebuild their home in West Vancouver. Their evidence was that they planned to go to China for the first six months of their home renovation so Mr. Zhang could undergo tests for medical issues he was experiencing at the time. They intended to return to Canada and move into the Unit from May 2022 until the renovations were completed.

[15] After Ms. He and Mr. Zhang had spent four months in China, and in anticipation of their occupation of the Unit, the Landlord delivered to Mr. Kassam a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). The effective date of the Notice was April 29, 2022 and it contained the following additional information:

> After you move out, if your landlord does not take steps toward the purpose for which this Notice was given within a reasonable period after the effective date of this Notice, your landlord must compensate you an amount equal to 12 months' rent payable under your current tenancy agreement.
>
> You must apply to the Residential Tenancy Branch to be awarded this compensation. Your landlord may be excused from paying this amount if there were extenuating circumstances that prevented your landlord from accomplishing the purpose for ending your tenancy or using the rental unit for that purpose for at least 6 months.

[16] Mr. Kassam vacated the Unit and moved into another unit in the same building.

[17] Ms. He and Mr. Zhang did not occupy the Unit until June 2023, nearly 14 months after the Notice came into effect.

[18] Ms. He and Mr. Zhang provided two reasons why they did not move into the unit in May 2022, as initially planned. First, their time in China was extended until August 2022, when Mr. Zhang received a diagnosis for the medical issues he was experiencing. Second, when they returned to Vancouver, there was construction

taking place on the exterior of the Unit. They decided that the construction would interrupt Mr. Zhang's ability to rest and recover from his medical issues. Consequently, they lived in their daughter's apartment instead of the Unit from August 2022 until June 2023, after the construction was completed. They moved into the Unit thereafter.

The RTB arbitration

[19] Mr. Kassam brought an application for compensation under s. 51 of the *RTA* as outlined in the Notice. The parties agreed that the Unit was not occupied within a reasonable time. Mr. Kassam argued that Ms. He had no intention of moving into the Unit until construction had commenced on the West Vancouver home. Thus, the issues before the arbitrator were:

(a) Under s. 51(3) of the *RTA*, were there extenuating circumstances that prevented Ms. He and Mr. Zhang from moving into the Unit?

(b) What was the amount of monthly rent actually payable by Mr. Kassam to the Landlord for the purpose of calculating compensation?

[20] In answering these issues, the arbitrator began her reasons by correctly quoting the entirety of s. 51 of the *RTA*, which provides that under extenuating circumstances the Director may excuse a landlord for not occupying a unit for a reasonable time in accordance with the section. Thereafter, however, the arbitrator erroneously stated the test as being exceptional circumstances—and, in several instances, italicized the phrase for emphasis. She made the same error verbally several times during the hearing when articulating the relevant test to the parties.

[21] The arbitrator reasoned that exceptional circumstances did not exist in this case. She accepted that Ms. He and Mr. Zhang had an intention to occupy the Unit during the renovation of their West Vancouver home, but found that Mr. Zhang's health did not delay those renovations and was thus not the reason for the delay in occupying the Unit.

[22] Rather, the arbitrator found that the delay in occupation of the Unit was because the Landlord should have waited until the building permits had been obtained for the renovation of Ms. He and Mr. Zhang's West Vancouver home before issuing the Notice. On this point, she referred, by analogy, to s. 49.2 of the *RTA*, which describes a tenant's rights when a tenancy is terminated for the purpose of performing renovations on the unit in which that tenant resides. The arbitrator held that s. 49.2 provides that construction permits must be in place before issuing a four-month notice to end tenancy in order for a landlord to have acted in good faith. The arbitrator reiterated that she was not applying s. 49.2, but merely referring to it to determine whether exceptional circumstances had been established by the Landlord in this case. She reasoned that—since Ms. He and Mr. Zhang were not ready to begin construction on the West Vancouver home until they received construction permits in July 2022 and it would have taken time to organize contractors and tradespeople—they could have issued the Notice to Mr. Kassam in July 2022 and allowed him to continue living in the Unit in the meanwhile.

[23] Mr. Kassam testified that the construction on the exterior of the Unit did not begin until May or June 2023. This testimony conflicted with the Landlord's evidence that the construction commenced in August 2022, and caused Ms. He and Mr. Zhang to live with their daughter upon their return from China. The arbitrator accepted Mr. Kassam's evidence, observing that he had continued to live in the building during this timeframe. She then found that the exterior construction was not a reason for Ms. He and Mr. Zhang's delay in moving into the unit since the construction did not begin until long after their return to Canada.

[24] As for the quantum of rent to be paid as compensation, the arbitrator held that the amount of rent in the unsigned tenancy agreement—$8,500 per month—was binding on the parties. She held that the parties had otherwise acted on the agreement as if it were binding. Any reductions in rent to $8,400 were temporary and to compensate for Mr. Kassam being inconvenienced due to frequent showings during a timeframe when the Landlord was attempting to sell the Unit.

[25] Accordingly, the arbitrator found that the Landlord was liable to compensate Mr. Kassam the amount of 12 months' rent at $8,500 per month, for a total of $102,000.

The judicial review

[26] On judicial review, the judge found that the arbitrator's decision was patently unreasonable in both her liability and compensation findings.

[27] First, the judge found that the arbitrator based her decision on predominantly irrelevant factors. The arbitrator's inquiries into s. 49.2 of the *RTA* caused her to look erroneously at the timeline of permits (*1129728 B.C. Ltd. v. Kassam*, 2025 BCSC 160 at paras. 47–48 [*RFJ*]), rather than what the judge viewed to be the real questions required by the statutory framework: whether the Landlord had a good faith intention to occupy the Unit when issuing the Notice, or if there were other extenuating circumstances : *RFJ* at para. 57.

[28] Second, the arbitrator applied the incorrect legal framework by considering whether the Landlord had established exceptional rather than extenuating circumstances in determining the cause of Ms. He and Mr. Zhang's delayed occupation of the Unit. The judge referred to the RTB's Residential Policy Guidelines which define "exceptional" circumstances (to determine whether a party is entitled to an extension of time under s. 66 of the *RTA*) and "extenuating" circumstances (to determine the persuasiveness of a Landlord's excuse for failing to accomplish a stated reason to end tenancy under s. 51(3) of the *RTA*) differently: *RFJ* at paras. 73–74. Since the arbitrator repeatedly referenced the incorrect legal threshold, her decision was patently unreasonable : *RFJ* at para. 80.

[29] Third, the judge found that the arbitrator's calculation of compensation was arbitrary and inconsistent with the documentary evidence. There was evidence on the record to the effect that Mr. Kassam never paid more than $8,400 of monthly rent. However, the arbitrator did not explain why she preferred Mr. Kassam's testimony and the unsigned tenancy agreement to the rental income statements, which were to the contrary. Nor did the arbitrator explain why the unsigned tenancy

agreement governed the parties' relationship. Accordingly, without further explanation, those findings were arbitrary, and thus patently unreasonable: *RFJ* at paras. 89–94.

[30] Fourth, the arbitrator's reasons were inadequate. She considered irrelevant factors, overlooked relevant evidence (given that every rent receipt before her was for less than $8,500), and failed to apply the "extenuating circumstances" test under s. 51(3) of the *RTA*: *RFJ* at para. 101.

[31] The judge remitted the matter to the RTB for a rehearing.

Issues on Appeal

[32] The parties advance many of the same arguments as to whether the decision was patently unreasonable as they did before the judge. The Landlord now further argues that the decision was procedurally unfair. For his part, Mr. Kassam submits that procedural fairness is a new issue on appeal which should not be entertained by this Court.

[33] The Director takes no position on the merits of the appeal. But they submit that they no longer have jurisdiction to rehear this matter due to amendments to the *RTA*. The Director says that the two options before this Court are to remit the decision to the Supreme Court, or to make an order under s. 58(4)(a) of the *RTA* to expand the jurisdiction of the Director to hear this matter.

Standing of the Director

[34] In the proceedings in the Supreme Court, the Landlord's petition named the "Residential Tenancy Branch" as a respondent. The Director filed a response stating, in part, that the "Residential Tenancy Branch" is not a legal entity, nor is it a decision maker subject to judicial review. The Director observed that the statutory authority to resolve disputes under the *RTA* is granted to the Director. Accordingly, they submitted, the style of cause should be amended either to remove the reference to the RTB or to instead reference the Director.

[35] At the hearing of the petition the judge made an order, by consent, removing the RTB as a respondent. The order did not add the Director as a party.

[36] Mr. Kassam's Notice of Appeal, filed on February 4, 2025, only named the Landlord as a respondent.

[37] Notwithstanding the fact they had not been named as a respondent on the appeal, on March 10, 2025 the Director filed a notice of appearance and on July 17, 2025, without objection, filed their factum.

[38] In their factum, the Director explained that as a result of a "clerical error" the order from the court below had caused some confusion, but they argued that they remained a party in this Court. The submission was to the effect that the consent provided in the Supreme Court replaced the RTB as a party with the correct legal entity, being the Director. I observe that this explanation was provided notwithstanding that the Director's response to petition states that the style of cause should be amended either to remove the reference to the RTB or to reference the Director.

[39] Prior to the hearing of the appeal, the Court sent a memorandum to the parties, requesting that the Director file a notice of application to add them as a party to the appeal, in the event the Court did not agree with the Director's submissions on this point. The Director did so, and neither the Landlord nor Mr. Kassam opposed the application.

[40] The Director argues that, regardless of the order in the Supreme Court, they remain a party to this appeal pursuant to s. 15(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*]. That section provides:

> **Notice to decision maker and right to be a party**
>
> **15**(1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power
>
> (a) must be served with notice of the application and a copy of the petition, and
>
> (b) may be a party to the application, at the person's option.

[41] The Director relies on *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 92 [*CPSBC*] for the proposition that they became a party to the appeal proceeding by filing a response to the Landlord's petition in the Supreme Court.

[42] Section 15(1)(b) of the *JRPA* is silent as to a respondent decision maker's standing on an appeal. In *CPSBC*, the issue was whether the Health Professions Review Board had standing to appeal a judicial review of their own decision even though they did not participate in the judicial review at the Supreme Court. This Court held at para. 92 that s. 15(1)(b) of the *JRPA* permitted the Review Board to appeal the judicial review because they were a party to the petition below. The question in this case, rather, is whether the Director is a respondent on appeal.

[43] There is no doubt that the Director, by filling a response to the petition, was a respondent in the Supreme Court proceeding. In my view, however, the clear language of s. 15(1)(b), "may be party to the application" cannot be interpreted to include further proceedings on appeal in this Court.

[44] I would conclude that the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*] and *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*] determine the Director's standing in this Court.

[45] The Director meets the definition of a "respondent" in s. 1 of the *Act*:

> (a) a person, other than the appellant,
>
> (i) who was a party to the proceedings in the court appealed from, and
>
> (ii) whose interests are affected by the relief requested by the appellant in an appeal;
>
> (b) a person who is added, under the rules, as a respondent to an appeal[.]

[46] Rule 6(1) provides that it is the appellant's responsibility to properly name the respondents in their notice of appeal:

> **6** (1) A person who wishes to appeal an order must do the following within the time limit set out in subrule (2):
>
> (a) file a notice of appeal in Form 1 that names as a respondent each person

> (i) who was a party to the proceedings in the court appealed from, and
>
> (ii) whose interests could be affected by the relief sought in the notice;
>
> (b) serve, in accordance with Rule 4 (1) *[permitted methods of service]*, on each respondent named in the notice of appeal a copy of the filed notice of appeal.
>
> [Emphasis added.]

[47] Where an appellant fails to properly name a respondent on appeal, R. 18 provides a process by which a proper respondent may be added:

> **18** (1) A justice may make an order under subrule (2), if
>
> (a) a person was not named as a respondent in a notice of appeal or notice of cross appeal, and
>
> (b) the justice determines that the person has interests that could be affected by the relief sought in the appeal or cross appeal.
>
> (2) On application by a person referred to in subrule (1)(a), a justice, in the circumstances referred to in that subrule, may order that
>
> (a) the person be added as a respondent to the appeal[.]

[48] The language of R. 18(1)(a) applies to any person who was not "named as a respondent in a notice of appeal", rather than any person who would not otherwise be a respondent. In other words, R. 18 encompasses those parties who meet the definition of a respondent in the *Act* and *Rules* but who were not named in the notice of appeal as they ought to have been.

[49] It is clear that the Director was properly a respondent to this appeal. Through the operation of s. 15(1) of the *JRPA*, they were a respondent to the petition in the court below, and their interests are affected by the appeal. However, properly being a respondent does not dispose of the question. Since the Director was not named as a respondent in the notice of appeal, the proper procedure to be added as a respondent was to apply under R. 18(2).

[50] The Court was advised of a practice that has been followed in the Court's registry, in which the Director, if they were not named as a respondent in this Court, could file a notice of appearance on appeals of judicial reviews of RTB arbitrator decisions, regardless of whether the Director participated in the judicial review

petition before the Supreme Court or was not named as a respondent in the relevant notice of appeal. The practice had as its objective, simplifying the process to be followed where the Director should have been named as respondent, but through oversight or other reason, was not. While this practice was well-intentioned, respectfully, in my view, it cannot be reconciled with the *Rules*.

[51] It follows that if the Director is not named in the notice of appeal, they must file a notice of application under R. 18(2) in order to be added as a respondent on the appeal. I would expect that in most circumstances, there will be no dispute between the parties about adding the Director. In those cases, an application by consent would be appropriate. Absent consent, the application would proceed to be heard in chambers with cost consequences potentially arising if the consent were found to have been unreasonably withheld.

[52] In this case, the Director ought to have been named as a respondent on the appeal but was not. The application to add them was thus granted.

Standard of Review

[53] The legal framework was recently succinctly summarized by Justice Grauer in *Habitat for Humanity v. Booth*, 2026 BCCA 8:

> **2. STANDARD OF REVIEW: PATENTLY UNREASONABLE**
>
> [8] The role of this Court in a judicial review appeal is well-established. As Justice Hunter, for the Court, put it in *Holojuch v Residential Tenancy Branch*, 2021 BCCA 133:
>
> > [15] The role of this Court in reviewing the decision of a chambers judge on a judicial review application is to determine whether the chambers judge identified the correct standard of review and applied it correctly. For that purpose, the appellate court is to "step into the shoes of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision": *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46, quoting *Merck v. Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247.
>
> [9] In this case, it is not contested that the review judge identified the correct standard for the review of the arbitrator's decision. In accordance with section 58(2)(a) of the *ATA*, the decision "must not be interfered with unless it is patently unreasonable" (emphasis added).

> [10] With respect to whether the review judge applied the standard correctly, we owe no deference to the review judge's analysis because we step into the shoes of the judge and conduct our own reasonableness assessment of the decision: *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 36. Our task, then, is to determine afresh whether the arbitrator's decision was patently unreasonable.
>
> [11] This Court described the standard of patent unreasonableness in *Ahmad v Merriman*, 2019 BCCA 82, which also involved the review of a decision of an RTB arbitrator:
>
> > [37] Section 58(2)(a) of the *ATA* requires that a decision of an expert tribunal, such as the RTB, may not be interfered with unless it is patently unreasonable. The standard of patent unreasonableness requires the decision under review be accorded "curial deference, absent a finding of fact or law that is patently unreasonable": *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 29. Stated otherwise, it must be "clearly irrational" or "evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963–64. A patently unreasonable decision is one that is "so flawed that no amount of curial def[er]ence can justify letting it stand": *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at paras. 52–53.

[54] In her reasons, the judge referred to *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232 at para. 35 where Justice Davies explained that a decision is patently unreasonable if it fails to:

1) Set out the legal test to be met by the party advancing its claim;
2) Set out the adjudicator's findings of fact and the principal evidence upon which those findings were made; and
3) Apply those findings of fact to the test to be met in reaching a conclusion that will allow the parties and others (including a reviewing court) to understand how and why the adjudicator reached that decision.

[55] Mr. Kassam submits that the requirements of patent unreasonableness in *Laverdure* have been "impliedly overruled" by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Specifically, he argues that the holistic approach to reasonableness from *Vavilov* is incompatible with the formulaic requirements stated in *Laverdure*. Where a judge must read the reasons as a whole to determine reasonableness, he argues, it is incompatible to parse the reasons line-by-line, as the description of patent unreasonableness in *Laverdure* requires.

[56] In my view, properly understood, *Laverdure* is consistent with *Vavilov*. Legislated standards of review continue to be the "polar star" of selecting a standard of review: *Vavilov* at para. 33. The standard of patent unreasonableness, as a legislated standard of review under s. 58(2)(a) of the *ATA*, continues to mean what it did before *Vavilov*, notwithstanding developments in the common law standard of reasonableness: *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152 at para. 29.

[57] *Laverdure* must be read consistently with the holistic Vavilov reasonableness framework. The factors in *Laverdure* are no more than a tool to evaluate whether one can "trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" (*Vavilov* at para. 102). In my view, the factors to ensure reasonableness in *Laverdure*—stating a legal test, finding facts, and applying those facts to the test—are a means of evaluating the steps in the decision maker's reasoning. Where it is clear from the reasons considered in the context of the record and having regard to the specialized expertise and background of the decision maker that it failed to take those basic steps, a reviewing court may find the decision to be unreasonable, with those circumstances rising to the level of patent unreasonableness where appropriate.

Was the Arbitrator's Decision Patently Unreasonable?

The statutory framework

[58] Pursuant to s. 49(4) of the *RTA*, a landlord that is a family corporation may terminate a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

[59] Section 49.2 of the *RTA* provides in part:

> **Director's orders: renovations or repairs**
>
> **49.2** (1) Subject to section 51.4 *[tenant's compensation: section 49.2 order]* and any prescribed conditions, restrictions or prohibitions, a landlord may make an application for dispute resolution requesting an order ending a tenancy, and an order granting the landlord possession of the rental unit, if all of the following apply:

> (a) the landlord intends in good faith to renovate or repair the rental unit and has all the necessary permits and approvals required by law to carry out the renovations or repairs;
>
> (b) the renovations or repairs require the rental unit to be vacant;
>
> (c) the renovations or repairs are necessary to prolong or sustain the use of the rental unit or the building in which the rental unit is located;
>
> (d) the only reasonable way to achieve the necessary vacancy is to end the tenancy agreement.

[60] Section 49.2 does not explicitly provide that a landlord must have all necessary permits in place prior to issuing a notice to end tenancy. The arbitrator did not explain why she concluded that such a prerequisite existed. I note that prior to July 21, 2021 (before the arbitrator's decision in this matter), the predecessor to s. 49.2 in the *RTA*, s. 49(6)(b) as it then was, provided in part:

> **49** … (6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:
>
> …
>
> (b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant.
>
> [Emphasis added.]

[61] None of the parties on this appeal advanced arguments about whether a landlord is still required to have permits in place before issuing a notice to end tenancy under s. 49.2. These reasons do not resolve that question.

[62] Section 51 of the *RTA* provides in part:

> **51** …(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant…an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement unless the landlord or purchaser, as applicable, establishes that…
>
> (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice;
>
> …
>
> (3) The director may excuse the landlord…from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord …from

> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy …
>
> [Emphasis added.]

Analysis

[63] I would find that the arbitrator's decision was patently unreasonable in two ways. First, she confused the relevant legal test she was applying under s. 51 of the *RTA*. By articulating the test in two different ways—in terms of both "exceptional" and "extenuating" circumstances—she created an unclear bar for the Landlord to meet. Second, she combined the analysis under s. 49(4), which encompasses a good faith requirement, with the analysis under s. 51(3), which does not. This resulted in an analysis that did not conform with the question the arbitrator was required to answer—being whether the Landlord had established that extenuating circumstances prevented it from occupying the Unit within a reasonable time.

Did the arbitrator articulate the case to be met by the Landlord?

[64] The arbitrator did quote s. 51(3) of the *RTA* in her decision, which sets out the correct legal test, being "extenuating" circumstances. But by also referring on numerous occasions to "exceptional circumstances" she treated the two expressions, erroneously in my view, as synonymous.

[65] Both terms have specific meanings. As the judge explained:

> [73] … Residential Tenancy Policy Guideline 36 discusses (in the context of extending a time period, which is not applicable here) the meaning of "exceptional circumstances":
>
> > The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse. Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.
>
> [74] By contrast, Residential Tenancy Policy Guideline 50 discusses (in the context of compensation for ending a tenancy, as here) the meaning of "extenuating circumstances":
>
> > These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control.

> [Emphasis added.]

[66] The issue is whether the arbitrator applied the correct test. In the immediately ensuing paragraph which follows the quotation of s. 51(3), the arbitrator stated:

> This is a two part test. I must first determine if the rental unit was used for the purpose stated on the notice for a reasonable period of time and if not, whether the landlord should be excused from paying compensation due to *exceptional circumstances*.
>
> [Emphasis in original.]

[67] It is evident that the arbitrator set out a second legal test, which incorporated a different standard for the Landlord to meet. Reading the decision contextually and as a whole, it is impossible to discern whether the standard she actually applied was "exceptional" or "extenuating" circumstances.

[68] This conclusion is reinforced by a review of the portions of the transcript which formed part of the record, in which the arbitrator repeats the phrase "exceptional circumstances" when referring to the case to be met. In the result, the standard applied by the arbitrator remains unclear throughout the record.

Did the arbitrator erroneously combine the good faith and extenuating circumstances issues?

[69] In my view, the decision is also patently unreasonable in that the arbitrator erred by combining her analysis of two issues: whether the good faith requirement and extenuating circumstances had been established. The question as to whether the Landlord had a good faith intention to occupy the Unit relates to the validity of the Notice under s. 49(4) of the *RTA* but does not form part of the test to excuse unexpected circumstances under s. 51(3). It bears repeating that Mr. Kassam did not challenge the Notice under s. 49(4), and vacated the Unit in compliance with its requirements.

[70] In her decision, the arbitrator reasoned that the Landlord had always planned to move into the Unit when construction commenced on the West Vancouver home, not when they returned to Canada from China:

> Rather, I find it more likely that the Landlords issued the 2 Month Notice prematurely. D.L. testified that they intended to move into the rental unit while their other home was substantially renovated. He further testified that they applied for permits at the end of 2021. Documentary evidence submitted by the Landlords indicates that they did not receive the permit until July 12, 2022, nearly three months after the effective date of the 2 Month Notice.

[71] This analysis relates to the question of whether the Landlord had a good faith intention for its principal to occupy the Unit under s. 49(4)—it does not determine whether there were extenuating circumstances under s. 51(3). By referring to findings that went to the good faith requirement to assist in resolving the extenuating circumstances issue, the arbitrator failed to properly consider the extenuating circumstances standard of proof.

[72] I would add that the judge made a related error at para. 57 of the *RFJ* when she stated that the arbitrator should have considered whether the Landlord had a good faith intention to occupy the Unit. The only question the arbitrator should have analyzed in her reasons was whether extenuating circumstances existed.

[73] The errors in the arbitrator's decision, in my view, are compounded by her references to s. 49.2 to ground a finding that there were no extenuating circumstances under s. 51(3). The question that arises under s. 49.2 is whether "the landlord intends in good faith to renovate or repair the rental unit": s. 49.2(1)(a) (emphasis added). But s. 49.2 is does not apply where the question is whether there are extenuating circumstances under s. 51.4(5) of the *RTA*. The arbitrator relied upon the portions of s. 49.2 concerning good faith—not those relating to extenuating circumstances (in s. 51.4(5)), which would be applicable to the question she was attempting to answer.

[74] Perhaps in other circumstances an analogy to s. 49.2 could be extended to the similar "good faith" requirement under s. 49(4). But in this case, the analogy was inapplicable because it was made to assist in determining whether "extenuating circumstances" existed under s. 51(3).

[75] For these reasons I would conclude that the arbitrator erred in her consideration of the applicable statutory requirements and these errors were so

open and evident that they rendered the decision patently unreasonable: *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 32.

Did the distinction between "extenuating" and "exceptional" circumstances matter in this case?

[76] Mr. Kassam submits that the analysis does not end because the arbitrator misapplied the test. He argues that the findings of fact were such that the arbitrator's lack of clarity in articulating the requisite test was irrelevant and the decision should still be upheld. He says the decision would have been the same regardless of whether the "exceptional" or "extenuating" circumstances framework was used because the arbitrator did not accept the Landlord's explanations for Ms. He and Mr. Zhang failing to occupy the Unit within what was admitted to be an unreasonable period of time.

[77] Mr. Kassam relies on certain of the arbitrator's findings of fact to advance this submission:

> The Landlord argues that they should be relieved of paying compensation due to exceptional circumstances. In that respect D.L. testified that his father in law, F.Z. had health issues in November of 2021 which prevented them from moving into the rental unit until June 2023.
>
> As aptly noted by counsel for the Tenant, F.Z.'s health issues arose some four months prior to the issuance of the 2 Month Notice. While the cause of F.Z.'s dizziness and balance issues were not known at the time, on balance, I am not persuaded that this was the reason the rental unit remained unoccupied for nearly a year and a half after the 2 Month Notice was issued.
>
> …
>
> D.L. testified that Y.H. and F.Z. returned to China in the spring of 2022 due to F.Z.'s health issues. I find the Landlord has submitted insufficient evidence to support a finding that F.Z.'s health issues impacted the issuance of the building permits on the West Vancouver home as the application for those permits had been submitted at the end of 2021.

[78] Mr. Kassam argues that these paragraphs make all the necessary findings of fact to preclude any degree of unforeseeable circumstances—regardless of whether they are exceptional or extenuating. By finding that Mr. Zhang's health issues were not the reason the Unit remained unoccupied, the arbitrator rejected all explanations

provided by the Landlord as to any external circumstances that prevented the occupation of the Unit. He submits that the arbitrator clearly found that Ms. He and Mr. Zhang's only purpose for moving into the Unit was as a temporary residence while awaiting the construction of their West Vancouver home. Since Mr. Zhang's health issues did not delay the issuance of permits for that construction, Ms. He and Mr. Zhang waited until construction began on their West Vancouver home before occupying the Unit, as they had always intended. Accordingly, neither extenuating nor exceptional circumstances could have arisen when Ms. He and Mr. Zhang followed their plan, as they had conceived it, before causing the Landlord to issue the Notice.

[79] I would not accede to this argument. In my view, the findings of fact were made at least partially to consider irrelevant legal tests—namely those in ss. 49(4) and 49.2.

[80] This is seen in a subsequent portion of the decision where the arbitrator found:

> I find it more likely that the Landlords issued the 2 Month Notice prematurely. D.L. testified that [Ms. He and Mr. Zhang] intended to move into the rental unit while their other home was substantially renovated. He further testified that they applied for permits at the end of 2021.

[81] To reach this conclusion, the arbitrator made findings about the date on which Ms. He received construction permits. The arbitrator also speculated on the timelines on which contractors were available to Ms. He:

> Again, I recognize this 2 Month Notice was issued pursuant to section 49(4), not section 49.2 and there was no intention by the landlords to renovate or repair the rental unit itself. However, their justification for needing to occupy the rental unit was due to the construction and renovation of their other home in West Vancouver. The evidence confirms they were not ready to begin construction on that home until at the very earliest July 12, 2022 when they received the required permits. Presumably it would have taken some time to organize contractors and tradespeople after the issuance of the permit as they would be working other jobs waiting for the "go ahead" on the West Vancouver home.

[82] I acknowledge that the arbitrator stated that she did not make her decision on the basis of s. 49.2. Rather, she drew an analogy between this matter and the

timelines in s. 49.2, to ground her finding that Ms. He's May 2022 move-in projection was never reasonable because Ms. He would not have contractors for the renovation of her West Vancouver home in place by the effective date of the Notice. The fact remains, however, that findings of fact were made, even by analogy, which were unnecessary in that they served as a basis for the arbitrator's conclusion that the Notice was issued prematurely, rather than serving as a basis that the Landlord failed to establish the existence of extenuating circumstances.

[83] For these reasons, the arbitrator's references to s. 49.2 of the *RTA*, including the requirements that permits be in place and the like, colour the fact-finding exercise and cannot, in my view, be artificially segregated from what the Landlord needed to establish to meet the extenuating circumstances standard.

[84] I am not persuaded that findings of fact that were made for reasons other than determining whether extenuating circumstances existed—and that were made at least partially with an irrelevant legal test in mind—should ground a conclusion that the Landlord's conduct would inevitably not be excused under s. 51(3). I would therefore not accede to the argument that the same result would have occurred under either the "exceptional" or "extenuating" standard. The findings of fact that resulted in such an analysis are tainted by the arbitrator's erroneous application of s. 49.2. It was neither rational, nor necessary for the arbitrator to analogize to s. 49.2 under these circumstances. As a result, her findings were patently unreasonable.

Conclusion on patent unreasonableness

[85] I am of the view that no amount of curial deference can uphold an administrative decision such as this where it does not clearly articulate the case for a party to meet (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52) and fails to apply the standard in accordance with the analysis required under s. 51(3) of the *RTA* (*West Fraser Mills Ltd.* at para. 32).

[86] I would dismiss this first ground of appeal.

The arbitrator's compensation award

[87] For the purposes of this appeal, Mr. Kassam stated that he was prepared to reduce his claim by $1,200 (the difference between 12 months' rent at $8,400 and at $8,500) in order to resolve the issue of compensation.

[88] In that I would remit the matter to the Supreme Court for a rehearing, it is not necessary to consider the reasonableness of the arbitrator's award of compensation.

Remedy

[89] The only remaining question is the appropriate remedy.

[90] The judge decided that the decision should be remitted to the RTB for a rehearing. In this Court, the Director argues that certain amendments to the *RTA* have removed this matter from the jurisdiction of the Director, and it therefore cannot be heard at the RTB.

Background

[91] In the proceedings below, the Director did not raise any issues as to the appropriate remedy. In fact, they did not attend at the hearing of the petition to advise the judge of recent amendments to the *RTA*.

[92] In this Court, the Director argues that amendments to the *RTA*, which came into effect on July 18, 2024, have removed this matter from the Director**'**s monetary jurisdiction. The amendments came into effect after the Landlord filed its petition for judicial review on February 26, 2024, but four months before the judicial review hearing occurred on November 24, 2024.

[93] The amended s. 58(2)(a.1) of the *RTA* provides:

> **58** (2) Except as provided in subsections (2.2) and (4) (a), the director must not resolve a dispute if any of the following applies:
>
> …
>
> (a.1) the amount claimed under any of the following provisions of this Act is more than $65 000:
>
> (i) section 51 (1) or (2)

[94] Section 58(2) does not apply where ss. 58(2.2) or 58(4)(a) apply. Subsection 58(2.2) provides jurisdiction to the Director in circumstances where the amount above $65,000 is abandoned by the applicant. Subsection 58(4)(a) provides, on petition, for the Supreme Court to order that the Director has extraordinary jurisdiction to resolve the dispute: *Choi v. Westbank Projects Corp.*, 2024 BCCA 410 at para. 36.

[95] Section 44 of the amending statute, the *Tenancy Statutes Amendment Act, 2024*, S.B.C. 2024, c. 19 [*TSAA*] states:

> **44** If, on the date this section comes into force, an application for dispute resolution has been made but a final determination has not been made in respect of the application, the following provisions, as amended by this Act, apply in respect of the application:
>
> …
>
> (b) section 58 of the *Residential Tenancy Act*, in the case of an application under that Act.

[96] The Director argues that, as a result of the transition provision in s. 44 of the *TSAA*, and the application of the new s. 58(2)(a.1), this case is no longer within their jurisdiction..

[97] This is clearly a new issue that the Court should hear on this appeal. On July 18, 2024, the new *RTA* provisions came into force and, subject to the amendments, removed this matter from the jurisdiction of the Director, a fact unknown to the judge.

[98] The issue in this Court is whether the appropriate remedy is to remit the decision to the Director by granting them extraordinary jurisdiction under s. 58(4)(a) of the *RTA* or to the Supreme Court.

This matter should be remitted to the Supreme Court

[99] Section 58(2)(a.1) removes the jurisdiction of the Director in this case, as the case involves a claim of $102,000, which exceeds the Director's limit of $65,000 under s. 51(2) of the *RTA*.

[100] Since Mr. Kassam is not prepared to abandon the amount of his claim in excess of $65,000, s. 58(2.2) does not apply.

[101] Mr. Kassam submits that this Court may expand the jurisdiction of the Director under s. 58(4)(a). He argues that he pled this relief in his response to petition, by seeking "any further and other relief that the court deems just". This, he argues, could include an application under s. 58(4)(a). His response to petition does not, in fact, include such a pleading.

[102] Be that as it may, since there is no application properly before the Court pursuant to s. 58(4)(a), the only available remedy, in my view, is for this Court to remit the matter to the Supreme Court for a rehearing.

[103] These reasons do not prevent either party from making an application to the Supreme Court to expand the jurisdiction of the Director under s. 58(4)(a) to hear this matter. I would add that there are no restrictions on the submissions the parties can make when this case is heard afresh by the Supreme Court. In particular, Mr. Kassam's acknowledgment at the hearing of this appeal to reduce his claim by $1,200 in order to resolve the compensation issue does not preclude him from arguing that he is entitled to the full $102,000 as ordered by the arbitrator.

Conclusion

[104] I would allow the appeal to the limited extent of remitting the matter to the Supreme Court for a rehearing in accordance with these reasons. I would otherwise dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Justice Warren"