

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1129728 B.C. Ltd. v. Kassam*,  
2025 BCSC 160

Date: 20250131  
Docket: S241321  
Registry: Vancouver

Between:

**1129728 B.C. Ltd.**

Petitioner

And

**Tariq Kassam**

Respondent

Before: The Honourable Justice Douglas

On judicial review from: An order of the Residential Tenancy Branch,  
dated December 27, 2023 (RTB File No. 910102266)

## Reasons for Judgment

Counsel for the Petitioner: W. Zhang

Counsel for the Respondent: N.J. Muirhead

Place and Date of Hearing: Vancouver, B.C.  
November 27, 2024

Place and Date of Judgment: Vancouver, B.C.  
January 31, 2025

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## I. OVERVIEW

[1] The petitioner landlord, 1129728 B.C. Ltd., seeks judicial review of a decision by an arbitrator of the Residential Tenancy Branch (“RTB”). Respondent, Tariq Kassam, is the landlord’s former tenant.

[2] Although the RTB is a named respondent and filed a petition response, it did not participate in the hearing of this petition. The parties consented to an order removing the RTB as a respondent at the hearing of the judicial review.

[3] The central issue before the RTB was whether extenuating circumstances prevented the landlord or one of its shareholders from occupying Mr. Kassam’s rental unit within a reasonable period of time after the petitioner terminated his tenancy for that purpose. The RTB arbitrator found that neither the landlord, nor one of its shareholders, moved into this unit within a reasonable period of time. The arbitrator granted the tenant a monetary order in the amount of \$102,100, representing twelve months’ rent at \$8,500 per month, plus a \$100 filing fee.

[4] The petitioner submits that this decision is patently unreasonable and that the matter should therefore be remitted to the RTB for a new hearing. For the reasons that follow, I agree.

## II. FACTUAL BACKGROUND

[5] Much of the relevant factual background is undisputed.

[6] The landlord is a family-owned company. Its shareholders include Dong Liu, his wife, Yugao Zhang, and his mother-in-law, Yi He. At all material times, the landlord owned a residential rental property at 1104 - 1139 West Cordova St. in Vancouver, BC (the “Unit”). On or about November 1, 2019, Mr. Kassam entered into an unsigned tenancy agreement with the petitioner landlord, moved into the Unit, and started paying rent. The initial term of this tenancy agreement extended from November 1, 2019 to October 21, 2021; thereafter, it continued on a month-to-month basis.

[7] Pursuant to the parties' unsigned written tenancy agreement, Mr. Kassam agreed to pay monthly rent in the amount of \$8,500. The petitioner denies Mr. Kassam ever paid rent in this amount and asserts that he actually paid monthly rent as follows:

- a) \$8,400.00 from November 2019 to March 2020;
- b) \$6,300.00 from April 2020 to June 2020;
- c) \$8,400.00 from July 2020 to April 2021; and
- d) \$8,000.00 from May 2021 to the end of the tenancy agreement.

[8] Monthly rental income statements for the years 2019 and 2020, but not 2021 or 2022, were before the arbitrator at the RTB hearing.

[9] Ms. He owned another property at 458 Southborough Drive, West Vancouver, where she resided with her husband, Fuhan Zhang. In late 2021, they decided to demolish and rebuild this West Vancouver property. They applied for a demolition permit and began planning this construction project. Based on evidence the landlord submitted at the RTB hearing, the City of West Vancouver had approved but not issued this demolition permit as of July 12, 2022.

[10] In November 2021, Ms. He and her husband travelled to China. Based on the transcript from the RTB hearing, they initially intended to remain in China for about six months so that Mr. Zhang, who was then experiencing some health issues, could undergo various medical tests. They planned to return to Canada and move into the Unit in May of 2022.

[11] On February 21, 2022, the petitioner issued a Two Month Notice to End Tenancy for Landlord's Use of Property, requiring Mr. Kassam to move out of the Unit by April 29, 2022. This notice stated that the Unit would thereafter be occupied by the landlord, or the landlord's spouse. It provided 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.

[12] The RTB record of proceedings contains a statement from Ms. He entitled "Explanation of the Situation". It reads, in part, as follows:

I, He Yi, am a shareholder of 1129728 B.C. Ltd. In 2021, I initiated the process of rebuilding my house in West Vancouver. Starting from the end of 2021, I engaged in discussions with other shareholders regarding the temporary use of unit 1104.

In February, [w]e contacted the rental agency to find tenants. The tenants were duly informed, and within a stipulated 15 day period, no objections were raised. Subsequently, they directly communicated with the rental agency and voluntarily vacated the premises ahead of schedule.

[13] This statement makes no reference to Mr. Zhang's health issues although, on Mr. Liu's evidence, they were known (but not diagnosed) in November 2021.

[14] Mr. Kassam vacated the Unit before April 29, 2022. Ms. He and her husband moved into the Unit in June 2023, about 17 months after they issued their February 2022 notice to end tenancy and required Mr. Kassam to vacate.

[15] There is no issue on this petition that: 1) the petitioner had a good faith intention to occupy the Unit when it issued its notice to end Mr. Kassam's tenancy; and 2) the petitioner did not occupy the Unit within a reasonable time thereafter.

### III. THE RTB HEARING

[16] Mr. Kassam submitted his dispute resolution application for compensation under s. 51 of the *Residential Tenancy Act*, SBC 2002, c. 78 [RTA] on or about February 24, 2023.

[17] The RTB hearing commenced on November 14, 2023, and proceeded by telephone conference call. Mr. Liu, who described his English as limited, attended

the hearing on behalf of the landlord with a friend, Nancy Fu, who provided some translation assistance. Mr. Kassam was represented by counsel.

[18] Due to time constraints, the RTB hearing was adjourned and continued on November 27, 2023. Mr. Liu again attended on behalf of the landlord and Ms. Fu provided him with some translation assistance; Mr. Kassam attended with counsel.

#### IV. THE RTB DECISION

[19] On December 27, 2023, the RTB arbitrator issued an 11-page decision, allowing Mr. Kassam's dispute resolution application and granting the tenant a monetary order, based on 12 months' rent at \$8,500 per month.

[20] The arbitrator found as a fact that Ms. He and Mr. Zhang intended to move into the Unit while renovating their West Vancouver property. Mr. Kassam does not challenge this finding. He concedes that the petitioner had a good faith intention to occupy the Unit pursuant to s. 49(2) of the *RTA*. The RTB arbitrator found, and the petitioner concedes, that the landlord did not occupy the Unit within a reasonable period pursuant to s. 51(2)(b) of the *RTA*.

[21] The central issue before the RTB arbitrator was whether, pursuant to s. 51(3) of the *RTA*, the director ought to excuse the landlord from making a monetary payment to the tenant on the basis that 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; and
- b) Using the rental unit, except in respect of the purpose specified in section 49(6)(a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

[22] The arbitrator concluded:

Based on the evidence before me, the testimony of the parties, and on a balance of probabilities, I find that the Tenant has established their claim for

compensation pursuant to s. 51(2). I find that the Landlord did not occupy the rental unit within a reasonable period of time after the effective date of the 2 Month Notice. Further, I am not satisfied the Landlord has established *exceptional circumstances* existed which prevented the Landlord for using the property for the stated purpose. Rather, on balance, I find it more likely the Landlords prematurely issued the 2 Month Notice and should have waited at least until the permits had been obtained for the construction and renovation of the West Vancouver home before ending this tenancy.

[23] The arbitrator acknowledged the parties' dispute regarding the amount of rent payable by Mr. Kassam pursuant to their tenancy agreement:

The parties disagreed as to the amount of monthly rent payable. The tenancy agreement provided rent was due in the amount of \$8,500 per month. While the agreement was not signed, I am satisfied the parties agreed to the terms of the agreement and acted as if bound by those terms. I therefore find it of no consequence that the agreement provided in evidence was not signed.

[...]

The evidence further indicates that for a period of time the Tenant paid \$8,400 per month. The Tenant says this was also a temporary reduction when the Landlord was attempting to sell the rental unit and the Tenant was subjected to frequent showings. I find this reduction was also temporary and does not affect the Tenant's entitlement pursuant to section 51(2).

[24] In the result, the RTB arbitrator allowed Mr. Kassam's application and granted him a monetary order calculated based on 12 months of rent at \$8,500 per month.

## V. LAW AND ANALYSIS

### A. What is the applicable legal framework?

[25] There is no dispute that the applicable standard of review is patent unreasonableness pursuant to section 58 of the *Administrative Tribunals Act*, SBC 2004, c. 45 [ATA].

[26] RTB decisions are protected by a privative clause pursuant to s. 84.1 of the RTA. Section 58 of the ATA applies to tribunals that are protected by a privative clause. Pursuant to s. 58 of the ATA, such tribunals must be considered expert in relation to all matters within their exclusive jurisdiction. A court must not interfere with a finding of fact or law or an exercise of discretion by an expert tribunal

regarding a matter over which the tribunal has exclusive jurisdiction under a privative clause unless it is patently unreasonable.

[27] While s. 58(3) of the *ATA* defines the standard of patent unreasonableness only in relation to exercises of an expert tribunal's discretion, and not in relation to its findings of fact or law, it is well-settled that patent unreasonableness calls for a high degree of deference to both discretionary and non-discretionary decisions of an administrative decision-maker: *Kohli v. Van Essen*, 2023 BCSC 1710 at para. 32, citing *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39 – 44, leave to appeal to SCC ref'd 36305 (29 October 2015).

[28] A discretionary decision is patently unreasonable if it is exercised arbitrarily or in bad faith, exercised for an improper purpose, based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account: *ATA*, s. 58(3).

[29] A decision is patently unreasonable if it is:

- a) Openly, evidently, and clearly irrational (*Gichuru v. Palmar Properties Inc.*, 2011 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114);
- b) Unreasonable on its face, unsupported by evidence, or vitiated by a failure to consider the proper factors or to apply the appropriate procedures (*Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para. 41); or
- c) One that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 at para. 18; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28.

[30] As noted by Justice D. MacDonald in *Kong v. Lee*, 2021 BCSC 606 at para. 58, the jurisprudence references many formulations of the patently unreasonable

standard; all demonstrate that the standard is an onerous one and that expert tribunals are entitled to a high degree of deference. A decision can only be quashed if there is no rational or tenable line of analysis supporting it: *Kong* at para. 58, citing *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65, aff'd 2009 BCCA 229. In determining whether a decision is patently unreasonable, it is not the court's role to substitute findings or to reweigh the evidence: *Furtado v. Maasanen*, 2020 BCSC 1340 at para. 14, citing *Yee v. Montie*, 2016 BCCA 256.

[31] A court conducting a judicial review must consider both the outcome and the reasons provided for it: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83 [*Vavilov*]. It is the duty of a reviewing court, whether applying the standard of reasonableness or patent unreasonableness, to determine whether the reasons meaningfully consider the central issue in the case and the concerns raised by the parties: *Kong* at para. 64, citing *Guevara v. Louie*, 2020 BCSC 380 at para. 48.

[32] An RTB decision may be set aside due to the inadequacy of reasons, where such inadequacy rises to the level of patent unreasonableness: *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232 at paras. 30-31. As noted in *Laverdure* at para. 35, for reasons to be adequate, the decision-maker must:

- a) Set out the legal test to be met by the party advancing its claim;
- b) Set out the adjudicator's findings of fact and the principal evidence upon which those findings were made; and
- c) 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.

[33] In short, as summarised in *Laverdure* at para. 37:

[F]or reasons to be adequate, they need not necessarily address every issue raised by the parties nor all of the evidence adduced, but on the central issue

or issues that underlie the conclusion reached there must be sufficient clarity of fact finding and application of those facts to the test to be met to allow the parties and a court to know why the decision was reached and whether it was within a range of acceptable outcomes.

[34] I have applied these legal principles to my analysis.

**B. Is the RTB decision patently unreasonable?**

[35] The petitioner submits that the RTB decision is patently unreasonable because:

- a) It is based entirely or predominantly on irrelevant factors;
- b) The arbitrator failed to consider relevant factors and to apply the correct legal framework;
- c) The arbitrator's calculation of the amount of compensation payable to Mr. Kassam was arbitrary and inconsistent with documentary evidence; and
- d) The arbitrator's reasons are inadequate.

[36] I address each point in turn.

**1. Did the arbitrator base the decision on irrelevant factors?**

[37] The petitioner argues that the RTB decision is based entirely or predominantly on irrelevant factors, including, in particular, details about when Ms. He applied for and obtained a permit regarding the planned demolition at her West Vancouver property.

[38] The petitioner submits that, by focusing on these irrelevant factors, the arbitrator conflated the first part of the applicable test (i.e., whether the landlord had a good faith intention to occupy the Unit) with the third part of the test (i.e., whether extenuating circumstances prevented the landlord from doing so within a reasonable time) and that the respondent effectively does the same thing on this judicial review.

[39] The record of proceedings before the RTB is incomplete. Only the first day and the first half of the second day of the RTB hearing were recorded and later transcribed. There is no record of the cross-examination evidence of Mr. Liu, the landlord's representative, or any of the evidence of Mr. Kassam, or Mr. Liu in reply. Ms. Fu's attempted translation of Mr. Liu's evidence was not consistently clear.

[40] Pursuant to s. 49(4) of the *RTA*, a landlord that is a family corporation may end 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. There is no dispute that the petitioner is a family corporation, as defined in the *RTA*.

[41] The petitioner interprets reference to "good faith" in s. 49 of the *RTA* to mean "honestly": *Semeniuk v. White Oak Stables Ltd.*, 56 B.C.L.R. (2d) 371, 1991 CanLII 968 (C.A.) at para. 13. Counsel for the petitioner argues that, as the chambers judge found in *Semeniuk*, provided the landlord honestly intended to use the rental unit for the purpose stated, the motives underlying that intention, and the reasonableness of them, are irrelevant.

[42] The petitioner says that, contrary to *Semeniuk*, the RTB arbitrator focused in error on the landlord's underlying motive for Ms. He's decision to move into the Unit with her husband due to their planned West Vancouver construction project, a factor that is irrelevant. Mr. Kassam admits the landlord had a good faith intention to occupy the Unit; he does not challenge the arbitrator's finding on this point.

[43] The arbitrator discusses the landlord's reason for wanting to occupy the Unit:

[The Landlord's] 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.

[...]

I find the Landlord has submitted insufficient evidence to support a finding that [Mr. Zhang'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.

[44] The petitioner argues that, in arriving at this conclusion, the RTB arbitrator improperly focused on whether there was evidence that permits were in place so that the planned West Vancouver construction project could commence, and evidence that Mr. Zhang's health issues were connected to the issuance of those permits. The petitioner submits that this is akin to *Hefzi v. Louw*, 2023 BCSC 994, where the decision-maker sought evidence from the landlord that the landlord was not required to produce. The petitioner says the RTB decision is patently unreasonable due to the arbitrator's misplaced focus on these irrelevant factors.

[45] In *Hefzi*, Justice Chan found that the RTB arbitrator had asked the wrong question and, in the result, rendered a decision that was patently unreasonable: *Hefzi* at para. 22 - 28. She found that the arbitrator had ignored relevant evidence and based their decision on irrelevant factors: *Hefzi* at para. 26.

[46] Mr. Kassam replies that the petitioner's argument overlooks Mr. Liu's own evidence at the RTB hearing. He submits that Mr. Liu gave evidence that Ms. He did not intend to move into the Unit until she had obtained the necessary permit and demolition could begin at her West Vancouver property. Accordingly, he says the RTB arbitrator correctly recognized that the date Ms. He obtained the necessary permit was synonymous with the earliest date she intended to move into the Unit.

[47] In support of the RTB decision, the arbitrator cited s. 49.2 of the *RTA* (which is not applicable here) in full, described this provision as "notable", and observed that it required landlords to have all necessary permits in place "*prior* to issuing a 4 Month Notice to End tenancy." The arbitrator stated:

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.

[Mr. Liu] testified that [Ms. He and Mr. Zhang] returned to China in the spring of 2022 due to [Mr. Zhang’s] health issues. I find the Landlord has submitted insufficient evidence to support a finding that [Mr. Zhang’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.

[48] As noted, the RTB arbitrator concluded that the landlord should have waited at least until the permits had been obtained for the construction of Ms. He’s West Vancouver home before ending Mr. Kassam’s tenancy. Based on the RTB decision, it appears that the arbitrator questioned whether the landlords ought to have obtained the required permits before issuing the notice to end tenancy (as is required by s. 49.2 of the *RTA*, but not s. 51(3) of the *RTA*). In my view, the question the RTB arbitrator ought to have asked was whether the landlord acted in good faith when it issued its notice to end Mr. Kassam’s tenancy. I conclude that the arbitrator improperly framed the question and then considered irrelevant factors and evidence in relation to that question.

[49] Section 51 of the *RTA* provides that a tenant whose tenancy is terminated under s. 49 of the *RTA* is entitled to 12 months’ compensation unless a landlord establishes that the stated purpose for ending the tenancy was accomplished within a reasonable period of time after the effective date of the notice to end tenancy.

[50] Mr. Kassam submits that Mr. Liu testified at the RTB hearing that the landlord did not intend to occupy the Unit until renovations had started on Ms. He’s West Vancouver property, and that a permit was required before that could occur. The petitioner notes that Mr. Kassam cites no reference in the transcripts of the available evidence to support this statement. Counsel for the petitioner argues that this is a significant gap in the evidence, particularly given the apparent difficulties Ms. Fu encountered in translating both Mr. Liu’s evidence and the arbitrator’s questions.

[51] Based on the RTB decision and the available transcripts, Mr. Liu testified, in part, at the RTB hearing as follows:

- a) The landlord intended to occupy the Unit during the construction project at their West Vancouver home;
- b) In November 2021, Ms. He and Mr. Zhang:
  - i. applied for the permits required to demolish and reconstruct their West Vancouver property; and
  - ii. travelled to China so that Mr. Zhang could undergo some medical investigations there;
- c) Ms. He and Mr. Zhang initially planned to return to Canada within six months (i.e., by May 2022);
- d) The landlord issued the notice to end Mr. Kassam's tenancy on February 21, 2022, with an effective date of April 29, 2022;
- e) The landlord did not occupy the Unit in May 2022, as initially planned; and
- f) Ms. He and Mr. Zhang did not return from China, where Mr. Zhang was diagnosed with Meniere's disease, until August 2022, by which time Ms. He had obtained city approval of her application for a demolition permit on her West Vancouver property.

[52] Although the RTB decision makes no reference to it, counsel for the respondent argues that RTB Policy Guideline 50 provides guidance regarding the meaning of a "reasonable time" within the context of s. 49 of the *RTA*:

A reasonable period to accomplish the stated purpose for ending a tenancy will vary depending on the circumstances. For instance, given that a landlord must have the necessary permits in place prior to issuing a notice to end tenancy, the reasonable period to accomplish the demolition of a rental unit is likely to be relatively short. The reasonable period for accomplishing repairs and renovations will typically be based on the estimate provided to the landlord. This, however, can fluctuate somewhat as it was only an estimate and unexpected circumstances can arise whenever substantive renovations and repairs are undertaken.

A reasonable period for the landlord to begin using the property for the stated purpose for ending the tenancy is the amount of time that is fairly required. It

will usually be a short amount of time. For example, if a landlord ends a tenancy on the 31st of the month because the landlord's close family member intends to move in, a reasonable period to start using the rental unit may be about 15 days. A somewhat longer period may be reasonable depending on the circumstances. For instance, if all of the carpeting was being replaced it may be reasonable to temporarily delay the move in while that work was completed since it could be finished faster if the unit was empty.

[Emphasis added.]

[53] Counsel for Mr. Kassam argues that the landlord ended the respondent's tenancy effective April 29, 2022, despite the fact that Ms. He did not intend to move into the Unit until July 12, 2022 (the day the city approved her application for a demolition permit) at the very earliest. He describes this as an unexplained delay of 74 days and far in excess of the 15-day period identified as reasonable in the applicable RTB Policy Guideline. Like the arbitrator, he asserts that the landlord issued its notice to end tenancy prematurely and ought to have waited until it had obtained the necessary permit.

[54] Counsel for the respondent argues that this delay of 74 days alone was sufficient to justify the arbitrator's order. I disagree. The petitioner concedes that it did not occupy the Unit within a reasonable time after issuing the notice to end Mr. Kassam's tenancy. The question before the arbitrator was whether extenuating circumstances prevented the landlord from doing so.

[55] In my view, the respondent has applied the same retrospective analysis on this judicial review as the one set out in the RTB decision. It poses the wrong question and considers irrelevant factors, including the timing of demolition and building permits for Ms. He's planned construction project at her West Vancouver home. Section 51(3) of the *RTA* required the arbitrator to ask whether extenuating circumstances prevented the landlord from occupying the Unit within a reasonable time after it issued the notice to end Mr. Kassam's tenancy.

[56] The arbitrator considered whether "exceptional circumstances" existed to explain the landlord's delay in moving into the Unit. The arbitrator noted that counsel for Mr. Kassam submitted that Mr. Zhang's health issues arose four months before

the Two Month Notice was issued, and then concluded “I am not persuaded that this was the reason the rental remained unoccupied for nearly a year and half after the 2 Month Notice was issued.” The arbitrator ultimately found that:

- a) Mr. Zhang’s health issues did not impact the issuance of the building permits on Ms. He’s West Vancouver property; and
- b) The notice to end Mr. Kassam’s tenancy was premature and should have been issued after permits were obtained.

[57] Given the applicable statutory framework, the relevant question was not whether Mr. Zhang’s health issues delayed the issuance of demolition or building permits for the West Vancouver construction project, or whether Ms. He ought to have applied for the required permits earlier, but rather whether: 1) the landlord acted in good faith; and 2) Mr. Zhang’s health concerns and/or any other matters comprised extenuating circumstances which prevented the landlord from occupying the Unit within a reasonable period of time. Based on my review of the RTB decision, the arbitrator did not engage in this analysis but instead relied on factors that were not germane to the legal question before the RTB.

## 2. Did the arbitrator apply the correct legal framework?

[58] The petitioner argues that the arbitrator described and applied the wrong legal framework and, in doing so, rendered a patently unreasonable decision which failed to consider the relevant statutory requirement, citing *Schuld v. Niu*, 2019 BCSC 949; *Furtado*; *Gordon v. Guang Xin Development Ltd.*, 2022 BCSC 1544; *Hefzi*.

[59] As noted, s. 51 of the *RTA* provides that the director may excuse a landlord from paying compensation if extenuating circumstances prevented the landlord from accomplishing the stated purpose for ending the tenancy within a reasonable time. Although s. 51(3) of the *RTA* references “extenuating” circumstances, the RTB decision consistently discusses “exceptional” circumstances.

[60] After correctly citing s. 51(3) of the *RTA*, the arbitrator incorrectly described the applicable test for compensation:

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 added.]

[61] The petitioner argues that the arbitrator clearly applied the stricter test of “exceptional circumstances” in determining whether the landlord was exempt from paying compensation to the tenant under s. 51(3) of the *RTA*, instead of considering whether the landlord’s reasons for its delay in moving into the Unit made requiring the landlord to pay compensation unreasonable or unjust. Counsel for Mr. Kassam concedes that the arbitrator used the wrong word in the RTB decision. However, he denies the arbitrator applied the wrong test, or that there is a material difference between the meaning of “exceptional” versus “extenuating” circumstances.

[62] The arbitrator addressed two distinct time periods in the RTB decision: 1) February 2022 (the date the landlord issued its notice to end Mr. Kassam’s tenancy) to August 2022 (when Ms. He and Mr. Zhang returned from China); and 2) August 2022 to June 2023 (when Ms. He and Mr. Zhang moved into the Unit).

[63] Based on the RTB decision, and the partially transcribed evidence given at the RTB hearing, Mr. Liu testified that Mr. Zhang and Ms. He travelled to China for medical investigations in November 2021, stayed longer than they had originally planned, and returned in August 2022, after Mr. Zhang received his diagnosis. Mr. Liu testified that Ms. He and Mr. Zhang stayed with Mr. Liu, their son-in-law, and their daughter, Mr. Liu’s wife, from August 2022 until June 2023, when they moved into the Unit. Mr. Liu told the arbitrator that Ms. He and Mr. Zhang lived their daughter during this period because they thought that the exterior building construction at the Unit would be detrimental to Mr. Zhang’s health and ability to rest, and because their daughter was helping to care for Mr. Zhang. None of Mr. Kassam’s evidence was transcribed but, based on the RTB decision, he testified that

this exterior building renovation work began in May of 2023, and that construction noise was not audible until June of 2023.

[64] Based on the RTB decision, Mr. Liu admitted in cross-examination that he could not remember whether this exterior building construction at the Unit began in 2022, or May of 2023. The arbitrator noted that Mr. Liu testified in reply that Ms. He intended to move into the Unit but Mr. Zhang's "unexpected medical issues changed everything". These portions of the evidence were unavailable for transcription.

[65] The arbitrator concluded:

As aptly noted by counsel for the Tenant, [Mr. Zhang's] health issues arose some four months prior to the issuance of the 2 Month Notice. While the cause of [Mr. Zhang'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.

Rather, I find it more likely that the Landlord issued the 2 Month Notice prematurely. [Mr. Liu] 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.

[66] The arbitrator accepted Mr. Kassam's evidence that exterior building work at the Unit did not commence until May of 2023, and that Mr. Kassam heard no related construction noise until June of 2023. The arbitrator also found that these exterior renovations did not delay Ms. He and Mr. Zhang moving into the Unit, as alleged by Mr. Liu. The arbitrator did not comment on the parties' credibility or explain why the tenant's evidence on this point was preferred.

[67] Based on Ms. Fu's transcribed translation of Mr. Liu's evidence, he testified that, in addition to ongoing exterior construction at the Unit, he and his wife were then providing some care to Mr. Zhang (while they resided together at her Yaletown home). The RTB decision neither mentions this evidence, nor addresses whether the arbitrator considered that to be an extenuating circumstance which explained the landlord's delay in occupying the Unit.

[68] In *Schuld*, Justice Verhoeven concluded that the RTB arbitrator had failed to evaluate the tenant's claim within the proper legal context because the arbitrator had misinterpreted a word in the statute. In the result, he found the arbitrator's interpretation to be patently unreasonable and irrational: *Schuld* at para. 19.

[69] There are obvious parallels between *Furtado* and the case before me. In *Furtado*, the petitioner landlord applied to set aside an RTB arbitrator's decision under s. 51(2) of the *RTA*, in part because the arbitrator had failed to consider extenuating circumstances that caused a delay in the landlord occupying the rental unit after serving a notice to end tenancy. Justice Murray found that there was uncontroverted evidence, including moving company receipts, that the landlord moved into the rental suite within three months of serving the notice to end tenancy to complete renovations: *Furtado* at paras. 20 and 38. She also found that there was evidence of extenuating circumstances related to the landlord's wife's health issues, which explained why she was prevented from moving into the unit until a later time: *Furtado* at paras. 33 and 38. Justice Murray set aside both the RTB decision and the monetary award on judicial review: *Furtado* at para. 38.

[70] Justice Murray found that the RTB arbitrator had omitted a crucial detail when summarizing the relevant section of the *RTA*: namely, consideration of extenuating circumstances: *Furtado* at para. 27. Her comments are germane:

[34] It was incumbent on the arbitrator to consider whether the evidence constituted extenuating circumstances that prevented the petitioners from occupying the suite earlier and if so, whether those circumstances would make it unreasonable and unjust to order the petitioners to pay compensation to the respondents.

[35] The arbitrator not only failed to consider the evidence of extenuating circumstances as mandated by the *RTA*, the arbitrator completely removed the consideration of same out of the analysis by inaccurately paraphrasing the sections of the *RTA*.

[36] As a result I am satisfied that the arbitrator erred and that the decision is unsupportable in both fact and law.

[71] In my view, the RTB arbitrator here effectively did the same thing.

[72] In *Gordon*, Justice MacDonald allowed the tenant's petition for judicial review, finding in part that the arbitrator's decision failed to consider the relevant statutory requirements under the *RTA* and was therefore arbitrary and patently unreasonable: *Gordon* at para. 19.

[73] I accept that "extenuating" and "exceptional" circumstances are not synonymous. Section 51(3) of the *RTA* references the former and not the latter. 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.

[75] The RTB decision references neither of these guidelines. In my view, they highlight the distinction between extenuating circumstances (which was the applicable test here) and exceptional circumstances (which, while not the applicable test, is the one the arbitrator apparently applied).

[76] As noted, I find that the arbitrator considered irrelevant evidence regarding the timing of the demolition and building permits for the West Vancouver home. Conversely, I find that the arbitrator overlooked relevant evidence from Mr. Liu that:

- a) Ms. He and Mr. Zhang initially intended to return to Canada in May 2022 (the month after the effective date of April 29, 2022 in the notice to end tenancy);

- b) The purpose of their trip to China was to obtain a clear medical diagnosis of Mr. Zhang's medical condition; and
- c) Their return from China was delayed until August 2022.

[77] It is unclear from the RTB decision if the arbitrator considered whether any of these factors comprised extenuating circumstances, as contemplated by s. 51(3) of the *RTA*. It is also unclear why the arbitrator accepted and preferred Mr. Kassam's evidence about when exterior building construction commenced at the Unit, or if the arbitrator considered whether Mr. Zhang required the kind of care his daughter and Mr. Liu were apparently then providing to him and, if so, whether this comprised an extenuating circumstance that delayed the landlord moving into the Unit.

[78] Mr. Kassam argues that the arbitrator is familiar with the *RTA* and correctly referenced section 51(3) in the RTB decision. He submits that nothing in the RTB decision suggests that the arbitrator applied any standard other than the extenuating circumstances one mandated in s. 51(3) of the *RTA*, despite the arbitrator's reference to "exceptional" rather than "extenuating" circumstances throughout the RTB decision. He asserts that, even if the arbitrator did apply a slightly different standard, it neither affected the outcome of the hearing nor rendered the RTB decision patently unreasonable.

[79] The difficulty with this argument is that it is unclear from the RTB decision what standard the arbitrator actually applied, or whether this affected the arbitrator's analysis or ultimate conclusions. I address this matter below when I consider the adequacy of the arbitrator's reasons.

[80] Ultimately, I find that the arbitrator repeatedly referenced the wrong test in the RTB decision, considered irrelevant factors, and overlooked relevant factors. In my view, those errors render the decision patently unreasonable.

### 3. Was calculation of the monetary payment patently unreasonable?

[81] The petitioner raises a threshold evidentiary issue related to the arbitrator's calculation of the monetary compensation payable by the landlord.

[82] The petitioner seeks to rely on documentary evidence that was not before the arbitrator at the RTB hearing: namely, a two-page monthly rental income and expenses statement, apparently compiled by Sutton Group – West Coast Realty, the property manager for the Unit, for the years 2021 and 2022. The petitioner says this document demonstrates that the RTB arbitrator's factual finding regarding the amount of rent payable pursuant to the parties' tenancy agreement was arbitrary, incorrect, and unsupported by any evidence. As noted, only rental statements for 2019 and 2020 were before the arbitrator. The petitioner says the 2021 and 2022 rental income statements demonstrate that Mr. Kassam never paid monthly rent in the amount of \$8,500 for the Unit, and that the RTB arbitrator's calculation of the monetary order is therefore patently unreasonable. The respondent denies this new evidence is admissible on this judicial review.

[83] Generally, the record on judicial review is restricted to the evidence that was before the original decision-maker: *Bedwell Bay Construction Ltd. (c.o.b. Hazelmere Park and Campground and Hazelmere RV Park & Campground) v. Ball*, 2022 BCSC 559 at para. 50 [*Bedwell Bay*], citing *Lovell v. Ontario (Minister of Natural Resources and Forestry)*, 2022 ONSC 423 at para. 6; *Kohli* at para. 39, citing *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52.

[84] The limited exceptions to this general rule, as outlined in *Bedwell Bay* at para. 50, include where new evidence would:

- a) Set out general background that would assist the court;
- b) Show procedural defects that are not apparent from the record or the reasons (ex., a reasonable apprehension of bias or a denial of procedural fairness); or

c) Show a complete lack of evidence to support a material finding of fact.

[85] The petitioner relies on the third above-noted exception. The court may, in rare circumstances, admit affidavit evidence to show that a tribunal made a factual finding that is incapable of being supported by the evidence: *Kinexus Bioinformatics Corp. v. Asad*, 2010 BCSC 33 at para. 17 [*Kinexus*]; *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353 at para. 81, citing *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, 1997 CanLII 386. Such affidavit evidence must be restricted to necessary references to factual errors, must not draw conclusions or interpret the evidence forming the record of proceeding, and must not be used to convert an application for judicial review into a re-hearing of the merits: *Kinexus* at para. 17.

[86] As was the case in *Kohli*, there is no evidence before me that the new evidence the petitioner seeks to introduce on this judicial review was unavailable to the landlord at the time of the RTB hearing. Mr. Liu could have put the monthly rental income statements for 2021 and 2022 before the arbitrator, but he did not: *Kohli* at para. 40. I conclude that the petitioner is seeking to supplement the record by introducing new evidence on this judicial review which, while available, it chose not to adduce at the RTB hearing. I decline to admit this new evidence. Even if I had done so, it would not have altered my decision. Notably, there are discrepancies between this new evidence and that of both parties at the RTB hearing.

[87] I turn next to the arbitrator's calculation of a monetary award in the amount of \$102,000, based on 12 months of rent at \$8,500 per month.

[88] The petitioner describes the arbitrator's calculation of this monetary award as arbitrary and patently unreasonable. The figure is based on \$8,500 in rent per month for 12 months, an amount the petitioner denies Mr. Kassam ever paid and says is inconsistent with documents in evidence. The petitioner denies the RTB decision provides any explanation for why the arbitrator rejected the landlord's evidence about the amount of rent Mr. Kassam actually paid.

[89] As noted, the following evidence was before the arbitrator on this issue:

- a) Mr. Liu testified in chief that:
  - i. Mr. Kassam's monthly rent was reduced to \$8,400, as set out in the monthly income statement of the property manager; and
  - ii. It was his understanding that Mr. Kassam was paying monthly rent of \$8,400 at the end of the tenancy;
- b) Mr. Kassam testified that:
  - i. He paid monthly rent in the amount of \$8,500 but acknowledged that he paid \$8,400 in some months;
  - ii. During the months he paid rent of \$8,400, the landlord's agent reduced rent by \$100.00, in exchange for frequent showings of the Unit as the landlord was trying to sell the Unit;
  - iii. His rent was reduced to \$8,400 for the last nine months of the tenancy and this is what he was paying when the tenancy ended;
- c) Mr. Liu testified in reply that the owner was very nice to Mr. Kassam and reduced his rent to \$6,300 per month and to \$8,000 for 10 months during his tenancy; and
- d) The 2019 and 2020 monthly rental income statements indicate that, apart from May – June of 2020 (when monthly rent was \$6,300), monthly rent for the Unit was paid in the amount of \$8,400 throughout those two years.

[90] The arbitrator discussed the monthly rent payable in the RTB decision. The arbitrator noted that the parties' unsigned tenancy agreement contemplated the payment of monthly rent in the amount of \$8,500, and that the parties disagreed about how much Mr. Kassam actually paid. The arbitrator found that the parties' written tenancy agreement was binding and that any reductions in rent were only

temporary. Accordingly, the arbitrator declined to reduce the amount of compensation available to the tenant.

[91] Given the conflict in the parties' evidence about the amount of rent Mr. Kassam actually paid, and the fact that both the petitioner and respondent acknowledged reductions in this monthly rent, it is unclear why the arbitrator found that the parties had agreed to act "as if bound" by their unsigned written tenancy agreement. Notably, the arbitrator's findings on this point are inconsistent with the 2019 and 2020 rental income statements in evidence. It is unclear from the RTB decision: 1) how the arbitrator resolved these discrepancies in the evidence; 2) why the arbitrator preferred the tenant's evidence on this point; or 3) why the arbitrator concluded that the reduction in rent was only temporary. The monthly rental income statements in evidence demonstrate that Mr. Kassam paid \$8,400 in rent at the start of his tenancy in 2019, and throughout the first year of his tenancy (subject to a further reduction during the COVID-19 pandemic). Mr. Liu and Mr. Kassam both testified that Mr. Kassam paid monthly rent of \$8,400 for at least the last nine months of his tenancy.

[92] Counsel for the respondent submits that the arbitrator held that s. 51(2) of the *RTA* mandates compensation based on the rent set out in the tenancy agreement, even if a temporary abatement was in place. He asserts that deference to the arbitrator's interpretation of the *RTA* is required, and that the decision accords with the plain wording of the statute and cannot be said to be patently unreasonable.

[93] Section 1 of the *RTA* defines a "tenancy agreement" as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas, services, and facilities, and includes a license to occupy a rental unit. The petitioner says the irrefutable evidence before the arbitrator demonstrated that, at all material times, Mr. Kassam paid no more than \$8,400 in monthly rent and, accordingly, the parties' agreement regarding the actual monthly rent payable pursuant to their tenancy agreement was, at most, \$8,400. The petitioner submits that the arbitrator failed to analyze this key

issue, in light of all the evidence tendered at the RTB hearing, and the broad definition of a tenancy agreement in s. 1 of the *RTA*.

[94] I conclude that, as in *Shahcheraghi v. Divangahi*, 2021 BCSC 1576 at para. 41 and *Laverdure* at para. 45, the arbitrator failed to meaningfully address relevant and apparently cogent evidence on this material issue, thereby rendering the RTB decision arbitrary, irrational, and thus patently unreasonable.

#### 4. Are the arbitrator's reasons adequate?

[95] The petitioner submits that the arbitrator's reasons are inadequate because they fail to:

- a) Identify and apply the relevant statutory test; and
- b) Explain clearly and intelligibly how and why the arbitrator reached their decision, including, in particular:
  - i. Rejecting, without explanation, the landlord's unchallenged evidence that Mr. Zhang's health issues delayed the landlord moving into the Unit;
  - ii. Discussing irrelevant factors, including the issuance of permits in relation to Ms. He's West Vancouver property, not germane to the analysis required under s. 51(3) of the *RTA*;
  - iii. Rejecting, without explanation, the documentary evidence regarding the amount of rent paid pursuant to the parties' tenancy agreement; and
  - iv. Rejecting, without explanation, the landlord's evidence and preferring the tenant's evidence that the reduction in his rent was only temporary.

[96] The respondent denies the arbitrator's reasons are inadequate or that the inadequacy of reasons is a standalone ground for judicial review: *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 18.

[97] The Supreme Court of Canada has emphasized the central importance of reasons on judicial review and found that, where reasons are required, the decision must be justified through those reasons: *Vavilov* at paras. 84 – 86.

[98] In *Andree v. Bentley*, 2011 BCSC 641, Justice Harris (then of this Court), found an RTB decision to be patently unreasonable where the decision-maker had clearly rejected certain evidence, but provided no explanation for doing so. If reasons are to fulfil their function, they should disclose the basis upon which sworn evidence has been rejected, particularly where the finding is one involving credibility: *Andree* at para. 23. To be adequate, reasons must be sufficiently clear and intelligible to allow the parties and others to know why the tribunal decided as it did: *Andree* at para. 24.

[99] In *Laverdure* at para. 45, Murray J. found the RTB dispute resolution officer had preferred the landlord's evidence, without providing adequate reasons to explain what evidence had been preferred or why. She also found the dispute resolution officer had misstated the governing statutory test and lowered the landlord's burden of proof, thereby resulting in a decision that was patently unreasonable.

[100] In *Shahcheraghi*, Justice Horsman (then of this Court) found that an RTB arbitrator's reasons failed to meet the minimum standard articulated in *Laverdure*. She concluded that the arbitrator's findings on critical issues did not allow the parties or the reviewing court to understand how and why they reached their decision or why seemingly relevant evidence of the landlord was ignored or rejected: *Shahcheraghi* at paras. 47 - 49. In the result, Horsman J. found the arbitrator's reasons were inadequate, allowed the petition, and remitted the matter back to the RTB for a re-hearing: *Shahcheraghi* at paras. 55 - 56.

[101] I have found that the arbitrator considered irrelevant factors, overlooked relevant evidence, and failed to apply the statutory test under s. 51(3) of the *RTA*. I also conclude that the arbitrator's reasons failed to explain:

- a) How and why the arbitrator reached their stated conclusions;

- b) Why the landlord's evidence was either overlooked or rejected; and
- c) Why the tenant's evidence was preferred on key points.

[102] In the result, even applying the high standard of patent unreasonableness, I conclude that the arbitrator's analysis and reasons failed to grapple with the central issue based on the applicable statutory framework, and do not meet the minimum standard set out in *Laverdure*. It follows that I conclude the RTB decision is patently unreasonable.

## 5. Summary

[103] In summary, I conclude that the RTB decision is patently unreasonable, that the petition must be allowed, and the matter remitted to the RTB for a re-hearing.

## VI. DISPOSITION

[104] I make the following orders:

- a) BY CONSENT, the style of cause in the petition is amended to remove the RTB as a respondent; and
- b) The petition is allowed and the matter remitted to the RTB for a rehearing.

[105] The petitioner is entitled to its costs of this petition on the ordinary scale.

"Douglas J."