

CANADA / JUDGMENT

Habitat for Humanity v. Booth

2026 BCCA 8

COURT

British Columbia Court of Appeal

DECIDED

12 January 2026

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2026 BCCA 8 Habitat for Humanity v. Booth

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Habitat for Humanity v. Booth,

2026 BCCA 8

Date: 20260112

Docket: CA50575

Between:

Habitat for Humanity Victoria

Appellant

(Respondent)

And

Erin Elizabeth Booth

Respondent

(Petitioner)

Corrected Judgment: The text of the judgment was corrected at paragraph 49 on January 15, 2026.

Before:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Grauer

The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated March 5, 2025 (Booth v. Habitat for Humanity Victoria, 2025 BCSC 793,

Victoria Docket S248636).

Counsel for the Appellant:

M. Scherr

S.A. Gray-Schleihauf

The Respondent, appearing in person:

E.E. Booth

Place and Date of Hearing:

Vancouver, British Columbia

October 17, 2025

Place and Date of Judgment:

Vancouver, British Columbia

January 12, 2026

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Justice Fleming

Summary:

The appellant is a charitable organization that builds and provides housing at below-market cost to eligible working families through a home ownership program. The respondent was accepted into this program. The parties entered an agreement granting the respondent occupancy of a newly built house while she completed the program requirements to be eligible to purchase that house. The respondent was unable to maintain eligibility for the program. The appellant asked her to vacate the house. The respondent applied to the Residential Tenancy Branch ("RTB") seeking a declaration that her occupancy was a tenancy within the meaning of the Residential Tenancy Act [RTA]. The RTB arbitrator held that the RTA did not apply since the parties did not intend for the respondent to rent the house. On judicial review, the judge set aside the arbitrator's decision, finding it to be patently unreasonable. He remitted the matter to the RTB for redetermination and stayed the appellant's petition for vacant occupancy of the house. The

appellant appeals this decision. Held: appeal allowed; the arbitrator's decision is reinstated and the judge's stay of the appellant's petition for vacant possession is set aside. The judge erred in his application of the patent unreasonableness standard, engaging in a disguised correctness review. The arbitrator's reasons reflect careful consideration of the intention of the parties in entering the agreements governing the respondent's occupancy. The arbitrator's decision is neither "irrational" nor "evidently not in accordance with reason", so as to be patently unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

- [1] The appellant, Habitat for Humanity Victoria ("Habitat"), is a registered charity that operates a Homeownership Program in the Capital Region. Through the program, Habitat builds and provides affordable housing at below-market cost to eligible working families who would not qualify for a mortgage from conventional lending institutions.
- [2] The respondent, Ms. Booth, is a chartered professional accountant and single mother of two. On February 19, 2020, she applied for a Habitat home. At that time, she and her children were living in a "small dark basement suite". Her application was accepted.
- [3] Under the program, Ms. Booth was given occupancy of a newly built house (the "Home") on terms that will be discussed fully below. Unfortunately, she was unable to maintain eligibility for the program, causing Habitat to ask her to vacate the Home. She refused.
- [4] In the face of a notice to vacate, Ms. Booth took the position that her occupancy was a tenancy within the meaning of the Residential Tenancy Act, SBC 2002, c 78 [RTA]. Pursuant to the RTA, she then applied to the Residential Tenancy Branch ("RTB"). She maintained that Habitat, as landlord, had attempted to contract out of the RTA contrary to section 5 of that Act, and sought a decision that the RTB had jurisdiction over her "tenancy".
- [5] The RTB arbitrator found that the Home was not a "rental unit" as defined by the RTA, so that the matter did not come within the jurisdiction of the RTB. He concluded that the arrangement between Habitat and Ms. Booth was such that the Home was not intended to be rented and was not rented, and that the legal relationship between them did not constitute a "tenancy" for the purposes of the RTA. It followed, in his view, that there was no jurisdiction under the RTA to consider Ms. Booth's complaint. He therefore declined to proceed.
- [6] Ms. Booth applied to the Supreme Court of British Columbia for judicial review of that decision. The review judge found that the arbitrator's decision was patently unreasonable--the standard of review mandated by section 58(2)(a) of the Administrative Tribunals Act, SBC 2004, c 45 [ATA]. In the judge's view, the arbitrator's decision was "clearly irrational, and one that no amount of curial deference can justify allowing to stand" (at para 58). The judge therefore set aside the arbitrator's decision and remitted the matter back to the RTB. His reasons are indexed at 2025 BCSC 793. The review judge also issued a stay of petition proceedings commenced by Habitat to obtain vacant possession.

- [7] Habitat appeals from the review judge's decision and seeks an order reinstating the arbitrator's decision and lifting the stay. For the reasons that follow, I would allow the appeal.
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.

3. THE PARTIES' RELATIONSHIP

3.1 Overview

- [12] Before the arbitrator, Ms. Booth was represented by counsel. She took the position that a tenancy was in place under the RTA, which Habitat had sought to contract out of, contrary to section 5 of the RTA. Accordingly, she sought "a decision on whether the RTB has jurisdiction over my tenancy". The arbitrator noted that this turned in large part on the legal and contractual relationship she had with Habitat in respect of the property. I therefore turn to review the documents and events relevant to that relationship.

3.2 Letter of Intent

- [13] Ms. Booth's acceptance into Habitat's Homeownership Program meant that she was eligible to purchase the Home from Habitat on terms and conditions to be finalized at the time of purchase, so long as she met Habitat's requirements.
- [14] To that end, the parties signed a letter of intent dated April 9, 2020. The letter began by outlining the goal of the program:

Habitat for Humanity Victoria (HFHV) is very pleased to inform you that your family has been approved to enter our Homeownership Program. The goal of this program is to enable you to affordably finance and purchase a home that will be - or has been - built through the collective efforts of HFHV homeowners, and the contribution of many volunteers and donors in our community. Congratulations and welcome to HFHV's Homeownership Program!

- [15] The letter specifically provided that it was not a contract and should not be considered an agreement of purchase and sale "as the details regarding the purchase of your Habitat home are unknown at this time".
- [16] The letter also set out program requirements, advising that Ms. Booth's eligibility "is contingent upon you fulfilling or continuing to meet certain obligations or criteria". These obligations or criteria included completing 500 hours of volunteer service in partnership with Habitat, qualifying for a retail mortgage with Habitat's lending partner, and living in need.
- [17] The letter explained Habitat's dual mortgage program. The retail mortgage from Habitat's partner lender, for which Ms. Booth was obliged to qualify, would be an interest-bearing mortgage loan estimated to be in the range of \$120,000-\$200,000 depending on family income and the value of the home. The difference between that mortgage and the purchase price would be provided by Habitat through an interest-free loan called the "Habitat Mortgage".
- [18] The "future homeowner" was expected to pay monthly amounts "calculated to be 30% of my ... gross household income re-set at least annually" (emphasis original).

- [19] Ms. Booth was responsible for advising of any material changes in her circumstances, including changes in family composition or in gross household income. If, as a result of a change in circumstances, she no longer met the criteria of the program, the letter explained that "your partnership with HFHV may be postponed or terminated and, if the latter, your participation in our Homeownership Program will end".
- [20] Habitat was to make "every reasonable effort to provide a new, renovated or pre-owned home to the best of its abilities, but I/we understand and agree that this Letter does not create an obligation by HFHV to provide a home".
- [21] At the time of this letter of intent, Ms. Booth was earning an income consistent with the criteria of living in need and being able to meet the financial requirements to participate in the program.

3.3 Early Occupancy Agreement

- [22] Later in 2020, the Home became available for occupancy. Ms. Booth had not yet satisfied the terms and conditions of the program and so was not yet in a position to purchase the Home. In particular, she had yet to complete the required 500 hours of volunteer service. That was not an uncommon situation, and Habitat had available an "Early Occupancy Agreement" ("EOA"), designed to allow occupancy prior to fulfillment of the program requirements and the ultimate purchase of the Home.
- [23] Habitat and Ms. Booth entered into the EOA on November 26, 2020, and in December 2020, Ms. Booth and her children moved in.
- [24] The EOA included the following recitals:

C. HFHV and the Occupant enter into this Agreement with the understanding that the Occupant has/have not yet satisfied the terms and conditions of HFHV's Homeownership Program such that Property cannot yet be purchased by the Occupant, most significantly the completion of the required 500 hours of volunteer service. It is the intention of both parties that, upon successful completion of the volunteer service requirements, and if other terms and conditions of the Homeownership Program remain in good standing, the Occupant will purchase the property on or before the Expiry Date of this Agreement on HFHV terms and condition[s] in place at that time. At the time of purchase, the Occupant will receive an interest in the property as generally described in Section E and Part 11 of this Agreement.

D. During the term of this Agreement, the Occupant wishes/wish to occupy property located at [address] ("the Property") as her residence on the terms and conditions described in this Agreement.

- [25] The terms and conditions included Recital E and clauses 3, 4 and 11, which related to what Ms. Booth was to pay for her occupation of the Home, and how those payments were to be treated:

E. HFHV is agreeable to permitting the Occupant to occupy the Property under the terms and conditions described in this Agreement. The Occupant will have an interest in the property equal to the total payments made over the course of the Occupancy less all costs incurred by the HFHV provided that the Occupant successfully fulfils her obligations under their Letter of Intent and this Early Occupancy Agreement.

3. The Occupant agrees to pay HFHV a monthly payment of \$1977.00 (the "Monthly Payments") a portion of which amount is intended to be treated as a non-refundable deposit against the purchase of the Property, to be applied as a credit against the HFHV Mortgage upon completion of the purchase of the Property.
 4. The parties acknowledge the Monthly Payments are based on the gross household income of the Occupant at the time of signing this agreement and is intended to reflect a genuine pre-estimate of mortgage payments should the Occupant successfully purchase the Property .
 11. Upon successful completion of the requirements of the HFHV Homeownership Program and continued eligibility as per the Letter of Intent signed by the Occupant on April 9, 2020, the Occupant shall be eligible for a pre-payment on the HFHV Mortgage equal[ing] the total of all Monthly Payments paid by the Occupant less the total of all expenses attended to by HFHV over the course of the Agreement.
- [26] Because the program determined affordability not by the price of a home, but by ensuring that payments would be capped at 30% of the participant's gross income, the monthly payments were reduced from \$1,977.00 to \$1,885.00. This resulted from a reduction in Ms. Booth's income calculation by deducting the childcare benefit she received.
- [27] The EOA further provided in clause 9 that its term would expire on May 23, 2022, by which time Ms. Booth must have completed the program requirements while continuing to maintain eligibility, failing which the EOA would expire, and Ms. Booth would be required to vacate the home. By clause 10, each party could terminate the agreement on 30 days' written notice.
- [28] By clause 13, Habitat and Ms. Booth acknowledged and agreed that the EOA "is not intended to create a tenancy within the meaning of the Residential Tenancy Act of British Columbia, and this Agreement does not constitute a tenancy agreement within the meaning of the Residential Tenancy Act of British Columbia" (emphasis added).
- [29] By clause 14, Ms. Booth also agreed that the EOA did not create an option to purchase, and that her purchase of the Home was subject to entering into a final contract of purchase and sale.

3.4 Accommodations Post-EOA and Extension

[30] In the summer of 2021, Ms. Booth was obliged to take time off from her employment for medical reasons. On August 26, 2021, she advised Habitat that her time off was extending beyond the sick leave she had at work, and that she had applied for medical employment insurance benefits. She asked if there was anything available in the form of "rent 'relief'". Habitat asked for additional information and agreed to hold the September cheque pending further adjustment.

[31] On September 2, 2021, Habitat offered Ms. Booth a temporary reduction in her payments for three months, based on the temporary medical leave. The reduced payment was set at \$886.15, to be reviewed in three months' time.

[32] Ms. Booth responded:

This is more than reasonable and reaffirms how fortunate and grateful I feel for being part of this program.

I also can assure you that I am very cognizant of the income requirements. I fully expect this is temporary

I'll be by shortly to drop off the new cheques.

[33] By May 2023, Ms. Booth had completed the volunteer hours required. Habitat was in the process of reviewing and revising its Homeownership Program and mortgage policy, which would affect the sale of the Home. On May 23, 2022, the parties signed an amendment to the EOA extending its expiry date to May 23, 2024. The provisions of the EOA were otherwise re-affirmed.

[34] In the meantime, Ms. Booth had found new employment with BC Transit. This did not, however, work out as she had hoped. On April 26, 2023, Ms. Booth advised Habitat that she was out of a job at the moment, but had some promising interviews lined up. She acknowledged that employment was necessary for mortgage qualification, and asked if she could "get a pause" on her payment (or a reduction) for May and maybe June.

[35] Habitat responded as follows:

Despite the requirements of your occupancy agreement and in order to support you during this transitional period HFHV CEO, Scott has approved a one time skip of your occupancy payment for the month of June 2023. Previously we had reduced your payments for three months due to a medical leave and similar to that occasion we can assist on a temporary basis.

Please keep us up to date on your search. We look forward to hearing about your new role and wish for it to be a good fit for you professionally.

[36] On February 6, 2024, Habitat reached out to Ms. Booth to begin the sale process. Ms. Booth advised Habitat that she had lost her job the previous week and was devastated. Habitat met with Ms. Booth and set a 30-day "grace period" for securing "adequate employment".

[37] On March 5, 2024, Habitat asked Ms. Booth how her job search was going, and offered a 90-day extension of the deadline for securing employment. The new deadline was May 15, 2024. It was later extended to May 31, 2024. Habitat also agreed to reduce Ms. Booth's occupancy payments "due to unemployment". The payments were reduced by half for both April and May 2024.

3.5 Notice to Vacate

[38] Ms. Booth was unable to find employment by May 31, 2024, and Habitat was unwilling to extend the grace period further. The parties had exchanged correspondence directly and through counsel concerning her position, and her concern about current mortgage and income requirements.

[39] On June 3, 2024, Habitat wrote to Ms. Booth's counsel to provide 30 days' notice to vacate the property, primarily on the ground that she remained unemployed and unable to qualify for either the retail or Habitat mortgage required to purchase the Home. She therefore did not meet the program's "ability to pay" eligibility criterion. The move out date was July 4, 2024.

[40] On June 10, 2024, Habitat became aware of online postings by Ms. Booth about Habitat, including an online petition. On July 4, 2024, the parties entered into an "Interim Agreement" acknowledging that Ms. Booth had made no payments since May 2024, and indicating that she would deactivate her website, make no further social media posts, and pay \$1,500 to Habitat for the month of June. Habitat agreed not to take possession of the property before July 31, 2024, and the parties reserved all other rights and remedies.

[41] Ms. Booth did not move out. On August 23, 2024, counsel for Habitat wrote to counsel for Ms. Booth to provide Notice of Trespass under the Trespass Act, advising that Ms. Booth must vacate the Home no later than noon on August 30, 2024. Ms. Booth did not vacate the Home, but applied to the RTB on August 28, 2024.

4. THE ARBITRATOR'S DECISION

[42] After discussing the background of the matter, the arbitrator began his analysis by looking at relevant definitions and reviewing the EOA and Letter of Intent. The paragraphs were not numbered, but I have added numbers to the excerpts I quote for ease of reference:

[1] "Tenancy" is defined to mean "a tenant's right to possession of a rental unit under a tenancy agreement." (section 1 of the Act). Further, it is noted that "Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created []" (Residential Tenancy Policy Guideline 9, page 1).

[2] "Tenancy agreement" means "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 and services and facilities, and includes a license to occupy a rental unit."

- [3] In looking at the [EOA], as well as the letter of intent there is nothing remotely reflective of what would be expected in a written residential tenancy agreement. While not all landlords and tenants in British Columbia use the recommended #RTB-1 form (Residential Tenancy Agreement), landlords and tenants are required to include a number of terms, as set out in subsection 13(2) of the Act. These do not appear in the [EOA].
- [4] Nor is there any requirement that the Applicant pay a security or pet damage deposit. And nowhere is there any reference to rent. Furthermore, the [EOA] permits the Respondent to enter the property without notice, which is far outside that which would be required under the Act.

[Emphasis added.]

- [43] The arbitrator turned to the definition of "rental unit" before returning to the EOA and Letter of Intent:
- [5] "Rental unit" is defined as "living accommodation rented or intended to be rented to a tenant." Nowhere in any of the documents agreed to by the parties is there any reference to rent, nor any evidence that there was ever any intention by [Habitat] to rent the property to the Applicant in a manner contemplated to be captured by the Act.
- [6] Indeed, both the Letter of Intent and the [EOA] contain a specific clause referencing the fact that the Act does not apply to the contractual arrangement between the parties. The Applicant reviewed, agreed, and signed their name to the [EOA], thereby accepting that the Act would not apply. Nor did the applicant produce any evidence to suggest that the [Applicant] was somehow coerced into signing away their rights under the Act. Certainly, simply saying that the Act does not apply does not make it so if the circumstances and facts surrounding the creation of an agreement suggest otherwise. But in this dispute, the entirety of the Applicant's participation in the Respondent's program is for the Applicant to be, at some point, able to purchase the property from the Respondent under a dual mortgage scheme.

[Emphasis added.]

- [44] The arbitrator found that neither party was operating under any assumption that the Act would apply to their agreement, and concluded as follows:
- [8] To reiterate, in considering the entirety of the [EOA], the addendum, the Letter of Intent, and all other correspondence between the parties, there is no question left in my mind that the property is not a rental unit as contemplated by the Act. There is no rent. And there is no tenancy agreement.
- [9] What there is, is an Agreement whereby the applicant paid a monthly "occupancy fee" that goes, in part, toward an eventual purchase of the property. In other words, this arrangement suggests, on a balance of probability, that the property is not intended to be rented and is not rented.

[Emphasis original.]

[45] The arbitrator then summarized his finding, considering all the "oral testimony and documentary evidence presented before me", that the legal relationship between Ms. Booth and Habitat concerning the property did not constitute a "tenancy" for the purposes of the RTA. Accordingly, the arbitrator declined to proceed due to lack of jurisdiction.

5. DISCUSSION

5.1 The Judgment Below

[46] The arbitrator was, of course, highly experienced in the application of the RTA. His approach paid careful attention to the relationship between Habitat and Ms. Booth as established by the documents they signed (particularly the letter of intent and the EOA) and the correspondence between them. On his analysis, their relationship was not one to which the RTA was intended by the Legislature to apply.

[47] The review judge approached it differently. After setting out the background of the dealings between the parties, the arbitrator's reasons, and the standard of review, the judge turned at para 32 to consider what he described as the "Statutory Scheme". In the of course doing so, he considered and opined on the intent of section 5 of the RTA:

[34] Section 5 provides that:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

[35] The intent of this provision is clear. A party cannot, by using different terminology, or different forms of documents, or by otherwise documenting a relationship in a way that may look different than a traditional residential tenancy agreement, avoid the application of the RTA. The application of the RTA is a matter of substance, not of form.

[Emphasis added.]

[48] After reviewing the positions of the parties, the judge gave his analysis:

[49] In my view, the decision of the Arbitrator is clearly contrary to the law and is patently unreasonable.

[50] The question of what the RTA applies to is dealt with by s. 2. That section provides that the RTA applies, among other things, to tenancy agreements and rental units. The Arbitrator does not refer to s. 2.

[51] Section 2 leads to a consideration of two of the key definitions in s. 1: the definition of "tenancy agreement", and the definition of "rental unit". The definition of "tenancy agreement" itself references the definition of "rental unit".

- [52] The Arbitrator does reference the definition of "tenancy agreement". The portion of the definition that the Arbitrator cites makes clear that a tenancy agreement can be "written or oral, express or implied". Not only does the Arbitrator give no effect to those words, he goes on to effectively require exactly the opposite of what is set out in the legislation by suggesting that any tenancy agreement would be documented in a form akin to the standard form document.
- [53] The Arbitrator's decision also eventually references the definition of "rental unit", but reads that definition as intended to form the foundation of a requirement that there must be a written agreement that specifically uses the word "rent".
- [54] As noted above, "rent" is a defined term in the RTA. Rent is broadly defined to include any money paid, value given or rights agreed to "in return for the right to possess a rental unit." Nothing in the RTA requires that the payments be characterized with the word "rent" in a written agreement. Nowhere in the Arbitrator's reasons does he consider whether the monthly payments made by Ms. Booth to HFHV were "in return for the right to possess" the house in which she and her children live.
- [55] The first half of the Arbitrator's analysis appears to be premised on the view that the application of the RTA is a matter of form over substance, or that any document not in something that looks very similar to a standard form residential tenancy agreement, and not specifically describing payments to be made as rent, is outside the scope of the RTA. That is an interpretation that is clearly and directly contrary to the wording of the provisions of the statute, as set out above.
- [56] The second half of the Arbitrator's analysis is largely based on s. 13 of the EOA, which states that the EOA is not intended to create a tenancy. The Arbitrator, in considering this provision, made no reference to s. 5 of the RTA. If and to the extent that the EOA is otherwise within the scope of the RTA, it seems clear that s. 5 of the RTA would render s. 13 to be of no effect.

5.2 Analysis

- [49] In *Red Chris Development Company Ltd v United Steel Workers, Local 1-1937*, 2021 BCCA 152, this Court explained the correct approach to a review for patent unreasonableness:
- [29] This standard of patent unreasonableness continues to apply notwithstanding developments of the common law standards of review since passage of the Act: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 33-35, and the standard of patent unreasonableness continues to mean what it meant when the Act came into being: *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada*, Local 2000, 2014 BCCA 496 at para. 48; *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2013 BCCA 497 at paras. 52-54.

[30] A useful explanation of patent unreasonableness is found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada*, Local 25-G, 2009 BCCA 229):

[65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* [Law Society of New Brunswick v. Ryan, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

(See also *College of Physicians and Surgeons of British Columbia v The Health Professions Review Board*, 2022 BCCA 10 at para 129.)

[50] While the judge referred to the sort of language discussed in the excerpt quoted above, that is not the approach he followed. With respect, in my view the judge made the error of engaging in a disguised correctness review, creating his own yardstick. The Supreme Court has told us in both *Mason and Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, that this is not the right process (see *Mason* at para 62, *Vavilov* at para 83). In the result, the judge failed to apply the "patently unreasonable" standard correctly.

[51] The judge, in effect, came to his own interpretation of the RTA, and measured the arbitrator's reasons against it, finding them unpersuasive. What the judge did not address was the arbitrator's careful interpretation of the EOA and his findings concerning the relationship between the parties. Had he done so, I expect he would have agreed there was nothing irrational about the arbitrator's conclusion that it was a relationship to which the Legislature did not intend the RTA to apply.

[52] The judge was critical of the arbitrator's treatment of the RTA's definition of "rental unit". I do not see anything irrational in that aspect of the arbitrator's approach. The term "rental unit" is foundational. As the arbitrator noted, it is a fundamental part of the RTA's definitions of both "tenancy" and "tenancy agreement". The definition of "rental unit" makes it clear that the factual determination of whether living accommodation is "rented or intended to be rented" is key, hence the arbitrator's thorough review of the facts and circumstances relevant to the relationship between the parties and their intentions. This led to his conclusion, based on the arrangement between the parties, that "the property is not intended to be rented and is not rented" (emphasis original). Respectfully, I see nothing

irrational or unlawful about that.

- [53] In para 55 of his reasons, the judge found that the arbitrator relied on form over substance in considering the EOA, so that his analysis was "clearly and directly contrary to the wording of the provisions of the statute". In para 56, the judge criticized the arbitrator for relying on section 13 of the EOA without considering section 5 of the RTA. These are legitimate concerns in a general sense, but, in my view, they do not accurately reflect the arbitrator's reasons. They do reflect a disguised correctness review.
- [54] While the arbitrator indeed noted that there was nothing about the EOA and Letter of Intent that was "remotely reflective of what would be expected in a written residential tenancy agreement", that was part of the arbitrator's exploration of the evidence concerning the intention of the parties in entering into those two agreements. Read contextually and deferentially, it was not a suggestion that any agreement for occupation is only a tenancy agreement if it contains certain phrases. As the arbitrator said in para 5 of his reasons as quoted above: "Nowhere in any of the documents agreed to by the parties is there any reference to rent, nor any evidence that there was ever any intention by [Habitat] to rent the property to the Applicant in a manner contemplated to be captured by the Act".
- [55] With respect to the effect of section 5 of the RTA, the arbitrator did not ignore it. He certainly noted that the EOA contained a specific clause indicating that the RTA did not apply to the parties' contractual arrangement. But he went on to observe at para 6 that "simply saying that the Act does not apply does not make it so if the circumstances and facts surrounding the creation of an agreement suggest otherwise".
- [56] In my opinion, that is consistent with section 5. That section provides that "landlords and tenants" may not avoid or contract out of the RTA. It does not apply to parties who are neither landlords nor tenants. The judge did not address that aspect. The arbitrator did. He found that "the entirety of the Applicant's participation in [Habitat's] program is for the Applicant to be, at some point, able to purchase the property from [Habitat] under a dual mortgage scheme." I consider that conclusion to be wholly consistent with the evidence, including the very nature of Habitat's program, the documents the parties signed, their dealings about matters such as Ms. Booth's difficulties making payments and maintaining employment, and the complete absence of any indication that their relationship was intended to be that of landlord and tenant.
- [57] Ms. Booth candidly agreed that neither party intended such a relationship. What she wants, understandably, is to be readmitted to Habitat's Homeownership Program. The reality, however, is that how matters between Habitat and Ms. Booth were or might be resolved within the context of the program is not before us, nor would a finding of a tenancy compel Habitat to readmit her.

- [58] In my respectful view, it would be contrary to the purpose of the RTA to impose a tenancy analysis on the relationship between the parties. To do so would threaten the viability of Habitat's worthy charitable program of assisting people needing housing to purchase homes in today's hostile market--surely a harsh consequence the Legislature did not intend (see, for example, Mason at para 69).
- [59] In all of these circumstances, I conclude that the arbitrator's decision is neither "irrational" nor "evidently not in accordance with reason". It is, in my view, rationally supported by the arbitrator's analysis, and, accordingly, cannot be described as patently unreasonable.

6. DISPOSITION

- [60] For these reasons, I would allow the appeal, set aside the order of the review judge, and reinstate the decision of the arbitrator that the RTB has no jurisdiction to hear and determine Ms. Booth's application. I would also set aside the review judge's stay of Habitat's petition in the Supreme Court of British Columbia for an order for vacant possession of the Home.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Fleming"

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Prepared on 29 October 2026 · Esheria