COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canada Lands Company CLC Limited v. Schlieper,* 2025 BCCA 145

Date: 20250501
Docket: CA49836

Between:

Canada Lands Company CLC Limited

Appellant
(Respondent)

And

Gunter Schlieper and Gail Marilyn Foran

Respondents
(Petitioners)

Before: The Honourable Madam Justice Fisher
The Honourable Justice Griffin
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2024 (*Schlieper v. Canada Lands Company CLC Limited*, 2024 BCSC 761, Vancouver Docket S240824).

Counsel for the Appellant:	C. Elrick
The Respondent, appearing in person and on behalf of Gail Marilyn Foran:	G. Schlieper
Place and Date of Hearing:	Vancouver, British Columbia December 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 1, 2025

Written Reasons by:
The Honourable Justice Donegan

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Griffin

Summary:

This an appeal of an order granting the tenants' petition for judicial review of a decision of a Residential Tenancy Branch arbitrator. The tenants disputed a notice to end tenancy for cause served upon them in October 2023 by the landlord. An arbitrator dismissed their application to cancel the notice and issued an order of possession in favour of the landlord. On judicial review, a chambers judge found that it was patently unreasonable for the arbitrator to have failed to address whether, in a September 2023 letter to the tenants, the landlord had waived its right to terminate the tenancy. The judge went on to decide that issue in favour of the tenants, allowed the petition, and set aside the order of possession. The landlord appeals.

Held: Appeal allowed. The arbitrator's decision was not patently unreasonable. The issue of waiver in relation to the September 2023 letter was not raised before the arbitrator and was a new issue that should not have been considered on judicial review. The arbitrator applied the proper test in dismissing the application to cancel the eviction notice and issuing the order of possession. Her decision is supported by the record that was before her, as well as the arguments and submissions made by the parties.

Reasons for Judgment of the Honourable Justice Donegan:

Introduction

[1] This appeal arises out of a tenancy dispute between the appellant landlord and the respondent tenants that resulted in the landlord issuing a notice to end tenancy for cause (the "Eviction Notice"), pursuant to s. 47 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (the "*RTA*"). The tenants disputed the Eviction Notice before the Residential Tenancy Branch (the "RTB"). On January 28, 2024, an arbitrator acting as a delegate of the RTB Director found the landlord had established the tenants had engaged in conduct that justified the Eviction Notice and issued an Order of Possession pursuant to s. 55(1) of the *RTA* (the "Arbitrator's Decision").

[2] The tenants sought judicial review of the Arbitrator's Decision. The chambers judge found the Arbitrator's Decision was patently unreasonable, allowed the petition, and set aside the Order of Possession. The judge rested this conclusion solely on his determination that the arbitrator had failed to consider an issue "squarely raised" at the hearing — whether the landlord had waived its right to terminate the tenancy for the cause relied upon in the Eviction Notice. The judge then conducted his own analysis of the issue, resolved it in favour of the tenants, and consequently set aside the Order of the Possession. The landlord now appeals.

[3] For the reasons that follow, I would allow the appeal.

Background

General

[4] The property at issue is located in the west side of Vancouver, on federally owned lands known as the "Jericho Lands", which were formerly owned and operated as military housing by the Department of National Defence (the "Lands").

[5] The respondents currently live in a residential unit on the Lands (the "Residence"), pursuant to a Licence to Occupy made January 14, 2016, and

subsequently amended from time to time (the “Licence to Occupy”). The appellant, Canada Lands Company CLC Limited (“Canada Lands”), is the Crown corporation that owns the Lands and the Residence.

[6] The Licence to Occupy granted the respondents a licence to use and occupy the Residence as of March 1, 2016. The parties to the Licence to Occupy were Canada Lands and Ms. Foran. Mr. Schlieper is not a party to the Licence to Occupy, but comes within the definition of “Dependent” contained therein.

[7] Provisions of the Licence to Occupy that are particularly relevant to this appeal are:

> 11. CLC [Canada Lands] may terminate this Licence without notice upon breach of any term thereof by the Occupant, or by giving at least a 30-day written notice to the Occupant.
>
> …
>
> 29. The Occupant shall be responsible for the conduct of Dependants and invitees. If such people act or omit to act in such manner as would constitute a breach of this Licence if the act or omission were by the Occupant, the act or omission shall be deemed to be an act or omission by the Occupant.
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> …
>
> 32. The Occupant shall comply with the attached "Occupant Handbook" and any regulations which CLC may from time to time make to ensure the proper care, cleanliness and safety of the Premises or to prevent nuisances. Further, the Occupant shall comply with all statutes, regulations and by-laws of any federal, provincial or municipal authority which affect the Premises or their use and occupation.
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> 33. The Occupant shall comply with all instructions issued from time to time by CLC relating to maintaining security or to preserving the routine, administration, or order in, on, or about the defence establishment to which the Premises relate.
>
> …
>
> 34. No waiver by CLC is effective unless it is in writing (the “no waiver provision”).

[8] The provision of the Occupant Handbook (referred to in clause 32 above) particularly relevant to this appeal is:

> Good Neighbour Considerations
>
> Conscientious and respectful neighbours help create a happy community. The following guidelines will maintain a respectful neighbourhood for you and your family:
>
> …
>
> b. Do not disturb the peace and/or comfort of your neighbours or of any person in any residential unit. This means you should not cause or permit anything that unreasonably interferes with your neighbours' peace, privacy or quiet enjoyment, including barking dogs and loud parties.
>
> …

[9] By 2018, Mr. Schlieper had begun to engage in conduct similar to that which gave rise to the Eviction Notice: namely, taking steps to enforce what he deems to be the security of the Lands by enforcing his interpretation of trespass law.

[10] In the hearings below, and on appeal, the respondents maintain that Mr. Schlieper's conduct is not contrary to the terms of the Licence to Occupy. They submit that Canada Lands has failed to address various issues on the Lands, including property crime, and that the steps taken by Mr. Schlieper are justified in the circumstances.

[11] Canada Lands delivered the Eviction Notice to the respondents on October 24, 2023, alleging cause pursuant to ss. 47(1)(d) and (h) of the *RTA*. In the years preceding this, Canada Lands had received numerous complaints that Mr. Schlieper was engaging in conduct that Canada Lands believed constituted significant interference with other occupants of the Land: jeopardizing their health, safety, and/or their lawful rights.

[12] The respondents disputed the Eviction Notice, as well as its factual basis. They continue to challenge some of the evidence advanced by Canada Lands, as well as its probity regarding the allegations that underlie the Eviction Notice.

[13] On November 1, 2023, the respondents made an Application for Dispute Resolution before the RTB, seeking cancellation of the Eviction Notice. The application was heard by an arbitrator, in a one-hour hearing on November 27, 2023, via teleconference.

RTB Proceedings

[14] The Eviction Notice provided to the respondents cites the following as the bases for the eviction: (a) that the tenant or a person permitted on the property by the tenant had significantly interfered with or unreasonably disturbed another occupant or the landlord, and/or seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and (b) that a material term of the tenancy agreement was breached, and was not corrected within a reasonable time after written notice was provided to do so.

[15] In the details provided in the Eviction Notice, Canada Lands stated that Mr. Schlieper had engaged in inappropriate and aggressive actions over a five-year period, purportedly to enforce trespass law on the Lands. Canada Lands stated that Mr. Schlieper had not altered his behaviour after multiple warnings, and that Ms. Foran was in breach of the Licence to Occupy by virtue of this conduct — specifically, s. 33 of the Licence to Occupy, and a provision of the referenced Occupant Handbook governing unreasonable interference with neighbours' peaceful enjoyment.

[16] The respondents submitted a brief summary of material facts and written argument in support of their application to cancel the Eviction Notice. Primarily, they: challenged the allegations made; raised concerns about how the Lands were managed; denied ever seriously jeopardizing the health, safety or lawful right of another occupant of the Lands or the landlord; and took the position that Mr. Schlieper's conduct was permitted by the *Trespass Act*, R.S.B.C. 2018, c. 3. They also raised examples of alleged trespass and/or criminal activity that they witnessed on the Lands, and the ways in which Mr. Schlieper's conduct purportedly benefited Canada Lands and/or the other occupants of the Lands.

[17] In their materials, the respondents included a letter dated September 6, 2023 from the property manager of the Lands sent to them (the "September Letter"). This letter referenced previous written communications from Canada Lands (in 2018 and 2022) warning Mr. Schlieper that his behaviour contravened the Licence to Occupy and Occupant Handbook. It also claimed that, by virtue of incidents that had occurred on May 9, 2023 and June 5, 2023, Mr. Schlieper was again in breach of s. 33 of the Licence to Occupy and the peaceful enjoyment provision of the Occupant Handbook. The September Letter closed with the following:

> Mr. Schlieper has previously been warned that he does not have the authority to enforce trespass against individuals, residents, or passersby, nor to decide who can and who cannot use the common grounds of the property. Despite the multiple warning[s] given, he has not stopped his actions.
>
> Due to the above, Canada Lands Company will only extend the Licence to Occupy agreement until January 31, 2024. The Licence to Occupy will terminate on January 31, 2024, and will not be extended further.

[18] Canada Lands filed affidavit and documentary evidence detailing what it argued was conduct justifying the Eviction Notice, including that: (a) between 2018 and 2023, Canada Lands had received several complaints about Mr. Schlieper's conduct, which included allegations that he had verbally accosted or threatened residents, visitors and members of the public (including with his dog) when they were walking on common areas, and that he used racially discriminatory language on one occasion and an obscene gesture on another; and (b) Canada Lands had provided the respondents with multiple written warnings about the inappropriateness of Mr. Schlieper's conduct, advising them that his conduct was in breach of the Licence to Occupy and the Occupant Handbook, and reminding them that the public was permitted to access the Lands.

[19] At the RTB hearing, the arbitrator asked the parties to focus on more recent conduct, to explain why they were before the RTB "in 2023 with this issue when it could have been dealt with in 2019." In response to this, counsel for Canada Lands said that this was not a case of "the landlord sitting on its rights", but was rather a situation of Canada Lands "giving the tenant the benefit of the doubt", "trying to be accommodating", and "being indulgent… in the extreme in allowing the tenant to

correct course". Counsel also referred the arbitrator to the no-waiver provision in the Licence to Occupy, arguing that this precluded any possibility of Canada Lands having acquiesced to Mr. Schlieper's conduct.

[20] The respondents' submissions at the hearing echoed their written submissions, with Mr. Schlieper primarily seeking to justify his conduct. Importantly, the respondents did not allege at any time that Canada Lands had acquiesced to Mr. Schlieper's conduct and/or waived its right to end the tenancy — with respect to the September Letter, or otherwise.

The Arbitrator's Decision

[21] The arbitrator found Canada Lands had established it had sufficient grounds to issue the Eviction Notice, dismissed the respondents' application (without leave to reapply), and granted the Order of Possession effective March 1, 2024. The arbitrator's findings in support of this conclusion included that:

a) Canada Lands had provided evidence of Mr. Schlieper's repeated threatening and harassing conduct toward the public, other residents of the Lands, and their guests;

b) the respondents were advised in writing over the course of several years that Mr. Schlieper's conduct was violating material terms of the Licence to Occupy, and the respondents failed to take appropriate corrective or remedial measures concerning this conduct;

c) Mr. Schlieper's decision to bring his dog with him on "patrol" demonstrated conduct that was calculated to threaten people who Mr. Schlieper did not believe were permitted on the Lands; and

d) Mr. Schlieper provided no legal authority that permitted him to lawfully patrol the Lands for alleged trespass, or for unrestrained pets owned by others.

[22] The arbitrator concluded that Ms. Foran, or a person permitted to be on the property by her (i.e., Mr. Schlieper), had engaged in conduct that significantly interfered with and unreasonably disturbed other occupants and the landlord, and has seriously jeopardized the lawful rights of others, as well as the landlord.

[23] In making the above findings, the arbitrator properly relied on the Residential Tenancy Branch Rules of Procedure, in describing the standard of proof as a balance of probabilities, with the onus lying on Canada Lands to prove that the Eviction Notice was validly issued and supported by fact.

[24] The arbitrator did not make any findings related to waiver. However, in outlining the positions of the parties, she did refer to the submissions of counsel for Canada Lands regarding the extended time given to the respondents to correct Mr. Schlieper's behaviour, including that: (a) the extended time given "was based upon [Canada Lands'] commitment toward its residents and their prior service to the government, and was not a waiver of [Canada Lands'] right to end the tenancy or an acquiescence to the behavior"; and (b) the Licence to Occupy provides that any waiver is not effective unless it is in writing.

[25] The respondents applied to the RTB for review consideration of the Arbitrator's Decision, appending a number of new documents said to support an allegation of fraud against Canada Lands. The application for review consideration was dismissed on February 5, 2024, as it was filed after the applicable deadline and no request for an extension of time was made (the "Review Consideration Decision"). The respondents did not seek judicial review of the Review Consideration Decision.

The Judicial Review Proceeding

[26] The respondents filed their petition for judicial review of the Arbitrator's Decision on February 6, 2024. In the petition, the respondents advanced arguments similar to those that they raised at the RTB hearing: challenging the factual assertions made by Canada Lands (and generally accepted by the arbitrator), and denying any wrongdoing or contravention of the Licence to Occupy. The

respondents cited various sections of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), the *RTA*, the *Trespass Act*, and *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, as well as the Residential Tenancy Policy Guideline.

[27] The petition was heard, and decided, by a judge in chambers on April 12, 2024, with reasons indexed as *Schlieper v. Canada Lands Company CLC Limited*, 2024 BCSC 761 (the "Chambers Decision").

[28] The judge began by recounting the factual and procedural background of the dispute, and summarizing the arbitrator's findings as I have described above. He next identified the standard of review as patent unreasonableness, and articulated the role of the court as follows:

> [10] The courts accord an arbitrator's decision significant deference. Decision is only patently unreasonable if it is "openly, clearly, evidently unreasonable" and is so flawed that no amount of curial deference can justify it. In other words, it must border on the absurd: *Vaquerano v. 43 Housing Society*, 2016 BCSC 2300 at paras.16–17; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 at para. 18.
>
> [11] The function of this court on the judicial review in this case is supervisory. It must not undertake a fresh examination of the substantive issues. Judicial review concerns itself only with the evidence that was before the tribunal: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 34.
>
> [12] This court has no jurisdiction to reweigh the evidence or second guess the findings of the arbitrator, substitute different findings of fact or inferences drawn from those facts, or conclude that the evidence is insufficient to support the result: *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para. 37.

[29] Subject to a single exception, the judge found the arbitrator had appropriately addressed the law, as well as the evidence and submissions that were before her. The exception he identified, calling it "significant" (Chambers Decision at para. 14), was the arbitrator's failure to address whether the September Letter constituted a waiver of Canada Lands' right to terminate the Licence to Occupy. The judge considered this failure to be patently unreasonable (Chambers Decision at para. 25).

[30] The judge began his analysis of the significance of the September Letter by noting that the "vast majority" of Mr. Schlieper's conduct occurred before May 2023.

He proceeded to refer to, and list, other evidence he believed was before the arbitrator, including:

> a) a May 24, 2023 letter from Canada Lands to the respondents advising them of the opportunity to extend the Licence to Occupy from its current termination date of September 30, 2023 to September 30, 2024, if they met certain conditions including compliance with the Licence to Occupy and the Occupant Handbook (the "May Letter");[1]
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> b) that on June 5, 2023, Canada Lands was advised of another incident likely involving Mr. Schlieper and his "trespass-policing conduct";
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> c) that sometime between May 24 and June 16, 2023, a document entitled "Third Amending Agreement Extending the Licence to Occupy to September 20, 2024" was signed by or on behalf of Ms. Foran (the "Third Amending Agreement");[2] and
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> d) that on June 19, 2023, Canada Lands learned of a May 9, 2023 incident involving Mr. Schlieper engaging in similar behavior.
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> (Chambers Decision at paras. 14–15)

[31] The judge next recounted the content of the September Letter, including the conclusion reproduced earlier that the Licence to Occupy would terminate on January 31, 2024, and would not be extended further. He then noted that the Eviction Notice was issued "without any evidence of any further inappropriate conduct on the part of Mr. Schlieper" (Chambers Decision at para. 19).

[32] Although the significance (if any) of the September Letter to the issue of waiver was not the subject of any submissions at the hearing before the arbitrator,

[1] As I will discuss later in these reasons, this letter was not, in fact, before the arbitrator at the RTB hearing.
[2] As I will discuss later in these reasons, this document (executed by or on behalf of Ms. Foran, but not by Canada Lands) was also not before the arbitrator at the RTB hearing.

the judge went on to determine that its contents constituted a “clear waiver” of Canada Lands’ right to terminate the Licence to Occupy. The judge reasoned:

> [23] Counsel for the respondent made submissions to the Arbitrator during the hearing regarding the no-waiver provision in the Licence to Occupy as well as on the law of waiver. In my view, he correctly submitted that the law of waiver requires two things. First, that the person waiving has full knowledge of the rights that are being wavered [*sic*]. Counsel for the respondent conceded during his submissions that the respondent indeed had full knowledge of its rights. The second requirement of waiver is that the person waiving have a conscious intention to abandon its rights. Clearly, in my view, both those requirements were met here, as evidenced by the September 6, 2023 letter. However, despite the issue of waiver having been squarely raised during the hearing, it was never addressed by the Arbitrator. There was no finding by the Arbitrator on the law on waiver or any issue respecting the application of the facts to that law in this case.
>
> [24] I recognize that the issue of waiver was not raised by the petitioners during the hearing. They are lay litigants. Rather, the petitioners' focus during the hearing was on Mr. Schlieper's alleged right to enforce trespass laws, but, nevertheless, the issue of waiver was squarely before the Arbitrator.

[33] The judge concluded that in these circumstances it was patently unreasonable for the arbitrator to fail to consider whether the September Letter constituted a waiver of Canada Lands' right to terminate the Licence to Occupy (Chambers Decision at para. 25). He then reiterated his decision on waiver, allowed the petition, and set aside the Order of Possession (Chambers Decision at para. 27).

[34] The judge also noted that the Licence to Occupy terminated on January 31, 2024 (the date set out in the September Letter). As the Order of Possession was set aside after that date had passed, there remained the question of whether there was any right to occupy. However, the judge did not consider that to be a question before him (Chambers Decision at para. 29).

On Appeal

Standard of Review

[35] On an appeal from a judicial review decision, this Court’s role is to determine whether the chambers judge selected the correct standard of review and applied it properly. Effectively, this means the appellate court steps into the shoes of the chambers judge and reviews the administrative decision on the proper standard of

review: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 36. Although the reasoning of the chambers judge may be instructive, his decision is not entitled to deference: *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 427 at para. 139, citing *Yu v. Richmond (City)*, 2021 BCCA 226 at para. 45.

[36] The standard of review applicable to the Arbitrator's Decision is the highly deferential standard of patent unreasonableness, pursuant to ss. 5.1 and 84.1 of the *RTA* and s. 58 of the *ATA*. The narrow grounds on which courts may interfere with RTB decisions were recently summarized by this Court in *Li v. British Columbia (Residential Tenancy Director)*, 2024 BCCA 202 at paras. 29–34 and *Najaripour v. Brightside Community Homes*, 2024 BCCA 250 at paras. 23–24. A patently unreasonable decision has been described as one that is clearly irrational, evidently not in accordance with reason, "so flawed that no amount of curial deference can justify letting it stand" (*Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147 at paras. 15–17, citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52), or almost bordering on the absurd (*West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28).

[37] Before turning to my application of these principles, I must first address two matters relating to the scope of the record we are to consider. The first relates to whether the record before the chambers judge was appropriately confined. The second relates to the respondents' application to adduce fresh evidence on appeal.

Scope of the Record

[38] Given the supervisory nature of the role played by the court on judicial review, the record upon which the review is conducted consists, generally, of the documents and information that were before the decision maker when the impugned decision was made: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at paras. 75–79 [*Beedie*]; *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 34–44. The record before the court may be supplemented, in certain limited circumstances, to permit

the court to discharge its supervisory function: *McLeod Lake Indian Band v. West Moberly First Nations*, 2024 BCCA 187 at para. 28, citing *British Columbia (Lieutenant Governor in Council) v. Canada Mink Breeders Association*, 2023 BCCA 310 at para. 25.

The Record Considered by the Chambers Judge was not Appropriately Confined

[39] As noted earlier, in determining that the Arbitrator's Decision was patently unreasonable, the judge relied on certain evidence he believed had formed part of the record before the arbitrator, including the May Letter and the Third Amending Agreement (unsigned by Canada Lands).

[40] Respectfully, it was an error for the judge to have considered these two documents. They did not form part of the record before the arbitrator. Rather, they were part of the package of new material the respondents filed in support of their RTB review consideration application. As the respondents only sought judicial review of the Arbitrator's Decision, the review consideration record should not have been considered by the judge.

[41] The genesis of this error is easily understood. As their pleadings reflect, the Director was unclear about which decision (the Arbitrator's Decision or the Review Consideration Decision) the respondents were seeking to have judicially reviewed. For this reason, the Director provided the court with both records, attached as exhibits to the same affidavit. The Director did not participate at the hearing of the petition, and it seems that neither party identified for the judge that some of the material placed before the court was extrinsic to the record before the arbitrator. This extrinsic evidence should not have been considered.

The Respondents' Fresh Evidence Application

[42] The respondents apply to introduce four affidavits as fresh evidence on appeal — two from Mr. Schlieper, one from Ms. Foran, and one from another resident of Lands. The affidavits contain evidence primarily relating to the allegations underlying the Eviction Notice, and the respondents' response to those allegations.

They say the affidavits are important for a number of reasons, but primarily because they demonstrate a pattern of Canada Lands advancing false or misleading evidence to the courts and the RTB, and they expand on or fill gaps in the record that was before the arbitrator. The respondents concede that most of this evidence was available at the time of the hearing before the arbitrator, but say they had insufficient time to gather and tender it.

[43] Canada Lands opposes the admission of this evidence. In addition to expressing concern about failing to confine judicial review to the record that was before the arbitrator, Canada Lands submits that the new evidence would not, in any event, meet the test for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R 759 at 775, 1979 CanLII 8. I agree.

[44] As noted earlier, a reviewing court does not generally admit evidence that was not part of the record before the original decision maker, as this would usurp the role of that decision maker and "judicialize" the hearing by effectively conducting a *de novo* hearing, rather than a review based on what was before the decision maker: *Beaudoin* at para. 179. Subject to certain exceptions well-recognized in the jurisprudence, attempting to introduce fresh evidence in respect of the merits of the challenged decision on an application for judicial review misapprehends the nature of judicial review. None of those exceptions apply here.

[45] As Justice Fitch held in *Beaudoin* at para. 182, because this Court steps into the shoes of the chambers judge and determines whether the standard of review was identified and applied correctly, there is no reason why the same principled constraint on the admission of fresh evidence should not operate on appeal. Similar to *Beaudoin*, I will refrain from commenting about the way in which the *Palmer* test for the admission of fresh evidence fits with the principles of judicial review, as the point was not developed in submissions. The parties have framed their submissions in light of the *Palmer* test and I am content to apply that test for the purposes of this case.

[46] Having reviewed the affidavits, it is my view that they do not meet the test for admission of fresh evidence under *Palmer*. The test, considered in the context of whether admission is in interests of justice, requires an applicant to establish that the fresh evidence: (a) was not available for the original hearing through due diligence; (b) is relevant evidence that bears upon a decisive or potentially decisive issue; (c) is credible and reasonably capable of belief; and (d) is evidence that, when considered with the other evidence, can be reasonably expected to have affected the result.

[47] With the possible exception of the affidavit from another occupant of the Lands, none of the proposed fresh evidence overcomes the due diligence threshold. The inability of the other occupant to provide his evidence at an earlier date is not explained in his affidavit, but the respondents tell us that the inability relates to his military-related duties. Even if I accept this as true, neither this particular affidavit nor any of the other proposed fresh evidence would meet, at the very least, the fourth requirement of the *Palmer* test. All four affidavits primarily address the respondents' argument that Mr. Schlieper's conduct constituted justified enforcement of trespass laws on the Lands. Even if the evidence were admitted, or had been before the arbitrator, there would still have been more than enough evidence upon which the arbitrator could have relied in dismissing the application to cancel the Eviction Notice and issue the Order of Possession. In other words, this evidence would not be expected to have affected the result.

[48] The respondent's application to adduce fresh evidence is dismissed.

Positions of the Parties on Appeal

[49] Canada Lands contends that while the chambers judge identified the correct legal test to apply, he failed to properly apply it. It says that by considering, and deciding, an issue — whether it had waived its right to issue the Eviction Notice in the September Letter — that was not advanced before the arbitrator, the judge erred in law. It argues that the judge violated the strong presumption that, absent exceptional circumstances, a petitioner seeking judicial review cannot advance fresh

arguments before the court and that by doing so, the judge effectively applied an erroneous standard of correctness to his review of the Arbitrator's Decision.

[50] Canada Lands submits that the Arbitrator's Decision is not patently unreasonable. It says the arbitrator considered the evidence before her, the submissions of the parties, and the relevant statutory framework and law. Far from being clearly irrational or bordering on the absurd, Canada Lands contends that the arbitrator's conclusion that the respondents had engaged in conduct that justified the Eviction Notice is strongly supported by the record and unassailable.

[51] Canada Lands further submits that in the event this Court were to consider the waiver issue, the result would be the same. It argues the evidence does not support a finding that it had an unequivocal and conscious intention to abandon its legal rights under the tenancy agreement and the *RTA*, but even if it did, it emphasizes that the *RTA* is mandatory legislation. Parties cannot contract out of its provisions, rendering any purported waiver a nullity.

[52] The respondents say the chambers judge applied the proper standard correctly. They contend that the September Letter waiver argument was not new. While acknowledging that it was not raised directly, they say the general issue of waiver was the subject of submissions and that the arbitrator should have considered and decided the issue. Her failure to do so was patently unreasonable and the chambers judge made no error in so deciding.

[53] The respondents' focus on appeal, as before the chambers judge and the arbitrator, is on the merits of the case: namely, that Mr. Schlieper's conduct did not occur as alleged, nor did it give proper grounds for the Eviction Notice. They ask that the appeal be dismissed or, alternatively, if the appeal is allowed, for the matter to be remitted.

Discussion

[54] It is my respectful view that while the judge correctly identified the standard of review, he failed to properly apply it. The issue of whether Canada Lands had

waived its right to issue the Eviction Notice in the September Letter was not before the arbitrator. By allowing a fresh argument to be advanced, and then decided, the judge erred in law in that he effectively applied a standard of correctness to his review of the Arbitrator's Decision.

[55] Courts, as a general rule, are reluctant to permit new issues to be raised on judicial review that were not before the administrative decision-maker: *The Owners, Strata Plan VR 1120 v. Civil Resolution Tribunal*, 2022 BCCA 189 at paras. 45–46, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 23. When a petitioner seeks to raise new issues, the court must consider whether the rationales behind the general rule against doing so, apply. These rationales include:

> a) respect for the intent of Parliament and provincial legislatures in delegating decision-making powers to administrative bodies, as opposed to the court;
>
> b) the need to accord deference to the decisions of statutory decision-makers, particularly when a decision-maker has specialized functions or expertise; and,
>
> c) the prejudice that arises if the court does not have an evidentiary record adequate to consider the new issue.

(The *Owners, Strata Plan 1120* at para. 45, citing *Alberta Teachers' Association* at paras. 24–26.)

[56] If these rationales apply, this militates against permitting a petitioner to raise the new issue on judicial review. In other words, if the reviewing court cannot adequately show deference to the administrative decision maker because it cannot discern the decision maker's views on the new issue, even by implication, this should generally lead the reviewing judge to refuse to entertain the new issue: *The Owners, Strata Plan* at para. 48.

[57] The chambers judge did not identify the issue of waiver in the context of the September Letter as a new issue. Instead, he concluded the issue of waiver had been "squarely" put at issue before the arbitrator by Canada Lands. He then concluded that it was, accordingly, patently unreasonable for the arbitrator to fail to

consider whether the September Letter constituted a waiver of Canada Lands' right to terminate the Licence to Occupy: Chambers Decision at paras. 24–25. Respectfully, I disagree with both of these conclusions.

[58] First, the issue of waiver was not discussed at the hearing in the context of the September Letter, or in response to any assertion of waiver (generally, or specifically in relation to the September Letter) by the respondents. The only submission touching, generally, on the issue of waiver came from counsel for Canada Lands, framed in response to a question by the arbitrator about the timing of the Eviction Notice, and as a pre-emptive counter to an argument that it thought may be raised by the respondents: that Canada Lands' delay in evicting the respondents could be seen as a form of acquiescence to Mr. Schlieper's conduct.

[59] The respondents did not raise any issues relating to waiver in their application, or in their submissions at the RTB hearing. While they touched on the September Letter in further reply submissions, it was not in the context of alleging that Canada Lands waived its right to terminate the Licence to Occupy. Their overall submissions instead focused on the merits underlying the Eviction Notice.

[60] I do not agree with the chambers judge that the mere fact that counsel for Canada Lands briefly discussed waiver in the context of the no-waiver provision — in response to a general inquiry from the arbitrator about Canada Lands' delay in pursuing the respondents' eviction in light of the duration of Mr. Schlieper's conduct — could reasonably be considered to have put at issue whether the September Letter constituted a waiver of Canada Lands' rights to enforce its rights under the Licence to Occupy or the *RTA*.

[61] In light of the full context of the record and submissions made at the RTB hearing, it was not patently unreasonable for the arbitrator not to address this issue. Effectively, the extent of the submissions on waiver that were before the arbitrator was a brief, general mention of waiver by Canada Lands, presented as a hypothetical counterargument, with no relevant submissions by the respondents. In this regard, I adopt the conclusion of Justice Chan in *Zhang v. First Service*

Residential BC Ltd., 2023 BCSC 361: “it cannot be patently unreasonable for the arbitrator not to have considered an argument that was not made to her” (at para. 38, citing *Vandale v. Workers’ Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 54). By determining that the reference to the doctrine of waiver of contract in one context put the specific issue identified by the judge as “squarely” at large for the entire record, the judge effectively, and erroneously, imposed an obligation on the arbitrator to parse the record, identify potential issues of waiver, and decide those issues in the absence of notice to, or submissions from, the parties.

[62] In my view, whether the September Letter constituted a waiver of Canada Lands’ right to enforce its rights under the Licence to Occupy or the *RTA* was not an issue before the arbitrator and would, therefore, properly be considered a new issue. Although the chambers judge did not treat it as such, there are several reasons I would not permit this new issue to be raised on judicial review.

[63] The respondents could have raised or addressed this issue, or any issue related to waiver, before the arbitrator — in response to Canada Lands’ submissions, or independently — but did not. Their failure to do so militates against allowing it to be raised on review. As well, it is also my view that the rationales against allowing a new issue to be raised on judicial review, as I have outlined above, apply in this case. Because the issue was not before the arbitrator, I am unable to discern her views on it, even by implication, and therefore cannot adequately engage with the standard of review that is required.

[64] In reaching the conclusion he did, the chambers judge placed some emphasis on the respondents’ status as self-represented litigants. While courts may afford self-represented litigants some leeway in certain contexts, I agree with the position taken by Canada Lands that line decision makers protected by a strong privative clause and a patently unreasonable standard of review will often have self-represented persons appearing before them, as will courts on judicial review. To allow a new issue to be raised on judicial review simply because a party is self-represented

would not only improperly avoid engaging with the required legal analysis, it would also fail to respect the legislature's decision to vest the RTB with its decision-making powers and a highly deferential standard of review, and undermine the *RTA*'s objective in providing cost-effective and expedient decision-making.

[65] Moreover, it is also my view that if the arbitrator had addressed the issue of whether the September Letter constituted a waiver by Canada Lands of her own accord, solely on the basis of the submissions and record that were before her, she would have violated a central component of the duty of procedural fairness — namely, for parties to know the case to meet and be provided an opportunity to answer it: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 at para. 74.

[66] I conclude the Arbitrator's Decision is not patently unreasonable. It was not patently unreasonable for the arbitrator to fail to address a point she was not asked to address. The arbitrator applied the proper test in dismissing the respondents' application to cancel the Eviction Notice and issuing the Order of Possession. She found Canada Lands established the respondents had engaged in conduct that significantly interfered with and had unreasonably disturbed other occupants and Canada Lands, and had seriously jeopardized the lawful rights of others, as well as Canada Lands. She also found that Canada Lands established that the respondents had been advised over the course of several years, and in writing, that Mr. Schlieper was engaging in conduct that violated material terms of the Licence to Occupy, and that the respondents failed to take appropriate corrective or remedial measures concerning this conduct. Far from being clearly irrational or bordering on the absurd, the arbitrator's findings and conclusions are all firmly rooted in the arguments that were made to her and are all strongly supported by the record that was before her.

[67] While the appeal can be disposed of on this basis alone, I agree with Canada Lands, for the reasons they submit, that even if this Court were to entertain an argument that the September Letter amounted to a waiver of the right to terminate the Licence to Occupy, the result would be the same. The record was replete with

evidence that Mr. Schlieper had significantly interfered with and unreasonably disturbed other occupants of the Lands, and that the respondents had been given multiple opportunities to correct this conduct. Within this context, the content of the September Letter does not constitute a waiver by Canada Lands of its termination rights under the Licence to Occupy or the *RTA*.

[68] First, the *RTA* is mandatory legislation: *RTA*, s. 5. Canada Lands, accordingly, cannot contractually waive its rights or obligations under the *RTA*.

[69] Second, even if s. 5 of the *RTA* did not apply, the common law doctrine of waiver in this context has a strict test: one that would require (among other things) “an unequivocal and conscious intention” by Canada Lands to abandon its rights under the Licence to Occupy and the *RTA*. This strict test is required because no consideration moves from the party in whose favour a waiver operates: *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para. 75.

[70] Nothing on the face of the September Letter, or elsewhere in the record, suggests that Canada Lands exhibited an unequivocal and conscious intention to waive its rights to evict the respondents on the grounds alleged in the Eviction Notice, or otherwise. To the contrary, the September Letter and Canada Lands’ prior conduct establishes that Canada Lands made repeated attempts to convince the respondents to correct Mr. Schlieper’s behaviour through means less severe than terminating the Licence to Occupy. It would be unreasonable to interpret these attempts at salvaging the landlord-tenant relationship as constituting a waiver of rights.

Disposition

[71] For the foregoing reasons, I would allow the appeal, set aside the order of the chambers judge, dismiss the underlying petition, and reinstate the Order of Possession effective 30 days from the date of this decision.

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Griffin"