COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Creative Energy Vancouver Platforms Inc. v. Concord Pacific Developments Ltd.,* 2024 BCCA 128

Date: 20240405
Docket: CA49579

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Between:

Creative Energy Vancouver Platforms Inc.

Appellant
(Respondent)

And

Concord Pacific Developments Ltd.

Respondent
(Claimant)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: A partial final award of an arbitral tribunal under the *Arbitration Act*, S.B.C. 2020, c. 2, dated December 11, 2023 (*Creative Energy Vancouver Platforms Inc. v. Concord Pacific Developments Ltd.*).

Counsel for the Appellant:	R.J.C. Deane P. Burnham
Counsel for the Respondent:	D.E. Gruber V.F.L. Pappas
Place and Date of Hearing:	Vancouver, British Columbia March 14, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 5, 2024

Summary:

The applicant applies for leave to appeal an arbitral tribunal's decision in a commercial dispute over the interpretation of a land purchase agreement. The applicant raises five grounds of appeal in relation to the tribunal's interpretative exercise. Held: Leave to appeal granted. The applicant identified an extricable question of law: whether the tribunal erred in allowing evidence of the factual matrix—including evidence of post-contracting conduct—to overwhelm the text of the agreement, thereby creating a new agreement for the parties. The importance of the award to the parties justifies granting leave as determination of the question may prevent a miscarriage of justice. The legal question involves careful consideration of the tribunal's reasoning and the evidentiary record and, therefore, is a question that should be decided by a division of this Court.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] This application for leave to appeal arises from a dispute over a purchase agreement between the applicant, Creative Energy Vancouver Platforms Inc. ("Creative Energy"), and the respondent, Concord Pacific Developments Ltd. ("Concord Pacific"), for a parcel of land situated in downtown Vancouver and referred to as the "Triangle". The parties agreed to submit the dispute to arbitration under the *Arbitration Act*, S.B.C. 2020, c. 2 [*Act*] and appointed a tribunal comprised of three experienced commercial arbitrators. The parties also agreed to bifurcate the arbitration into two phases. At the conclusion of phase one, the tribunal issued what is described as the Partial Final Award on December 11, 2023 (the "Award"). Creative Energy seeks leave to appeal the Award, alleging that the tribunal made five errors that all raise questions of law.

[2] Concord Pacific argues that the alleged errors do not involve extricable questions of law or, if they do, they are not of such importance that this Court should grant leave to appeal. Concord Pacific asks that the application be dismissed.

[3] For the reasons that follow, I grant leave to appeal, but only with respect to a single question of law.

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Factual background

[4] Creative Energy owns the property at 720 Beatty Street in Vancouver ("720 Beatty"), on which it has operated a steam plant since the late 1960's. The Triangle is immediately adjacent to 720 Beatty.

[5] Concord Pacific agreed to sell the Triangle to Creative Energy by way of a purchase agreement dated April 22, 1988 (the "Original Purchase Agreement") that was entered into after it acquired the Expo 86 lands from the Province of British Columbia. The Triangle was originally part of the Expo 86 lands. The Original Purchase Agreement contemplated that Concord Pacific would subdivide the Triangle in order to affect the transfer to Creative Energy. However, the City of Vancouver rejected Concord Pacific's attempt to subdivide the Triangle. Instead, the city required that the Triangle be joined together with a small strip of land adjoining the Triangle (the "Strip"), also part of the Expo 86 lands, to form a new lot—Lot 222—which could then be subdivided.

[6] As a result of those developments, on January 31, 1993, the parties entered into an amending agreement (the "Amending Agreement") that modified certain terms of the Original Purchase Agreement which, except as amended, would continue in full force and effect (the "Amended Purchase Agreement" or the "APA"). The Amended Purchase Agreement reiterated the parties' intent to transfer "full ownership of only the Triangle" to Creative Energy, even though it resulted in the transfer of the whole of Lot 222. Concord Pacific, in turn, was granted an irrevocable option to purchase the Strip. The Amended Purchase Agreement also shifted the onus of applying for a rezoning of the Triangle from Concord Pacific to Creative Energy.

[7] The Original Purchase Agreement provided that the purchase price for the Triangle had been established "on the assumption that at the Date of Completion the floor space ratio applicable to the Triangle under the City of Vancouver zoning therefore will be one (1)". It also provided that if the floor space ratio (or the "FSR") was greater than one, Creative Energy would be required to either transfer that

excess density (the "Excess Density") to Concord Pacific or purchase it at fair market value. While the requirement to transfer or purchase the Excess Density remained in the Amended Purchase Agreement, the event that would trigger that calculation and purchase was changed:

> 5.1 The Purchase Price for the Triangle has been established between [Creative Energy] and Concord Pacific on the assumption that consequent upon the first zoning thereof the floor space ratio applicable to the Triangle under the City of Vancouver zoning therefore will be one (1). If the applicable floor space ratio consequent upon the first zoning is greater than one (1) then, unless [Creative Energy] exercises its option to purchase extra density hereafter set forth, [Creative Energy] will transfer such density in excess of [floor space ratio] one (1) to Concord Pacific for One ($1.00) Dollar, subject always to the consent of the City. If such consent is not given [Creative Energy] will retain such excess density but will not use the same unless concurrently therewith it pays to Concord Pacific the fair market value thereof at the time of commencing use. If the applicable floor space ratio is greater than one (1) [Creative Energy] shall have the option, exercisable before final completion of zoning, to elect in writing to acquire such excess density for the fair market value thereof.
>
> [Emphasis added.]

[8] In or about 2017, Creative Energy began the process of redeveloping 720 Beatty and the Triangle. It advanced three rezoning applications for the properties. Each of the applications proposed the development of an office tower on 720 Beatty, that would include Creative Energy's steam utility plant, and a low density building for entertainment and retail use on the Triangle. The city advised Creative Energy that to carry out its proposed development, the two properties would have to be consolidated and zoning would be assigned to the new property. The Triangle, having been part of the Expo 86 lands, did not have an assigned zoning when the parties entered into the Amended Purchase Agreement. 720 Beatty was not part of the Expo 86 lands; it was zoned pursuant to the city's Zoning & Development By-law.

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[9] The following events took place as Creative Energy moved to develop and rezone the properties:

- On September 15, 2020, the Vancouver City Council approved a pending by-law (the "Rezoning By-law") which would amend the Zoning & Development By-law by rezoning Lot 8 (720 Beatty) and Lot 222 (minus the Strip) to a single CD-1 zoning district (CD-1 (818));
- On February 18, 2021, Creative Energy submitted a development permit application based on the council's approval of the Rezoning By-law;
- On February 18, 2022, Creative Energy subdivided Lot 222 creating two new parcels of land for each of the Triangle and the Strip;
- On April 11, 2022, Creative Energy exercised its option to purchase the Excess Density greater than FSR 1.0 from Concord Pacific (per s. 5.1 of the Amended Purchase Agreement); and
- On June 13, 2022, Creative Energy consolidated Lot 222 (minus the Strip) with Lot 8, thus creating the new Lot 1.

[10] The final step in this process occurred on June 21, 2022, when the city enacted the Rezoning By-law. Under that by-law, the CD-1 (818) zoning district (applicable to Lot 1) is comprised of two sub-areas: Sub-area A, being 720 Beatty; and Sub-area B, being the Triangle. While the Rezoning By-law established different building heights and floor areas for the two sub-areas, it established a single floor space ratio applicable to the entirety of Lot 1: 8.96.

[11] The parties did not agree on how to calculate the floor space ratio applicable to the Triangle for the purpose of determining the Excess Density under s. 5.1. Creative Energy maintained that the floor space ratio is 1.36. Concord Pacific maintained that the floor space ratio is 8.96. As the formula for calculating the fair market value of the density acquired by Creative Energy under s. 5.1 is based on the

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amount of Excess Density, the parties' positions differed by a factor of more than 22 (.36 compared to 7.96).

[12] In phase one of the arbitration, the principal dispute referred to the tribunal was the determination of the amount of Excess Density that Creative Energy acquired when it exercised its option. The Award established that density. Other disputes were referred to the tribunal in phase one, but do not form the subject of this application. In phase two, which has yet to occur, the tribunal will determine the fair market value of the Excess Density.

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The Award

[13] The Award is comprehensive—over 300 paragraphs in length. Prior to closing submissions, the tribunal invited the parties to address questions that are set out in Annex A attached to the Award. Annex A describes the first issue—determining whether the "floor space ratio" in excess of 1.0 "applicable to the Triangle", and "consequent upon the first zoning" of the Triangle, is 7.96 as Concord Pacific asserted or 0.36, as Creative Energy asserted. It states that the issue raises the "following antecedent question of contractual interpretation":

> What is the FSR "applicable to the Triangle" for the purpose of calculating the Excess Density under s. 5.1 of the Amended Purchase Agreement?

[14] Annex A then sets out seven questions addressed at the contractual interpretation issue. Question one sets out principles of contractual interpretation, with references to leading decisions, and asked the parties if the tribunal should apply those principles in determining the question. Questions two to seven asked specific questions of contractual interpretation and invited the parties to make submissions on matters including: identification of the factual matrix that the tribunal should consider and its relevance to terms of the contract; ambiguity; whether post-contractual events and post-contractual conduct could be relied upon; whether the parties intended to derogate from the "established practice" of the city of determining the floor space ratio in relation to an entire site and not sub-areas; and what meaning should be given to the phrase "applicable to the Triangle".

[15] The Award sets out the terms of reference, the history of the proceedings, the factual background, and the positions the parties advanced in their submissions.

[16] Concord Pacific argued that because “floor space ratio” does not have any dictionary or generally understood meaning, it was necessary to look to the Zoning & Development By-law, which has remained unchanged since 1983. Under that by-law, floor space ratio is defined as the “figure obtained when the area of the floors of the buildings on a site is divided by the area of the site”. Site, in turn, is defined as “an area of land consisting of one or more adjoining parcels or lots”. Using those terms in the Zoning & Development By-law, and noting that the contracting parties were sophisticated and represented by counsel, Concord Pacific submitted that they must have intended that the Excess Density be determined by reference to the Zoning & Development By-law. In addition, they noted that s. 4 of the Amended Purchase Agreement specifically contemplated the possible consolidation of Lot 222 with Lot 8.

[17] The tribunal summarized Concord Pacific’s submission on the Excess Density question as:

> 135. …Concord Pacific submits that the FSR “applicable to the Triangle” as per s. 5.1 of the Amended Purchase Agreement must be calculated with reference to the single consolidated site it is now found within – the consolidated Lot 1.

[18] Creative Energy argued that the floor space ratio was to be determined using the maximum permitted floor area prescribed for Sub-area B as set out in the Rezoning By-law. It noted that the Amending Agreement identifies the Triangle as a physical tract of land that existed separately from the legal parcel in which it may be found from time to time. It argued that the Rezoning By-law effectively undermines Concord Pacific’s position that “applicable to the Triangle” should be based on the aggregate floor space ratio applicable to Lot 1. It submitted that there was no objective evidence to support the position that the parties intended the definitions of “floor space ratio” and “site”, as used in the Zoning & Development By-law, to govern the Amended Purchase Agreement.

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[19] The tribunal summarized Creative Energy's position as:

> 155. Consistent with the applicable principles of contractual interpretation, Creative Energy submits that s. 5.1 of the Amended Purchase Agreement requires an assessment of the FSR "*applicable*" to the particular tract of physical land labelled as the Triangle, not the FSR applicable to other tracts of land, even within the same parcel. Put differently, Creative Energy states that "*[t]he question is what can be built on the Triangle*".
>
> [Emphasis in original.]

[20] The tribunal's analysis is set out at paras. 193–277 of the Award. The tribunal described its approach as follows:

> 212. In order to determine which interpretation is the correct one, the Tribunal will first state the applicable principles of contractual interpretation, and thereafter consider, in light of these principles, the provisions of the Amended Purchase Agreement and the surrounding circumstances known to the Parties at the time of the formation of the contract.

[21] Before turning to that approach, the tribunal summarized the zoning process in the city based on the evidence of the expert witnesses. It considered that evidence to be "useful" because of the reference in s. 5.1 of the Amended Purchase Agreement to "first zoning" of the Triangle: Award at para. 212.

[22] The tribunal then set out applicable legal principles of contractual interpretation. It noted that there was broad agreement between the parties with respect to those principles, "except as regards [to] the contours of the relevant factual matrix in this case, in the circumstances and conditions under which evidence of post-contractual events, including the parties post-contractual conduct, can be relied upon to interpret the terms of the contract": Award at para. 235.

[23] The extent to which the tribunal could consider the circumstances that led to the rezoning of the Triangle was a key question. Creative Energy argued that the subsequent conduct of the parties and the city should not be considered when interpreting the Amended Purchase Agreement. They now submit that consideration of that evidence is what led the tribunal to its interpretation. The tribunal described what it did in this fashion:

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> 251. [Creative Energy] has invited the tribunal to make a clear distinction between the *interpretation* of the Amended Purchase Agreement, and the *application* of the APA once the objective intention of the Parties under the contract has been ascertained through interpretation. [Creative Energy] urged that the latter exercise requires the Tribunal to apply the bargain struck by the Parties at the time of the Amended Purchase Agreement to the facts leading to, and consequent upon the first zoning of the Triangle. In this regard, the Tribunal notes that it has considered evidence of the genesis of the Rezoning By-law not as evidence of subsequent conduct for the purpose of determining the intention of the parties to the Amended Purchase Agreement at the time of contract formation, but rather as an aid to understanding the Rezoning By-law and how it must be treated under the bargain struck by the Parties when they entered into the APA.
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> [Italic emphasis in original; underline emphasis added.]

[24] Referring to *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the tribunal indicated that it "must read the Amended Purchase Agreement as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the Parties at the time of formation of the contract": Award at para. 252.

[25] At paras. 257–263 of the Award, the tribunal noted the significance of the language used in s. 5.1 of the Amended Purchase Agreement, which changed the timing of the determination of the Excess Density from the "date of completion" to "consequent upon the first zoning thereof". It concluded:

> 263. When read in the context of the Amended Purchase Agreement considered as a whole, and in light of surrounding circumstances, the Tribunal finds that the provisions of the Amended Purchase Agreement are unambiguous. The words "*applicable floor space ratio consequent upon the first zoning*" in s. 5.1 of the Amended Purchase Agreement were intended by the parties to refer to the FSR of the site of which the Triangle would form part consequent upon the first zoning thereof.
>
> [Emphasis in original.]

[26] The tribunal described its reasons for reaching that conclusion. It rejected Creative Energy's submission that Sub-area B, as opposed to the "site", should be used as the denominator for the floor space ratio calculation as the provisions of the Zoning & Development By-law, both at the time of formation of the agreements and at the time of rezoning, based that calculation on the area of the "site": Award at para. 265.

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[27] It also rejected Creative Energy's contention that the term used in the contract—floor space ratio "*applicable to*" the Triangle—was equivalent to the floor space ratio "*of*" the Triangle. It stated:

> 266. … the words "*applicable to*" in s. 5.1 of the APA imply provenance of the relevant FSR from a source <u>external</u> to the contract and without intervention from the Parties, and is wholly consistent with the relevant FSR being the FSR prescribed for the site under the relevant rezoning by-law.
>
> [Emphasis in original.]

[28] The tribunal found support for this view from s. 4 of the Amending Agreement which:

> 269. … makes clear that the "*FSR applicable to the Triangle consequent upon the first zoning*" referred to in s. 5.1 could be the FSR of a re-zoned lot consisting only of the Triangle, the FSR of the rezoned Lot 222, or the FSR of a rezoned lot resulting from the consolidation of Lot 222 with Lot 8. … Accordingly, the tribunal is of the view that the core submission of [Creative Energy] - that for the purpose of determining the FSR under s. 5.1 of the APA '*the Triangle is a distinct tract of land (irrespective of the legal parcel in which it is found from time to time*) - is inconsistent with the provisions of s. 4 of the Amending Agreement, which forms part of the APA, an agreement which, under the applicable principles of contract interpretation, both Parties agree must be read as a whole.
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> [Emphasis in original.]

[29] The tribunal, having determined the parties' common intention at the time of contracting, then applied its interpretation to the first zoning of the Triangle. The tribunal observed that it was "beyond doubt" that the city considered the floor space ratio of the site—including the Triangle—created under the Rezoning By-law to be 8.96. It stated:

> 275. The Tribunal having found that, read as a whole and in light of the surrounding circumstances, the terms of s. 5.1 of the Amended Purchase Agreement are unambiguous, the Tribunal did not consider it necessary, in reaching its conclusion as to the proper interpretation of s. 5.1 of the APA, to rely upon evidence of the Parties' post-contractual conduct.

<u>Legal framework</u>

[30] Appeals from arbitration proceedings are governed by the *Act*. Section 59 reads, in part:

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> 59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.
>
> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
>
> > (a) all the parties to the arbitration consent, or
> >
> > (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.
>
> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
>
> > (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
> >
> > (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
> >
> > (c) the point of law is of general or public importance.

[31] The *Act* limits the right to appeal from arbitral awards with a view to advancing the central aims of commercial arbitration, namely, efficiency and finality: *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32 at para. 1.

[32] Three requirements must be met before leave can be given to appeal an arbitration award:

> (1) the appeal must be based on a question of law;
>
> (2) the judge must be satisfied that one of the three circumstances identified in s. 59(4) exists; and
>
> (3) the judge must be prepared to exercise the residual discretion implicit in the phrase “the court may grant leave...”.

MSI Methylation Sciences, Inc. v. Quark Venture Inc., 2019 BCCA 448 at para. 54.

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[33] Much has been written about how to identify an extricable question of law, both for the purpose of whether leave to appeal should be granted and for the purpose of determining the standard of review on appeal. The classic distinction between questions of law, questions of fact, and mixed questions of law and fact was set out by Justice Iacobucci for the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CanLII 385:

> [35] …questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

At the same time, he acknowledged that "the distinction between law on the one hand and mixed law and fact on the other is difficult".

[34] In *MSI*, Justice Hunter noted the importance of that distinction in the context of arbitral review:

> [62] The difficult distinction between questions of law and questions of mixed fact and law has particular importance in the context of arbitral review in British Columbia because it goes beyond the question of standard of review to the very jurisdiction of the court to embark on the review process.

[35] As explained in *Sattva*, at paras. 54–55, courts should be "cautious in identifying extricable questions of law in disputes over contractual interpretation". This is because:

> [55] …the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare.

[36] In *MSI*, Justice Hunter referred to para. 37 of *Southam* for the proposition that the degree of generality of a challenged proposition is one way to distinguish between questions of law and questions of mixed fact and law:

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> [37] ... as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. ... in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

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Justice Hunter also noted that the importance of precedential value in the identification of questions of law was endorsed in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, and reinforced subsequently in *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 35, *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46 at para. 49, and *J.W. v. Canada (Attorney General),* 2019 SCC 20 at para. 110.

[37] Having summarized the developments in the jurisprudence, Justice Hunter helpfully summarized the principles relevant to appeals from arbitration awards:

> [72] From these authorities, and having in mind the legislative evolution of s. 31 of the *Arbitration Act*, I draw the following principles in relation to appeals from arbitration awards:
>
> > (a) Appeals are limited to questions of law arising out of the award. If the proposed question is not a question of law arising out of the award, there is no jurisdiction to grant leave to appeal.
> >
> > (b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).
> >
> > (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. <u>If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law</u>. I would add to this that when the "question" is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a

> question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.
>
> (d) A narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration.

[Emphasis added.]

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Positions of the parties

[38] Creative Energy identifies five grounds of appeal, and submits that each demonstrates an error of law extricable from the fact-specific parts of the contract interpretation exercise:

a) importing the Zoning & Development By-law into and making it part of the Amended Purchase Agreement;

b) allowing evidence of the factual matrix to overwhelm the text of the Amended Purchase Agreement, thereby creating a new agreement for the parties;

c) relying upon evidence that was not admissible to determine the factual matrix relevant to interpreting the Amended Purchase Agreement;

d) relying on post-contracting conduct of the parties and the city in the absence of a finding of ambiguity; and

e) failing to determine the issue before it—i.e., rather than determining the floor space ratio applicable to the particular tract of land specifically defined in the Amended Purchase Agreement (the Triangle), the tribunal determined the floor space ratio applicable to a different and much larger tract of land, including land that Creative Energy already owned and in respect of which Concord Pacific has never held any legal interest.

[39] Creative Energy stresses that it is not necessary or appropriate to consider the full merits on this application as it only has to establish that the grounds of appeal have arguable merit.

[40] Concord Pacific submits that Creative Energy has only identified questions of mixed fact and law, not extricable questions of law. It emphasizes the cautious approach this Court must take in identifying extricable questions of law in disputes over contractual interpretation given the legislature's intention to restrict appeals from arbitral awards.

[41] For the first two alleged errors, Creative Energy states that it is an error to rely upon and import a regulatory instrument (the Zoning & Development By-law) into a contract where that instrument is incompatible with or uses terms different from those used by the parties. As an example, Creative Energy cites *U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong*, 2006 BCCA 491, and *Ted Leroy Trucking Ltd. v. Century Services Inc.*, 2010 BCCA 223. Creative Energy asserts that the consequence of this error was that the tribunal "injected" the Zoning & Development By-law's definition of the term "site" into the Amended Purchase Agreement.

[42] Concord Pacific counters, arguing that these alleged errors highlight the question of interpretation that was before the tribunal: namely, what the term "floor space ratio" means. Concord Pacific states that this exercise in interpretation required more factual context than could be found in s. 5.1 of the Amended Purchase Agreement. Concord Pacific says that "[t]here is plainly not only one reasonable interpretation of the text".

[43] Creative Energy states that the third and fourth errors are extricable questions of law because the tribunal relied on inadmissible evidence in interpreting the Amended Purchase Agreement. Creative Energy argues that the tribunal improperly relied on post-contracting evidence, misdescribing it as evidence from the factual matrix, despite finding that the Amended Purchase Agreement contained no ambiguity. In support, Creative Energy cites *Kilitzoglou v. Curé*, 2018 ONCA 891 at

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paras. 40–56, *Wade v. Duck*, 2018 BCCA 176 at paras. 32–37, and *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517 at paras. 62–69.

[44] In response, Concord Pacific notes that s. 28 of the *Act* expressly permits an arbitral tribunal to consider evidence that would be potentially inadmissible in court, and that the cases Creative Energy cites do not involve appeals from arbitral proceedings.

[45] On the fifth error, Creative Energy argues that the tribunal answered the wrong question and relies on *In the matter of the Bankruptcy of Joel MacDonald Blanchette*, 2020 BCSC 158 at para. 41, citing *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at para. 24, 1997 CanLII 357, for the proposition that answering the wrong question is a recognized error of law. Concord Pacific states that this proposed ground "simply begs the interpretative question" before the tribunal.

Matter of importance

[46] Concord Pacific argues that, even if Creative Energy has identified an extricable question of law, none of the three factors set out in s. 59(4) of the *Act* apply here. Creative Energy argues that all elements are present.

[47] Regarding s. 59(4)(a), Creative Energy argues that the monetary amount in dispute is relatively large, despite having yet to be decided, as Concord Pacific's position has been that it is entitled to millions of dollars. Further, if the tribunal had decided the floor space ratio differently, it would have affected the result of phase one of the arbitration, i.e., the Excess Density would be 0.36, not 7.96. And finally, that correcting these material errors is necessary to prevent a miscarriage of justice, namely that Creative Energy will have to pay Concord Pacific for density attributable to 720 Beatty—land in which Concord Pacific has never had any interest.

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[48] Regarding s. 59(4)(b) and (c), Creative Energy argues that the issues raised on appeal “are of broader importance to any party that has an interest or is involved with land-use planning and zoning of existing parcels of land in the City of Vancouver”. Concord Pacific counters, saying that the appeal is unique to the parties “because it involves unzoned land of the type not found anywhere else in the City”.

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<u>Analysis</u>

[49] It is evident from a review of the Award and the parties’ arguments that Creative Energy’s five alleged errors are closely related. Each is founded on the assertion that the tribunal erred in its interpretation when it rejected Creative Energy’s proposition that the parties intended the “floor space ratio” to refer to the maximum permitted buildable floor area prescribed for the Triangle (Sub-area B in the Rezoning By-law) compared to the area of land of the Triangle. In stating five grounds of appeal, Creative Energy has been creative in its attempt to identify a jurisdictional basis for this Court to grant leave.

[50] As I will explain, it is my view that Creative Energy has identified two extricable questions of law—grounds b) and d)—that I would restate as a single question. Having identified a question of law, the application turns on whether the point is arguable. I conclude that is and, accordingly, grant leave for the following reasons.

Is there a question of law?

[51] The tribunal had to ascertain the objective intention of the parties at the time of contracting, a task that was inherently fact-specific: *Sattva* at para. 55. The determination of the Excess Density applicable to the Triangle was clearly a question of mixed fact and law. Accordingly, Creative Energy must identify an extricable question of law for this Court to have jurisdiction to entertain an appeal.

[52] The tribunal, by way of Annex A, notified the parties, in advance of their closing submissions, of the legal principles that it considered relevant. It also set out possible questions for the parties to address. As a result, the legal framework for the

dispute was accepted by the parties, and their arguments were directed to the issues raised by the contract language and the circumstances leading to the first zoning of the Triangle. At paras. 234–251 of the Award, the tribunal set out the principles of contractual interpretation it would apply and noted that there was no disagreement between the parties on most of those principles. Indeed, Creative Energy does not point to any misstatement of a relevant legal principle by the tribunal.

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[53] The question on which the parties disagreed was highlighted in the Award: the identification of the facts and circumstances that formed the factual matrix; and the use that could be made of those facts when determining the parties' intentions at the time of contracting: at paras. 241–242. Ultimately, the tribunal concluded that "[Creative Energy] takes too narrow a view of the relevant factual matrix": at para. 243.

[54] The arguments advanced by Creative Energy on this application are all directed at the tribunal's consideration of the factual matrix as part of the interpretive exercise. The first four grounds of appeal attempt to identify separate errors allegedly made by the tribunal in its identification and use of the factual matrix evidence. As I will explain, it is my view that only grounds b) and d), which are closely related, raise issues that can be characterized as extricable questions of law.

[55] Before dealing with the specific grounds of appeal, I would observe that there is a high degree of particularity to some of the questions put forward by Creative Energy. The grounds of appeal, while framed broadly, cannot be understood without reference to the particular and unique circumstances of this case. As noted in *MSI*, the lack of precedential value to the resolution of questions posed, suggests that the challenges to the propositions are better characterized as questions of mixed fact and law. In my view, this observation applies with particular force to grounds a) and e). However, the question of particularity is not significant in relation to ground b). The question of whether the tribunal allowed the factual matrix

to overwhelm its interpretive task necessarily involves consideration of the particular circumstances of the case.

[56] I turn now to the alleged grounds of appeal, leaving grounds b) and d) to be considered together.

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Ground a): Impermissibly importing the Zoning & Development By-law into the Amended Purchase Agreement

[57] Creative Energy describes the general proposition it relies on for this ground of appeal in the following terms:

> As a matter of contract interpretation, it is an error to rely upon and import [into an agreement] a regulatory instrument – the City's 1993 Zoning & Development Bylaw (as amended) - where that instrument is incompatible with or uses terms different from those actually used by the parties.

[58] Using the guidance provided in *MSI*, the issue is whether the question raised can be abstracted from the particular facts of the case to a question of principle: at paras. 63, 72. First, I note that the question does not appear to be a general question of principle as it suggests that it *is* possible to rely upon and import a regulatory instrument into an agreement in some circumstances. The answer to the question posed depends on the particular facts of the case: what circumstances were present at the time of formation of the contract and what was the intention of the parties? In other words, on its face, the proposition raises a question of application (mixed fact and law), not a question of principle regarding contractual interpretation.

[59] In addition, the cases Creative Energy cites do not support the proposition that it is an error of law to rely upon and import regulatory provisions into an agreement. Indeed, the decision in *U.B.C.*, suggests just the opposite. At issue was a term of an employment contract which set notice, or pay in lieu of notice, in accordance with the provincial employment standards legislation. This Court upheld the chambers judge's conclusion that a plain reading of a term of the contract in question incorporated certain provisions of the legislation into the employment contract: at paras. 33–35.

[60] Similarly, the decision in *Ted Leroy Trucking* has no application to the case at hand. It considered a question of statutory interpretation and did not involve an appeal from arbitration, or contractual interpretation. The Court was called upon to determine how the term "wages" should be interpreted within the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[61] This ground does not raise an extricable question of law.

Ground c): Relying on evidence that was not admissible to determine the factual matrix relevant to interpreting the Amended Purchase Agreement

[62] Section 28 of the *Act* provides that an arbitral tribunal may determine admissibility of evidence; specifically, an arbitral tribunal has the power to "decide all evidentiary matters, including the admissibility, relevance, materiality and weight of any evidence, and draw such inferences as the circumstances justify". Accordingly, the proposition that the tribunal erred in admitting evidence or relying on inadmissible evidence is not, on its face, an error of law available to Creative Energy.

[63] Further, the parties' arguments at the arbitration were not focused on questions of admissibility. Through Annex A, the tribunal asked the parties to make submissions on the extent to which the factual matrix, including evidence about the Zoning & Development By-law, could be used for the contractual interpretation question. The issue was not admissibility, but relevance to the interpretative analysis. To suggest that the tribunal erred in admitting evidence is an attempt to turn a question of mixed fact and law that arises from the particular circumstances of this case into a question of law.

[64] Creative Energy's complaint is not that the tribunal relied on inadmissible evidence by considering the regulatory framework, as both parties had asked the tribunal to accept *some* of the evidence about the regulatory framework and the Zoning & Development By-law. The question was how, and which parts of, the

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regulatory framework were relevant to the interpretation of the Amended Purchase Agreement.

[65] Creative Energy submits that this situation is analogous to the circumstances in *Kilitzoglou*, where the trial court was found to have erred by allowing a faulty assessment of the factual matrix to, in effect, create a new agreement between the parties. However, that case does not assist Creative Energy in relation to this ground of appeal. In *Kilitzoglou*, the Court found that the trial judge had erred in considering evidence that was not relevant to the factual matrix and by permitting the factual matrix to overwhelm the contract. This is the argument advanced in relation to ground b), which I deal with below.

[66] This ground of appeal does not raise an extricable question of law.

Ground e): Failing to determine the issue before it—i.e., rather than determining the floor space ratio applicable to the particular tract of land specifically defined in the Amended Purchase Agreement (the Triangle), the tribunal determined the floor space ratio applicable to a different and much larger tract of land, including land that Creative Energy already owned and in respect of which Concord Pacific has never held any legal interest

[67] Again, applying *MSI*, it is evident that Creative Energy is advancing a proposition that is a question of mixed fact and law. It does not raise a question of general application and, indeed, approaches utter particularity. Creative Energy argues that in these particular circumstances, and considering the specific wording of the Amended Purchase Agreement, the tribunal should have determined the floor space ratio of the Triangle instead of the floor space ratio of the larger consolidated tract of land. That is not a question of general application.

[68] Further, Creative Energy's suggestion that the tribunal "answered the wrong question" is without merit. Before final submissions, but after hearing the evidence, the tribunal stated the issue to be considered and invited the parties to make submissions on the seven questions set out in Annex A. The tribunal set out the parties' positions on the issues in great detail at paras. 113–189 of the Award. The question stated and answered by the tribunal was the very question referred to

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arbitration, and the tribunal's process ensured that the parties had the opportunity to make full submissions.

[69] As Concord Pacific submits, it is clear that this alleged error simply begs the interpretive issue before the tribunal. This is not a case where the tribunal answered the wrong question, Creative Energy's complaint is that the tribunal gave an answer that it believes is incorrect.

[70] This ground of appeal does not raise an extricable question of law.

Grounds b) and d): Allowing evidence of the factual matrix to overwhelm the text of the Amended Purchase Agreement, thereby creating a new agreement for the parties; and relying on post-contracting conduct of the parties and the city in the absence of a finding of ambiguity

[71] I consider these two grounds together as they raise a similar issue: did the tribunal commit an error of law through its reliance on evidence of the factual matrix—including the "post-contracting conduct of the parties and the City"—in interpreting the Amended Purchase Agreement.

[72] Dealing first with ground b), I accept that allowing the factual matrix to overwhelm the words of a contract can raise a legal question: *Teal Cedar* at paras. 4, 62. The Court explained that the "overwhelming principle" is subject to two formulations, one of which may confer appellate review jurisdiction. The first formulation—that the tribunal allowed the factual matrix to overwhelm the contract language by giving it excessive weight—involves the weighing of evidence and raises a question of mixed fact and law and thus falls outside the scope of appellate review under the *Act*: *Teal Cedar* at paras. 55–61.

[73] The second formulation—"that the factual matrix overwhelms the words of a contract when it is interpreted in isolation from the words of the contract, effectively creating a new agreement between the parties"—raises a legal question. This is a question of law because contractual interpretation must be grounded in the text of the contract: *Teal Cedar* at paras. 62–63.

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[74] I am satisfied that Creative Energy's characterization of the alleged error falls within the second formulation and thus raises a legal question. Creative Energy argues that consideration of the factual matrix, including the Zoning & Development By-law and the steps required to achieve the first zoning of the Triangle, caused the tribunal to inject terms or concepts into the Amended Purchase Agreement that are inconsistent or incompatible with those actually used by the parties. In particular, it says that the tribunal imported into the agreement the concept that the floor space ratio of the Triangle could be the same as that of a larger "site" in which it was located at the time of the first zoning. The term "site" does not appear in the Amended Purchase Agreement for the purpose of identifying the area to be used as the denominator for the floor space ratio, so the idea that the floor space ratio of the much larger Lot 1 could be used to determine the Excess Density for the Triangle amounts to a new agreement. Significantly, from the perspective of Creative Energy, the finding that the floor space ratio attributable to the Triangle is that of the "site", meant that the Excess Density attributed to the Triangle is much greater than the actual permitted density for the Triangle. As with any question of law, this Court does not have jurisdiction under s. 59(4) of the *Act* unless it is satisfied that the ground of appeal has "arguable merit": *Sattva* at paras. 68–74. The question of arguable merit is to be considered at the second stage of this analysis: whether one of the three circumstances identified in s. 59(4) exists.

[75] Ground d) alleges that the tribunal erred in relying on evidence of the subsequent conduct of the parties and the city to interpret the contract having concluded that the Amended Purchase Agreement was unambiguous. There is no question that doing so would amount to an error in principle. Evidence of subsequent conduct cannot be relied on for interpretive purposes unless the contract is found to be ambiguous after considering the words used in the context of the agreement as a whole and the factual matrix surrounding the creation of the contract: *Wade* at paras. 28–31; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at paras. 39–50.

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[76] Concord Pacific counters by saying that the tribunal made no such error. It says that on a proper view of the analysis, it is clear that the tribunal did what it said it was doing; it interpreted the words of the contract as a whole, giving them their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: Award at para. 237.

[77] The tribunal's analysis at paras. 241–251 is detailed, and ends with the following statement:

> 251. …In this regard, the Tribunal notes that it has considered evidence of the genesis of the Rezoning By-law not as evidence of subsequent conduct for the purpose of determining the intention of the parties to the Amended Purchase Agreement at the time of contract formation, but rather as an aid to understanding the Rezoning By-law and how it must be treated under the bargain struck by the Parties when they entered into the APA.

[78] Of course, the Rezoning By-law was enacted on June 21, 2022, long after the parties entered into the Amending Agreement. The steps taken by the parties and the city that led to the enactment of the Rezoning By-law are described in detail at paras. 71–112 of the Award. Much of the evidence about the events that occurred and the actions of the parties that resulted in those steps being taken is, without question, evidence of subsequent conduct. Creative Energy challenges the tribunal's assertion that it used that evidence merely as an aid to understanding how the Rezoning By-law must be treated under the bargain struck by the parties. It argues that the tribunal's conclusions about the Excess Density could only be explained by improper reliance on the subsequent conduct evidence. I am satisfied that this argument raises an extricable question of law. As with ground b), whether it has arguable merit is to be considered at the next stage of the analysis.

[79] Before moving to the next stage, I return to my observation that these questions raise what is essentially, a single issue: did the tribunal commit an error of law in its reliance on evidence of the factual matrix, including post-contracting conduct evidence. Whether it did so with or without the impermissible subsequent conduct evidence, the error only gives this Court jurisdiction if the tribunal allowed the factual matrix evidence to overwhelm the words of the contract such that it

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created a new agreement. Accordingly, I would restate the question to include both grounds b) and d):

> Did the tribunal err in allowing evidence of the factual matrix—including evidence of post-contracting conduct of the parties and the city—to overwhelm the text of the Amended Purchase Agreement, thereby creating a new agreement for the parties?

Are the requirements under s. 59(4) satisfied?

[80] Creative Energy relies on s. 59(4)(a), contending that the importance of the Award to the parties justifies granting leave as determination of the identified issues may prevent a miscarriage of justice. It points to the fact that the difference in the monetary award between the two possible results is likely to be dramatic. It also argues that the fact that the Excess Density is based on the floor space ratio derived from property in which Concord Pacific never held an interest adds to the injustice of the result. I agree.

[81] I reject Concord Pacific's contention that it is not possible to assume that the monetary award will be substantial. It is clear that if the identified question were to be decided differently, the fair market value of the Excess Density is likely to be reduced by a factor of 22. I have no hesitation in concluding that the materiality of the issue rises to a level that satisfies the miscarriage of justice test: *Sattva* at para. 70.

[82] However, as explained in *Sattva*, to satisfy the "miscarriage of justice" test, the appeal must have a possibility of succeeding: at para. 71. Concord Pacific's principal argument is that the appeal falls short of having any prospect of success.

[83] *Sattva* provides instruction on the level of assessment of the merits required at this stage of the analysis. An appeal with no chance of success will not meet the threshold. While it is not appropriate to consider the full merits of the case, there must be some preliminary assessment of the potential for success and for a different result to be obtained on appeal: *Sattva* at paras. 71–72.

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[84] The Court explained the correct approach to the preliminary assessment:

> [73] *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.
>
> [74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. … In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.
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> [Emphasis added.]

[85] Concord Pacific argues that a preliminary examination is sufficient to decide that there is no chance of success because of the nature of the question Creative Energy has identified. In *Teal Cedar*, the Court noted that it is difficult to extricate a question of law premised on the "overwhelming principle". It cautioned:

> [65] Again, contractual interpretation is a fact-specific exercise. It follows that a question of law premised on the failure to apply the principle that the factual matrix must not be interpreted in isolation from the words of the contract will be very difficult to extricate in practice. On closer examination, it will often amount to nothing more than a complaint about how much weight was allocated to the factual matrix — in effect, a disagreement about *how* the decision-maker interpreted the words of a contract in light of the factual matrix (*Sattva*, at paras. 50 and 65). In short, the supposed question of law will often reveal itself to be a question about whether the decision-maker applied the principle properly — a mixed question — and not about whether the decision-maker applied the proper principle. To extricate a question of law based on the alleged error of having overwhelmed the contract, a reviewing court must be satisfied that the decision-maker interpreted the factual matrix isolated from the words of the contract; an approach which could effectively create a new agreement.
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> [Italic emphasis in original; underline emphasis added.]

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[86] Concord Pacific's submission is not without merit as the Award is comprehensive and engages with the language of the contract. However, I find that I cannot summarily dismiss Creative Energy's contention that the tribunal erred as alleged. As Creative Energy submits, the result of the Award is that the Excess Density is not based on a floor space ratio that can actually be used for the Triangle. In addition, the concept of using the floor space ratio for a larger "site" to determine the Excess Density is not stated directly in the Amended Purchase Agreement, in which the word "site" does not appear. Further, there is no question that the tribunal heard a significant amount of evidence covering many years of events leading to the enactment of the Rezoning By-law, some of which is properly characterized as post-contractual conduct. In my view, to resolve the question raised, I would have to delve more deeply into the legal question than is appropriate at this stage. That is particularly the case here as the legal question involves careful consideration of the tribunal's reasoning, but also of the evidentiary record. Accordingly, I am unable to conclude without a detailed examination that the tribunal did not allow the factual matrix, with or without evidence of post-contractual conduct of the parties, to overwhelm the contract and effectively create a new agreement. That is a question that should be decided by a division of this Court.

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Disposition

[87] I would grant leave to appeal based on grounds b) and d) as described in Creative Energy's notice of appeal. However, I would restate those grounds as a single ground of appeal as stated in para. 79 above.

"The Honourable Mr. Justice Butler"