COURT OF APPEAL FOR ONTARIO

CITATION: All Communications Network of Canada v. Planet Energy Corp., 2023 ONCA 319
DATE: 20230508
DOCKET: C70642 & C70653

Lauwers, Paciocco and Thorburn JJ.A.

BETWEEN

All Communications Network of Canada, Co.

Applicant (Respondent)

and

Planet Energy Corp., Planet Energy (Ontario) Corp., and Planet Energy (B.C.) Corp.

Respondents (Appellants)

AND BETWEEN

Planet Energy Corp., Planet Energy (Ontario) Corp., and Planet Energy (B.C.) Corp.

Applicants (Appellants)

and

All Communications Network of Canada, Co.

Respondent (Respondent)

Daniel S. Murdoch and Zev Smith, for the appellants

Kris Borg-Olivier, for the respondent

Heard: March 27, 2023

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated April 7, 2022

Thorburn J.A.:

OVERVIEW

[1] This is an appeal of an order upholding an arbitral award in favour of the respondent, All Communications Network of Canada, Co. ("ACN"), in the amount of $29,259,787 plus interest.

[2] The appellants, Planet Energy Corp., Planet Energy (Ontario) Corp. and Planet Energy (B.C.) Corp. (together "Planet"), provide fixed-price electricity and natural gas to residential customers in Canada and the U.S.

[3] The respondent, ACN is a marketing business that has contracts with thousands of Canadian independent business owners who earn commissions by referring customers to ACN or its third-party providers, including Planet.

[4] Planet and ACN entered into the Amended, Restated and Assigned Sales Agency Agreement (the "Agreement") on November 9, 2012.

[5] Planet agreed to pay gross margin commission payments to ACN for every customer who successfully registered for Planet's products and services.

[6] ACN agreed to use its network of independent business owners to make commercially reasonable efforts to sell Planet products and to take no actions that would be harmful to Planet's business in the contractually defined territory of Ontario, British Columbia, and Manitoba (collectively, the "Territory"). Section 12(a)(ii) of the Agreement provides that,

> ACN hereby agrees to indemnify and hold Planet … harmless from and against all damages which any Planet Indemnified Person may sustain, incur or assume as a result of any allegation, claim, civil or criminal action, proceeding, charge or prosecution which may be alleged, made, instituted or maintained against any Planet Indemnified Person arising out of, resulting from or based upon…
>
> (ii) any claim asserted or threatened to be asserted by any third party in connection with ACN, its affiliates or the IBOs, selling the Energy Products or serving or having served pursuant to this Agreement; provided, however, ACN shall not be liable to indemnify and hold any Planet Indemnified Person harmless from any such damages to the extent it is the result of the gross negligence, bad faith, willful misconduct or criminal conduct of, or the breach of this Agreement by, the party seeking indemnification hereunder.

[7] Although the Agreement expired in November 2016, Planet's obligation to pay commissions to ACN survived the termination of the Agreement.

[8] Planet claims that in early 2015, contrary to the terms of the Agreement, ACN began working with Xoom Energy, LLC ("Xoom") to develop an energy retail business to compete with Planet, resulting in a significant decline in customer enrolments after January 2015. Moreover, in March 2018, Planet advised ACN that it would not pay any further commissions as there was a compliance investigation by the Ontario Energy Board ("OEB") into the conduct of the independent business owners who sold Planet's products. Planet told ACN that it

would set-off the amounts it claimed were owed by ACN pursuant to the investigation against any commissions payable to ACN.

[9] The Agreement provides that all claims be resolved by binding arbitration and that any award is “final, conclusive, non-appealable and binding upon the parties” and “enforced in any court of competent jurisdiction”. In April 2018, the parties proceeded to arbitration.

[10] ACN claimed it was owed commissions under the Agreement. Planet disputed ACN’s claim for commissions and claimed that ACN and its independent business owners failed to make reasonable efforts to sell Planet’s products and breached their confidentiality obligations and commitment not to harm Planet by working with Xoom to compete with Planet in Ontario. Planet claimed that Xoom was the alter ego of ACN.

[11] The arbitrator granted ACN’s claims for commissions payable under the agreement and dismissed Planet’s claims against ACN for breach of its confidentiality obligations and commitment not to harm Planet by working with a competitor.

[12] Planet brought an application to the Superior Court to set aside the arbitral award on the basis that, among other things, the arbitrator deprived Planet of the opportunity to present its case, and the award to ACN was contrary to public policy because it violated the *Energy Consumer Protection Act, 2010*, S.O. 2010,

c. 8 (“*ECPA*”). ACN brought a separate application for an order recognizing and enforcing the award.

[13] The application judge rejected Planet’s claims and upheld the arbitral award. Planet seeks to set aside the award or refer it back for proper consideration and claims the application judge erred by:

i. not conducting a *de novo* hearing;

ii. holding that the arbitrator did not deny Planet the opportunity to present its case pursuant to article 34(2)(a)(ii) of the Model Law; and

iii. concluding that the arbitral award was not contrary to public policy pursuant to article 34(2)(b)(ii) of the Model Law.

[14] For the reasons that follow, I would dismiss the appeal.

[15] Before considering these issues, I will set out the applicable rules of arbitration and the underlying rulings and decisions of the arbitrator and the application judge.

THE RULES OF ARBITRATION

[16] This was an international arbitration governed by Ontario’s *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5 (the “*Act*”) and administered under the rules of the International Center for Dispute Resolution (the “ICDR rules”).

[17] The United Nations Commission on International Trade Law (“UNCITRAL“) Model Law on International Commercial Arbitration (1985) (the “Model Law”) is a multilateral instrument designed to provide consistent, stable, and predictable rules respecting the conduct of international commercial arbitrations and how they are dealt with by domestic courts.

[18] The Model Law is incorporated into Ontario law as Schedule 2 to the *Act.*

[19] Article 5 of the Model Law provides that, “no court shall intervene except where so provided in this Law.” This is consistent with the trend in favour of limiting court involvement in international commercial arbitration as the parties made a conscious decision to exclude court jurisdiction in favour of international arbitration. The Model Law provides for court involvement only where a party challenges and seeks the termination of the mandate of an arbitrator (articles 11, 13 and 14), challenges the jurisdiction of the arbitral tribunal (article 16), or seeks to set aside the arbitral award (article 34).

[20] Article 18 provides that each party be given a full opportunity to present its case and article 19 lays out the rights and powers of the parties to determine the rules of procedure and guarantees the parties' freedom to agree on the procedure to be followed in conducting the arbitration, subject to a few mandatory provisions. This includes the power to determine the admissibility, relevance and weight of the evidence.

[21] Article 34(1) of the Model Law provides that "[r]ecourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article" (emphasis added). Article 34(2) of the Model Law provides that:

> An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration… or
>
> (b) the court finds that:
>
> (i) the award is in conflict with the public policy of this State. [Emphasis added.]

THE UNDERLYING LEGAL PROCEEDINGS

The Arbitration Proceeding

[22] As noted above, ACN commenced an arbitral proceeding claiming it was owed commissions under the Agreement. Planet denied ACN's claim and

brought its own claim against ACN and its independent business owners for failure to make reasonable efforts to sell its products, and breach of their confidentiality obligations and commitment not to harm Planet by working with Xoom to compete with Planet in Ontario. Planet claimed that Xoom was the alter ego of ACN.

[23] At the outset, Planet named Xoom as a respondent party in the arbitration. Planet's attempt to add Xoom to the arbitration was dismissed by the arbitrator. The arbitrator also denied requests by Planet to join additional parties to the arbitration, including Xoom-affiliated entities.

[24] A number of procedural orders were made before the hearing:

[25] On September 17, 2019, the arbitrator held that production of documents was to be completed by December 31, 2019. ACN had not provided certain documents by November 15, 2019 (the date for production of documents in response to requests to which there was no objection) and ACN opposed many requests for production of documents made by Planet.

[26] On November 19, 2019, a hearing was held to address the disputed document requests. The arbitrator subsequently ordered ACN to produce documents but did not order it to obtain documents from Xoom. ACN produced several hundred documents. Planet took the position that the disclosure was inadequate.

[27] On January 20, 2020, the arbitrator denied Planet's request for leave to submit an application about deficiencies in ACN's document production. However, the arbitrator ruled that "[t]o the extent that ACN disputes alleged deficiencies raised by Planet, such deficiencies will be appropriate subjects for the Parties' pre-hearing submissions and/or cross-examination at the evidentiary hearing. If Planet succeeds in establishing that ACN failed to produce responsive documents, Planet may invite the Arbitrator to draw adverse inferences and/or grant other relief as may be appropriate."

[28] Planet was not satisfied with this response and, without seeking the permission of the arbitrator, brought an application to the United States District Court of North Carolina seeking production of documents in the possession of Xoom (the "U.S. Application").

[29] In response, ACN asked the arbitrator to issue an order compelling Planet to cease and desist with the U.S. Application.

[30] In a procedural order dated March 11, 2020, the arbitrator declined to do so. She did, however, acknowledge that Planet had breached applicable procedures agreed on by the parties by failing to seek leave to make the U.S. Application. She also held that ACN raised legitimate concerns about procedural delay and the impact of the U.S. Application on the proceedings and held that "[p]resumptively, any delay or impasse that might arise in connection with the

[U.S. Application] shall not be deemed good cause for the extension of any deadlines in this arbitration…" The U.S. District Court granted the application and ordered Xoom to produce the documents by June 22, 2020.

[31] On June 19, 2020, the arbitrator held that Planet must submit any new Xoom documents to be admitted, no later than June 24, 2020 and ACN was given until June 25, 2020 to state any objection. (Planet had requested 10 days but the arbitrator rejected this as "patently disproportionate to the task at hand".)

[32] On June 22, 2020, four days before closing arguments were to be made, Xoom produced over 400 documents (the "Xoom Documents").

[33] The arbitrator held that only eight were relevant, three of which were highly relevant.

[34] One week before closing arguments were delivered, ACN produced a spreadsheet outlining Planet's sales by jurisdiction. Planet claims this is the type of information that one competitor could use to develop a sales strategy. Planet says it became aware of this information when, further to the U.S. District Court order, Xoom produced two emails without attachments. Planet claims the attachments may have included confidential Planet information such as Planet's sales in Ontario and B.C. by month and the percentage of Planet's customers who subscribe to power versus gas services.

[35] On February 3, 2021, the arbitrator rendered her decision. She held that ACN's "claims have been upheld in all material respects and ACN is the prevailing party in the arbitration." Damages to ACN were assessed at $29,259,787 as of August 20, 2019, including the costs of the arbitration and prejudgment interest.

The Application to the Superior Court

[36] Planet brought an application to the Superior Court to set aside the award and ACN brought a cross-application to enforce the award of damages. Planet argued, in part, that:

i. It was unable to present its case in accordance with article 34(2)(a)(ii) of the Model Law, because it was deprived of an opportunity to respond to the evidence and arguments advanced by ACN and denied the right to discovery and cross-examination on a complete evidentiary record; and

ii. The award was contrary to public policy because Planet could not comply with the award without violating the *ECPA*, contrary to article 34(2)(b)(ii) of the Model Law.

[37] The application judge dismissed Planet's application to set aside the award and granted ACN's application recognizing and enforcing the award. In deferring to the arbitrator's decision, the application judge observed that the arbitrator had the benefit of hearing all of the evidence, reviewing the full evidentiary record,

and considering Planet's submissions. The application judge also held that Planet failed to provide proof that it was unable to present its case.

[38] The application judge also considered Planet's argument that the *ECPA* precluded payment of commissions for renewals effective January 1, 2017 and that the arbitrator's decision was therefore contrary to public policy. The application judge rejected this submission after considering the terms of the *ECPA* and a memorandum made out to Planet by the OEB, as well as the principles of contract interpretation. On the contrary, he upheld the arbitrator's assessment that the Agreement was clear and unambiguous on gross margin payments as negotiations revealed "a consistent and uniform course of conduct with respect to ACN's entitlement to commissions from renewals".

ANALYSIS OF THE ISSUES UNDER APPEAL

1. Standard of Review where a Party Claims it was Unable to Present its Case

[39] The first issue raised on this appeal is the standard of review to be applied to the application judge's analysis of whether Planet was unable to present its case.

[40] Planet does not challenge the arbitrator's jurisdiction to hear the case; rather, Planet challenges the arbitrator's decisions regarding document production, time for cross-examination, and opportunity to prepare closing

submissions to the arbitration that Planet claims resulted in its inability to properly present its case at the arbitration.

[41] Planet claims that the application judge was required to conduct a *de novo* hearing to determine whether Planet was able to present its case, and that he erred by failing "to independently assess the importance of document discovery and the prejudicial effect" of ACN's failure to comply with its obligations to Planet, and instead, deferred to the arbitrator. Planet claims that, had the application judge conducted a *de novo* hearing, he would have concluded that Planet was unable to present its case.

[42] The onus on a party seeking to set aside an arbitral award on the basis of a failure of due process, is high. "Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing State": *Consolidated Contractors Groups S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939, 70 C.L.R. (4th) 51, at para. 65, leave to appeal refused, 2018 CanLII 99661 (SCC), citing Lax J. in *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.,* [1999] O.J. No. 3573, at para. 34 (Sp. Ct.), aff'd (2000) 49 O.R. (3d) 414 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 581.

[43] The only authority cited by Planet in support of its claim that a *de novo* hearing should have been conducted by the application judge to determine whether this high threshold has been met, was *lululemon athletica Canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428.

[44] In my view, *lululemon* is distinguishable.

[45] In *lululemon,* the appellant challenged the *jurisdiction* of the arbitral decision. *Lululemon* invoked s. 34(2)(a)(iv) of British Columbia's legislation which, like the wording in s. 34(2)(a)(iii) of the Ontario Act, concerns "disputes not contemplated by or not falling within the terms of the submission to arbitration: see s. 34(2)(a)(iv) of British Columbia's *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

[46] In this case by contrast, the appellant challenges the procedural fairness of the proceeding.

[47] Moreover, as was made clear by this court in *United Mexican States v. Cargill, Inc.*, 2011 ONCA 622, 107 O.R. (3d) 528, at para. 47, leave to appeal refused, [2011] S.C.C.A. No. 528, even in appeals of pure jurisdictional questions,

> [C]ourts are to be circumspect in their approach to determining whether an error alleged under art. 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to

> carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.

[48] The correct test is whether the arbitrator's decisions respecting document production, cross-examination of witnesses, and closing submissions, "offend our most basic notions of morality and justice" such that the arbitrator committed a breach of procedural fairness: *Consolidated Contractors*, at para. 65.

[49] It was incumbent on Planet to demonstrate that it was unable to present its case. In the absence of evidence to demonstrate how the arbitrator erred in making her findings in respect of the documents, and why more time was needed to prepare cross-examinations and make closing submissions, the application judge was entitled to rely on the findings of the arbitrator. Even if a *de novo* hearing were conducted, as the application judge said, "Planet's submissions … repeat the same submissions that were made to the Arbitrator", Planet has not challenged the finding that only eight of the 400 Xoom Documents were relevant, and no new evidence has been adduced to demonstrate how it has been deprived of its ability to present its case. As such, this would not have changed the result.

[50] For these reasons, I find that the application judge applied the correct test and invoked the correct standard of review. I would therefore dismiss this first ground of appeal.

2. Was Planet denied the Opportunity to Present its Case?

[51] Planet's second ground of appeal is that it was "arbitrarily denied reasonable discovery rights" because ACN failed to produce all relevant documents as "Xoom's rushed but significant production of over 400 documents was not delivered until after the evidentiary hearing and 4 days before closing submissions". They included documents that the arbitrator acknowledged were "highly relevant" to Planet's case. Planet claims it was thereby denied the right to cross-examine witnesses or make closing submissions on a complete evidentiary record.

[52] Natural justice requires that an arbitrator act with procedural fairness, the requirements of which depend on the subject-matter of the dispute, the circumstances of each case, the nature of the inquiry, and the rules under which the parties have agreed to arbitrate their dispute: *0927613 B.C. Ltd. v. 0941187 B.C. Ltd,* 2015 BCCA 457, 392 D.L.R. (4th) 541, at para. 60 (citations omitted).

[53] The failure to give a party the opportunity to present its case by ordering production of necessary documents, refusing to admit relevant evidence, or failing to deal with all issues for determination, may constitute a breach of the rules of procedural fairness and natural justice: *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834, at para. 81. See also: *Williston Navigation Inc. v. BCR Finav No. 3*, 2007 BCSC 190, 69 B.C.L.R. (4th) 187, at paras. 45-53;

Amos Investments Ltd. v. Minou Enterprises Ltd., 2008 BCSC 332, 45 B.L.R. (4th) 258, at paras. 26-39.

[54] The question for the application judge was whether the arbitrator breached Planet's right to procedural fairness, and if so, whether the breach was "sufficiently serious to offend our most basic notions of morality and justice" such that it "cannot be condoned": *Consolidated Contractors*, at para. 65.

[55] In his thorough and careful reasons, the application judge recognized that "a tribunal has the obligation to ensure equal treatment of the parties, and that minimum procedural standards are observed".

[56] He noted that Xoom's entry into the Ontario market was an important issue and that Planet sought production of documents it believed would demonstrate improper conduct concerning Xoom's entry into Ontario and efforts by ACN to assist Xoom contrary to the terms of its agreement with Planet. He noted that the arbitrator specifically adverted to Planet's argument that ACN's intertwined relationship with Xoom created a conflict of interest with ACN's obligations under the agreement, ACN shared Planet's confidential information with Xoom, it abdicated its responsibilities to Planet in favour of Xoom, and it deliberately omitted a transition plan required for an orderly wind down.

[57] The application judge noted the arbitrator's findings that,

i. although Planet sought and obtained 400 documents from Xoom, only three were “highly relevant”, “they are all part of the same e-mail chain and concern the same subject [and do not] put any different light on the evidence that was presented at the hearing”;

ii. “[t]o the extent that ACN disputes alleged deficiencies raised by Planet, such deficiencies will be appropriate subjects for the Parties’ pre-hearing submissions and/or cross-examination at the evidentiary hearing”; and

iii. Planet had experienced legal counsel.

[58] The application judge also found that,

> The Arbitrator set out the procedural history in respect of these documents including her rulings in the June 19, 2020 email. The Arbitrator referred to Planet’s proposal that 122 Xoom documents be admitted into the record from among 400+ documents produced by Xoom. The Arbitrator referenced her confirmation that the proposed exhibits were admitted into the record and that oral closings would take place on June 26, 2020. The Arbitrator recorded in the Award, at para. 101, that “[a]t no time before or after the Arbitrator admitted the Xoom Documents into the record did either Party ever argue that they should be permitted to recall one or more witnesses to testify or to seek the appearance of any new witness”.
>
> …
>
> The Arbitrator had the benefit of hearing all of the evidence and of considering Planet’s submissions about relevance of documents, prejudice from late production, and the appropriateness of drawing adverse inferences against ACN, in the context of a full understanding of the evidentiary record.

[59] The application judge therefore correctly concluded that,

> It was open to counsel to request the right to cross-examine one or more witnesses on the Xoom documents. A decision was taken not to do so. It is not open to Planet, having taken this decision, to now argue that its ability to conduct further cross-examination was unfairly denied.
>
> …
>
> The record shows that the Arbitrator considered the arguments made by Planet and, for reasons given in the Award, she did not accept them. Planet is asking this Court to consider the evidentiary record anew and substitute new findings for those made by the Arbitrator. This is not the proper role of the Court on this application.

[60] I therefore see no error in the application judge's finding that Planet was given the opportunity to adduce the documents necessary and present its case.

[61] Moreover, although the application judge did not specifically advert to the two missing attachments to emails identified on this appeal, ACN furnished one attachment (an Excel spreadsheet) one week before the final submissions in the application, and has confirmed that the other is no longer available. The content of the attachments is clear from the description provided in the emails to which they are attached.

[62] I therefore see no error in the application judge's conclusion that, although "Planet clearly disagrees with the Arbitrator's findings and conclusions, … it has failed to furnish proof that it was unable to present its case because of the

Arbitrator's decisions with respect to ACN's document production obligations." Moreover, at no time during the arbitration or since, has Planet articulated what additional documents it would have adduced and what prejudice was suffered by the failure to do so.

[63] The application judge also rejected Planet's argument that the arbitrator erred by ignoring Planet's evidence about ACN's audit conducted pursuant to the Agreement and, instead, relied exclusively on the evidence of the ACN's expert, which Planet says was inconsistent with the evidence as a whole and undermined on cross-examination. He noted that the auditor gave extensive reasons for his opinion. After studying the expert reports of each party, the arbitrator noted that Planet's auditing expert largely adopted Planet's representations with only limited attempts at verification. For this reason, she concluded that Planet's auditing expert's evidence should be accorded little weight.

[64] I see no error in the application judge's conclusion that the arbitrator did not ignore the evidence of Planet's expert.

[65] For these reasons, I would dismiss Planet's claim that it was unable to present its case.

3. The Arbitrator's Approach to the *ECPA* Issue

[66] Planet argued before the arbitrator that ordering it to make commission payments to ACN is illegal under the *ECPA* and would expose Planet to penalties.

[67] Planet claimed that the amendment to the *ECPA* on January 1, 2017 (at s. 9.3, along with Regulation O. Reg. 389/10) provides that the remuneration to salespersons selling electricity or gas to consumers must not include any remuneration based on a commission or the value or volume of sales. Planet also relied on a memorandum from staff of the OEB (the "OEB Memorandum") which expressed the view that "a salesperson may not be remunerated for any new, renewed or extended contract based on a commission…including the renewal/extension of contracts entered on or before January 1, 2017."

[68] Planet argued that according to the plain language of the Agreement, ACN was only entitled to commissions on sales to ACN's customers with the amount of such commissions to be calculated based on these customers' usage across all products. In short, payment of the arbitral award would put Planet in breach of the *ECPA*. Planet submitted that the arbitrator "rewrote" the terms by ordering Planet to pay over $19 million of commissions to ACN after improperly relying on extrinsic evidence of ACN's witness who was involved in the negotiation of the Agreement.

[69] ACN claimed that its entitlement to commissions arose from the acquisition of the customer, not the marketing and signing of new customer contracts and that, as such, there was no breach of the *ECPA*.

[70] The arbitrator considered the relevant provisions of the *ECPA*, along with submissions of both parties and concluded that the *ECPA does not* preclude payment of commissions for renewals that became effective on/after January 1, 2017. She also considered that the Agreement provides that customer contact rests exclusively with Planet, and that the OEB Memorandum was written on the understanding that ACN would be doing the retail sales for Planet and did not consider that Planet could directly contact its customers.

[71] In so doing, the arbitrator addressed the language of the statute and regulation, the submissions of the parties, the OEB Memorandum, and the fact that the statute is consumer protection legislation. She disagreed with the Planet's interpretation of the Agreement in light of her factual findings to which deference is owed. She found that the Agreement was clear and unambiguous on gross margin payments and the negotiation history of the Agreement showed "a consistent and uniform course of conduct with respect to ACN's entitlement to commissions from renewals." The arbitrator concluded that for any customer referred by ACN to Planet through their online portal, ACN was entitled to continue receiving commissions for as long as that customer remained with

Planet, regardless of the means by which the relationship with Planet was renewed.

[72] The application judge noted that the public policy defence should be invoked "only if the judgment involves an act that is illegal in the forum or if the action involves acts repugnant to the orderly functioning of the social or commercial life of the forum": *Depo Traffic v. Vikeda International*, 2015 ONSC 999, at para. 47. The public policy defence is a high standard, and the onus is on the claimant to demonstrate that such enforcement "offends our local principles of justice and fairness in a fundamental way": *Consolidated Contractors*, at para. 99, citing *Schreter v. Gasmac Inc*. (1992), 7 O.R. (3d) 608 (Sup. Ct., at p. 623).

[73] The application judge correctly observed that the arbitrator addressed the issues raised by Planet in relation to the claim for unpaid commissions and directed her mind to the arguments raised by experts and the weight to be given to their evidence. He also correctly held that the arbitrator did not disregard the *ECPA*; rather, she considered the statutory provision and its purpose and applied it to the evidence available. He held that,

> The Arbitrator's interpretation of the ECPA and the regulation in this context is a reasonable one. Planet has not shown that the Arbitrator made an error in her factual findings with respect to the basis for the views of OEB staff. Planet has not shown that as a result of the Arbitrator's decision, the Award fundamentally offends the principles of justice and fairness in Ontario. The

> Arbitrator's decision on the question of statutory interpretation is entitled to deference.

[74] For the reasons set out above, I see no error in the application judge's conclusion. As such, I would dismiss this ground of appeal.

CONCLUSION

[75] For these reasons, I would dismiss Planet's appeal. On the agreement of both parties, I would award costs of this appeal to the respondent in the amount of $25,000 all inclusive.

Released: May 8, 2023 "P.D.L"

"Thorburn J.A."
"I agree. P.Lauwers J.A."
"I agree. David M. Paciocco J.A."