
CANADA / JUDGMENT

On Call Internet Services Ltd. v. Telus Communications Company

2013 BCCA 366

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 366 On Call Internet Services Ltd. v. Telus Communications Company

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

On Call Internet Services Ltd. v. Telus Communications Company,

2013 BCCA 366

Date: 20130814

Docket: CA038120

Between:

On Call Internet Services Ltd.

Appellant

(Petitioner)

And

Telus Communications Company

Respondent

(Respondent)

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice Neilson

On appeal from: An order from the Supreme Court of British Columbia, dated

May 14, 2010 (Telus Communications Company v. On Call Internet Services Ltd., Vancouver Docket S099444).

Counsel for the Appellant:

J. Aiyadurai

Counsel for the Respondent:

D. Wotherspoon

J. Payne

Place and Date of Hearing:

Vancouver, British Columbia

June 4-5, 2013

Place and Date of Judgment:

Vancouver, British Columbia

August 14, 2013

Written Reasons by:

The Honourable Madam Justice Kirkpatrick

Concurred in by:

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice Neilson

Summary:

Appeal by On Call from a Supreme Court chambers order which dismissed its petition pursuant to s. 30 of the Commercial Arbitration Act to set aside the Final Award of an arbitrator, or, alternatively, for leave to appeal the Final Award pursuant to s. 31 of the Act. Before the chambers judge, On Call alleged the arbitrator committed two arbitral errors, framed in the alternative as errors of law. The judge rejected both allegations.

On appeal, On Call alleged a number of errors in the chambers judgment. Telus submitted all but one of the issues was not argued before the chambers judge. On Call also alleged the witness Mr. Telfer made a material misrepresentation in his affidavit, and it applied to adduce further evidence.

Held: Appeal dismissed. The fresh evidence should not be admitted and On Call should not be permitted to raise the new issues. The only ground of appeal properly before the Court was whether the judge erred in refusing to set aside or in denying leave to appeal the Final Award on the basis that the arbitrator erred in accepting and relying upon the Telfer affidavit. The judge did not err in holding the arbitrator did not commit an arbitral error. The issues arising from the Telfer did not constitute a question of law sufficient to ground leave to appeal the award. On Call failed to establish the judge erred in the exercise of her discretion to refuse leave to appeal.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

Introduction

- [1] The overarching issue in this appeal is whether a party to a private arbitration should, by reason of its decision not to participate in the arbitration, be permitted to litigate issues it did not litigate or argue before the arbitrator and did not raise in its petition in the Supreme Court.
- [2] The narrow issue is whether the Supreme Court judge erred in refusing to set aside the arbitration award on the basis of two alleged arbitral errors or in refusing to grant leave to appeal on the basis of the same two alleged errors which were recast as questions of law.

Background

- [3] The appellant, On Call Internet Services Ltd. ("On Call") appeals from the order pronounced in Supreme Court chambers on May 14, 2010, which dismissed its petition pursuant to s. 30 of the then Commercial Arbitration Act, R.S.B.C. 1996, c. 55, to set aside the Final Award of Arbitrator Clemens, Q.C., or, in the alternative, seeks leave to appeal the Final Award pursuant to s. 31 of the Act. On Call also appeals the term of the order that allowed the petition of the respondent, TELUS Communications Company ("Telus") to enforce the Final Award pursuant to s. 29 of the Act.
- [4] Telus supplied wholesale Internet services to On Call, beginning in 1997. On Call in turn provided Internet services to customers in the southern interior of British Columbia. The relationship between Telus and On Call was marked by a long-running dispute over billing, which came to a head in October 2007, when Telus demanded On Call pay allegedly outstanding arrears or face suspension of certain services. Discussions took place regarding the means for resolving the dispute, and on February 11, 2008, Telus proposed arbitration under the auspices of the British Columbia International Commercial Arbitration Centre. Following further discussion, on the evening of February 13, 2008, counsel for On Call sent an email to counsel for Telus confirming the verbal agreement to arbitrate.
- [5] In a letter dated February 14, 2008 (the "arbitration agreement"), On Call and Telus agreed to resolve "the outstanding issues between them" by way of arbitration. On April 11, 2008, Telus issued a Notice to Arbitrate, and Murray Clemens, Q.C. was appointed as the arbitrator. Shortly thereafter, On Call challenged Arbitrator Clemens' jurisdiction, arguing on several

bases that the arbitration agreement was invalid. In his subsequent interim award on jurisdiction handed down March 13, 2009, Arbitrator Clemens ruled that he had the jurisdiction to arbitrate the outstanding issues between the parties, and that:

"the outstanding issues between them" means issues connected to the economic relationship between TELUS and On Call with respect to ordering and providing services, including the accounts between the parties, and related claims for payments or credits.

- [6] A number of further applications followed, resulting in interim awards on May 21, 2009, awarding costs to Telus for the jurisdictional challenge; on July 7, 2009, dismissing On Call's application for a declaration that Telus had breached a fundamental term of the arbitration agreement and that the arbitration was terminated; and on August 10, 2009, dismissing Telus' application for a declaration that it was entitled to terminate non-tariff services being provided to On Call. On Call brought petitions in Supreme Court seeking leave to appeal the jurisdiction award, costs award, and termination award, all of which Madam Justice Dickson dismissed in chambers on February 12, 2010.
- [7] As to the jurisdiction award, Dickson J. described On Call's claim at para. 32 of her reasons:
- [32] On Call relies on s. 31(2)(a) of the Act in seeking leave to appeal the Jurisdiction Award. In its submission, Arbitrator Clemens erred in law by failing to apply or applying incorrectly the principles of economic duress. Had he not erred in this manner, On Call says Arbitrator Clemens would have found the parties were not bound to arbitrate, which is a material matter of sufficient importance to warrant the Court's intervention.
- [8] She concluded at para. 36:
- [36] Taking into account the foregoing, I conclude there is insufficient substance to the appeal to warrant it proceeding. There is no merit to the submission that Arbitrator Clemens failed to apply, or applied incorrectly, the principles of economic duress, and, even if he did, given his factual finding regarding the pre-existing February 13 oral agreement to arbitrate, the alleged error was not material to the decision. In these circumstances, I dismiss On Call's application for leave to appeal the Jurisdiction Award.
- [9] As to the termination award, Dickson J. described On Call's position at para. 44:
- [44] On Call submits that Arbitrator Clemens erred in law in failing to find that Telus fundamentally breached the arbitration agreement by breaching confidentiality when it informed the CRTC of the Jurisdiction Award. As I understand it, On Call argues that, in the arbitral context, confidentiality necessarily goes to the root of the contract and, in concluding otherwise, Arbitrator Clemens must have misapprehended and misapplied the law.
- [10] She dismissed the application for leave to appeal the termination award, stating at paras. 46-47:

- [46] Taking into account [Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426] I conclude that there is no merit to On Call's submission that Arbitrator Clemens committed a reviewable legal error. It is well settled law that whether conduct complained of amounts to a fundamental breach is a question of fact: Fridman, G.H.L., *The Law of Contract in Canada*. Arbitrator Clemens acted within his mandate in determining that, in the circumstances, any confidentiality breach that may have occurred was, at most, trivial, as opposed to fundamental. As previously noted, his factual findings are immune from review.
- [47] Taking into account the foregoing, I conclude there is insufficient substance to the appeal to warrant it proceeding and dismiss On Call's application for leave to appeal the Termination Award.
- [11] On Call has not appealed the orders made by Dickson J.
- [12] In advance of the hearing on the substance of the case, Arbitrator Clemens held a number of pre-arbitration hearings, during which both parties agreed that no expert evidence would be called or relied upon in the arbitration. Telus filed affidavits of witnesses in advance of the hearing. Among Telus' filed materials was the affidavit of Mr. Geoff Telfer, an employee of Telus, sworn on November 12, 2009. In his affidavit, Mr. Telfer confirmed the tariffs identified in the affidavit of Ms. Zaferopoulos, the Telus employee who calculated the amounts outstanding for services provided to On Call and the rates which applied to those services. At para. 10, Mr. Telfer stated:

Since about March 2006, On Call has subscribed to tariffed Wholesale Internet ADSL services as well as the tariffed NNI service to support it. Previously On Call subscribed to a forborne Internet ADSL service, which included certain rates for the Internet ADSL service (sometimes called "port fees") but the backhaul, or connection, was provided by TELUS free of charge. The tariff Internet ADSL introduced lower port fees than those under the forborne service, but the backhaul was no longer provided free of charge. Thus, On Call's move to the tariff allowed it to enjoy the lower rates for Internet ADSL but meant that it had to subscribe to an NNI service to support the Internet ADSL.

- [13] On November 15, 2009, Ms. Quigley, the president of On Call, wrote to counsel for Telus stating that a review of the "four recently provided affidavits and the various submissions that Telus has made to the CRTC discloses that they are fraught with so many inconsistencies that the evidence is unreliable, and should be summarily rejected." In particular, Ms. Quigley stated:

Telus has asserted that there was a forbearance ruling on ADSL access from 2000 to 2006. Telus knows full well that this representation is a complete falsehood because there was no such tariff for which the CRTC could render a forbearance hearing.

- [14] A copy of this letter was sent to the arbitrator.

- [15] The arbitration hearing was held on November 16, 2009. On Call did not file a substantive defence or counterclaim, submitted no evidence or argument, and chose not to attend or participate in the hearing. On December 18, 2009, the arbitrator issued his Final Award, awarding Telus \$810,669.58 plus costs.
- [16] On Call filed a petition in Supreme Court to have the Final Award set aside pursuant to s. 30 of the Commercial Arbitration Act on the ground that the arbitrator committed the arbitral error of "exceeding the arbitrator's powers". In the alternative, On Call applied for leave to appeal the Final Award pursuant to s. 31 of the Act on the grounds that the arbitrator committed errors of law.
- [17] On Call alleged two arbitral errors, which were the same as the alleged errors of law. First, On Call alleged that the arbitrator erred by accepting and relying on the Telfer affidavit. Second, On Call alleged that the arbitrator erred by considering the arbitration agreement to be a lawful contract. Telus filed its own petition pursuant to s. 29 of the Commercial Arbitration Act, seeking leave to enforce the Final Award.
- [18] The hearing was held before Madam Justice Boyd on May 12 and 13, 2010, and oral reasons for judgment were pronounced May 14, 2010. The judge began by setting out the governing principles and relevant provisions of the Commercial Arbitration Act. The judge noted the "key overriding principle" was that the court must give substantial deference to decisions made in arbitration. As the judge noted, the privative clause at s. 32 provides that "Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained except to the extent provided in this Act." The judge noted that the court may only intervene as authorized by s. 30 and 31 of the Act, and set out the following provisions in full at para. 7 of her judgment:
- 30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
- (a) set aside the award, or
 - (b) remit the award to the arbitrator for reconsideration.
- (2) The court may refuse to set aside an award on the grounds of arbitral error if
- (a) the error consists of a defect in form or a technical irregularity, and
 - (b) the refusal would not constitute a substantial wrong or miscarriage of justice.
- (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.
- 31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if
- (a) all of the parties to the arbitration consent, or

- (b) the court grants leave to appeal.
- (2) In an application for leave under subsection (1) (b), the court may grant leave if it 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.
- (3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.
- (4) On an appeal to the court, the court may
 - (a) confirm, amend or set aside the award, or
 - (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal
- [19] Further, the judge noted that the law was clear that leave to appeal would only be granted on questions of law.
- [20] After reviewing the proper approach to applying the test for leave to appeal under s. 31, as set out in *BCIT (Student Association) v. BCIT*, 2000 BCCA 496, the judge turned to the first error alleged by On Call, that the arbitrator erred by accepting and relying on the Telfer affidavit.
- [21] On Call argued that the arbitrator should have known that Ms. Quigley's letter of November 15, 2009 was a specific challenge to Mr. Telfer's evidence. Further, it alleged the arbitrator failed to take appropriate steps in light of the fact that Mr. Telfer was Telus' own employee, that his evidence was tantamount to expert evidence, and that his evidence concerning the forbearance issue was in direct contradiction to On Call's November 15 letter. On Call submitted that the arbitrator should have refused to admit the Telfer affidavit since it was in effect expert evidence, but, as Mr. Telfer was a Telus employee, it was not the evidence of an independent expert. Alternatively, On Call said Arbitrator Clemens should have insisted on calling his own expert evidence on the forbearance issue. On Call alleged that, by failing to take these steps, the arbitrator "exceeded his powers".
- [22] The judge dismissed this argument, noting that "A party can only complain the arbitrator has exceeded his jurisdiction where the arbitrator has purported to rule on an issue which is not before him, thus exceeding the jurisdiction provided for in the parties' arbitration agreement" (at para. 32). The judge noted that the arbitration agreement had not identified the exact issues subject to arbitration, but had stated the arbitration would address "the outstanding issues between them". As the judge noted, the arbitrator, in his jurisdiction

award, had ruled that this meant issues connected to the economic relationship between Telus and On Call. The arbitrator had also noted in that award that the issues between the parties included claims of "billing contrary to government regulation". The chambers judge took this to be a reference to the tariff and forbearance issues raised in the Telfer affidavit. Thus, the arbitrator's decision to consider the Telfer affidavit fell squarely within his jurisdiction in this matter.

- [23] Next, the judge considered On Call's alternative submission that the arbitrator erred in law by considering the Telfer affidavit. She held that this argument must fail for several reasons. First, she held that the Telfer affidavit was not tendered as expert evidence or treated as such. Further, On Call had never objected to its admissibility despite its prior knowledge that the Telfer affidavit would be tendered. The judge did not find Ms. Quigley's letter of November 15, 2009 to constitute more than "an oblique challenge" to the tendering of the affidavit (at para. 41). She found that in challenging Mr. Telfer's evidence, On Call was challenging the factual matrix on which the arbitrator relied. The judge noted that findings of mixed fact and law are immune from appeal under s. 31, and as such conflicts over the factual matrix cannot be considered on an application for leave to appeal. Finally, the judge held that On Call had not met its burden to satisfy at least one of the conditions precedent for leave to appeal applications under s. 31.
- [24] On Call had asked the judge to consider the affidavit of Mr. Francois Menard (which was not tendered to the arbitrator) in support of its argument that, had the arbitrator rejected the Telfer affidavit and sought out other evidence, evidence such as Mr. Menard's would have been available and likely yielded a result favorable to On Call. However, the judge held that the Menard affidavit was seriously flawed and it was too late in the day for On Call to attempt to introduce what was essentially fresh evidence when it was clear that this evidence was available to On Call before the arbitration hearing. She thus held that On Call did not demonstrate that the arbitrator made an arbitral error or an error in law in admitting and relying on the Telfer affidavit.
- [25] The judge then turned to the second alleged error, that the arbitrator erred in considering the arbitration agreement to be a lawful contract. On Call submitted that the arbitration agreement was unlawful as its terms were contrary to the provisions of the Telecommunications Act, S.C. 1993, c. 38, and, specifically, breached the provisions of the applicable tariff. On Call alleged that, as an illegal contract, the arbitration agreement could not be enforced by the court.
- [26] The judge held that On Call must also fail in its challenge to the lawfulness of the arbitration agreement. She noted that the issue of the purported illegality of the contract was never before the arbitrator, and as such the arbitrator had made no findings as to its legality. There could therefore be no grounds to a challenge on this alleged error either as an arbitral error or an error of law. Secondly, she noted that while On Call alleged that the terms of the arbitration agreement were contrary to the CRTC (Canadian Radio-television and Telecommunications Commission) 21461 General Terms of Service, there was no evidence

before the court that the arbitration agreement in fact violated the General Terms of Service. She noted that On Call had in fact made a complaint to the CRTC that the arbitration agreement violated the General Terms of Service, and the CRTC had dismissed the complaint. She therefore agreed with Telus' submission that the issue of the illegality of the arbitration letter was *res judicata*. Further, there was insufficient merit to the appeal to warrant it proceeding.

- [27] Having rejected On Call's allegations of arbitral error and error of law, the judge held that Telus was entitled to an order pursuant to s. 29 of the Commercial Arbitration Act and dismissed On Call's petition.

Issues on Appeal

- [28] On Call alleges the following errors in judgment in this appeal:

1. The chambers judge erred in law by not granting On Call leave to appeal the Final Award on the basis that the arbitrator did not decide the dispute by reference to, and in accordance with, the Telecommunications Act, and specifically, that the Final Award does not accord with the tariffs under the Telecommunications Act and therefore breaches the CRTC 21461 General Terms of Service; and
2. The chambers judge erred by not setting aside the Final Award on the basis that the arbitrator committed a series of "arbitral errors" within the meaning of s. 30 of the Commercial Arbitration Act, including:
 - a. awarding an amount that exceeded the amount claimed;
 - b. not determining the dispute on its merits;
 - c. allowing the Telfer affidavit to be adduced as evidence despite its late disclosure; and
 - d. accepting and relying on the Telfer affidavit evidence despite its inadmissible contents.

- [29] On Call frames the alleged arbitral errors in the alternative as errors of law appealable pursuant to s. 31 of the Commercial Arbitration Act, and the alleged error of law in the alternative as an arbitral error.

- [30] Telus submits in response that the issues set out in numbers 1 and 2(a)-(c) were not argued before Boyd J. (or, indeed, before the arbitrator) and thus On Call cannot pursue them on appeal. However, if On Call can pursue these issues, Telus says they are without merit.

- [31] In its reply factum, On Call further alleges that Mr. Telfer made a material misrepresentation to the arbitrator in his affidavit and that the Final Award was therefore "improperly procured" and should be set aside pursuant to s. 30. In support of this submission, On Call applies to adduce further evidence.

- [32] At the hearing of the appeal, On Call paid scant attention to the alleged errors arising from the Supreme Court order. It instead devoted virtually all of its time to attempt to persuade us that approximately 600 pages of documents that were not before the arbitrator or the chambers judge should be admitted in evidence and that we should decide the new issues On Call has raised on that evidence. Counsel for On Call gave detailed submissions that amounted to testimony as to the meaning and effect of the documentary evidence and the impact of the various statutory provisions on the evidence. In addition, counsel for On Call spent much of his time making arguments about the validity of the arbitration agreement or the arbitrator's jurisdiction, issues that had been put to rest by Madam Justice Dickson's decision.
- [33] As the chambers judge correctly noted, the Commercial Arbitration Act grants the court jurisdiction to intervene, but only as permitted by s. 30 and s. 31. Leave to appeal an arbitration decision can be granted only on questions of law alone, and those questions must be clearly defined: *Greg Dowling Architects Inc. v. J. Raymond Griffin Architect Inc.*, 2012 BCCA 336; *BCIT (Student Association) v. BCIT*, 2000 BCCA 496; *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, 2008 BCCA 31.
- [34] On Call's approach also fails to recognize the objects of arbitration. As this Court noted in *VIH Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125 at para. 45:
- [45] [C]ourts should be particularly reluctant to grant leave to appeal from an arbitration on the basis of an issue that was not argued before the arbitrator. Where parties have deliberately preferred arbitration as the method for resolving disputes, it is to be expected that they will fully argue their cases in that forum.
- [35] The Court cited with approval (at para. 46) the following comments from *Ed Bulley Ventures Ltd. v. Eton-West Construction Inc.*, 2002 BCSC 826, on the purposes of arbitration:
- [5] Arbitration is intended to provide a speedy and final resolution of the issues. No party may appeal any aspect of an arbitration award as of right. The court retains a certain discretion, to be exercised according to the criteria set out in s. 31(2), to grant or refuse leave after weighing the importance of the result of the arbitration and the point of law invoked .
- [6] After most arbitrations, one party or the other, perhaps both, will be unhappy with the result. The substantial constraints on the granting of leave to appeal play an important role in preserving the integrity of the arbitration system. If leave were granted too readily, one of the beneficial and distinguishing features of arbitration (its finality) would be lost.
- [36] In my opinion, On Call's submissions fundamentally misconceive the proper role of an appellate court, particularly in the context of the underlying arbitration. As we repeatedly stated at the hearing, our role is not to make findings of fact or interpret evidence for the first time on appeal. On Call's approach also ignores the statutorily circumscribed review of arbitral decisions.

[37] Two preliminary issues then arise:

- a) Should the fresh evidence, on which the new issues largely depend for their force, be admitted?; and
- b) Should On Call be permitted to pursue the new issues on appeal?

A. Fresh Evidence

[38] At the heart of this appeal is On Call's submission that para. 10 of the Telfer affidavit is untrue. For ease of reference, that paragraph reads:

Since about March 2006, On Call has subscribed to tariffed Wholesale Internet ADSL services as well as the tariffed NNI service to support it. Previously On Call subscribed to a forborne Internet ADSL service, which included certain rates for the Internet ADSL service (sometimes called "port fees") but the backhaul, or connection, was provided by TELUS free of charge. The tariff Internet ADSL introduced lower port fees than those under the forborne service, but the backhaul was no longer provided free of charge. Thus, On Call's move to the tariff allowed it to enjoy the lower rates for Internet ADSL but meant that it had to subscribe to an NNI service to support the Internet ADSL.

[39] The Telfer affidavit was sworn on November 12, 2009 and was delivered to On Call and the arbitrator the same day.

[40] As I have noted, on November 15, 2009, Ms. Quigley sent a letter to Telus' counsel that stated in part:

TELUS has asserted that there was a forbearance ruling on ADSL access from 2000 - 2006. TELUS knows full well that this representation is a complete falsehood because there was no such tariff for which the CRTC could render a forbearance ruling.

[41] The letter, a copy of which was sent to the arbitrator and the Law Society of British Columbia, concluded:

As a member of The Law Society of British Columbia, you're duty bound to vet all of your client's evidence to make sure it is consistently 100% accurate. If you fail to do so not only will you be knowingly in breach of your professional duties owed to your client, the adjudicator, and the other party. Such dereliction of duty, we offer with the greatest of respect, will make you complicit in the commissions of acts of perjury.

[42] Notwithstanding Ms. Quigley's evident belief that Mr. Telfer's affidavit was untrue, On Call made the deliberate decision not to attend or participate in the arbitration to directly challenge Mr. Telfer, who was available to be cross-examined.

[43] On Call applied to adduce further evidence at the appeal pursuant to R. 31 of the Court of Appeal Rules. On Call seeks to rely on two letters that were not in evidence before the chambers judge:

- (1) A letter from Ted Woodhead, Telus' Vice-President, Telecom Policy & Regulatory Affairs dated November 12, 2009, and addressed to the CRTC and copied to On Call; and
- (2) A letter from Elsa Van Hulst, ATIP (Access to Information & Privacy) Coordinator with the CRTC dated October 18, 2010, and addressed to Ms. Quigley.
- [44] Both letters are said by On Call to be relevant to the issue of forbearance alluded to in the Telfer affidavit. On Call submits the letters support its submission that Mr. Telfer's impugned statement was untrue.
- [45] In support of its motion, On Call filed two affidavits sworn on May 22, 2013 containing approximately 600 pages of evidence.
- [46] On May 29, 2013, Telus filed a notice of motion to strike irrelevant portions of the evidence.
- [47] The admissibility of fresh evidence is governed by the principles set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759 at 775:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [48] The principal focus with respect to the proposed evidence in this appeal is due diligence. In *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, this Court articulated the test at paras. 49-50:
- [49] The tests for the reception of fresh evidence in this Court are stringent, and as a result, it is rare for this Court to grant an application to adduce such evidence. In particular, this Court generally takes a hard line with respect to the due diligence aspect of the test, especially in civil cases. In *Morris v. Fletcher* (1993), 76 B.C.L.R. (2d) 283 at 286, Southin J.A. for the Court, said:

There may be rare and unusual circumstances where lack of diligence or lack of all reasonable diligence may be forgiven upon an application such as this but I see no reason at all why utter and complete lack of diligence should ever be indulged by this Court. On that footing, I would dismiss the application to adduce further evidence .

[50] Nonetheless, the Court does retain a discretion to allow fresh evidence to be adduced even when the due diligence aspect of the Palmer test is not met. In unusual cases, where the interests of justice demand it, the Court may allow fresh evidence to be adduced even if it ought to have been adduced in the court below: *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263, 88 C.P.C. (6th) 12.

[49] On Call filed the affidavit of Francois Menard in Supreme Court on April 21, 2010, and it is useful to refer here to the judge's decision concerning that evidence.

[50] Mr. Menard described himself as a telecommunications specialist and regulatory consultant having in-depth knowledge of the Telecommunications Act, which he said governed the relationship between Telus and On Call. He deposed that he had been On Call's consultant under retainer since March 2009, several months before the arbitration hearing.

[51] Mr. Menard stated at para. 40 of his affidavit:

After reviewing the sworn affidavit of Geoff Telfer, provided to me by On Call that was filed in the arbitration and considered by the arbitrator before rendering his final award, I'm of the professional, expert opinion that the affidavit evidence contains false testimony, specifically, his sworn assertion that TELUS was rightfully providing forborne ADSL access services to On Call is not true. It is my opinion that, to this date, the CRTC did not forbear from regulating TELUS' wholesale ADSL services, and that TELUS' charges to On Call for same would not be allowed as they contravene Part III of the Telecommunications Act 1993, c.38.

[52] Counsel for On Call submitted to Boyd J. that the Menard affidavit was tendered for the purpose of demonstrating only the complexity of the determination of tariffs and forbearance rulings. Later, however, On Call proffered the evidence to suggest that, if accepted, it would have materially affected the outcome of the arbitration.

[53] The judge addressed this submission at paras. 52-53:

[52] At this juncture, however, the evidence is specifically proffered to suggest that had the arbitrator rejected the Telfer affidavit and sought other evidence, Menard's evidence, or evidence similar to that contained in the Menard affidavit, would have been available for the arbitrator's review and would likely have yielded a different result.

[53] I have difficulty with that submission. First, in my view, the evidence which is now proffered to challenge the arbitrator's award, in other words the Menard affidavit is a seriously flawed affidavit. I note on reviewing the affidavit that while Mr. Menard has made a number of strong conclusory statements, he does not specifically set out the factual substrata to support the conclusions. Further, given that On Call has been consulting with Mr. Menard since March 2009, several months prior to the arbitration itself, it is clear that Mr. Menard's evidence was available to On Call before the arbitration hearing, and accordingly, it ought to have been tendered at the hearing. In my view, it is now too late in the day to attempt to introduce what is essentially fresh evidence to challenge the arbitrator's award when that evidence was available and yet not offered at the arbitration itself.

- [54] In my opinion, the chambers judge's reasons for rejecting the Menard affidavit were sound. The same conclusions apply to the evidence now sought to be admitted: it is clear that the letter from Mr. Woodhead could have, with the exercise of due diligence, been tendered at the hearing before Boyd J. This letter was sent to the CRTC and On Call on November 12, 2009, and was therefore in existence and in On Call's possession before the hearing before the judge on May 12-13, 2010. The letter from the CRTC was in response to Ms. Quigley's request under the Access to Information Act, R.S.C. 1985, c. A-1, received by the CRTC on September 28, 2010. There is no satisfactory explanation as to why On Call did not make its Access to Information Act request at an earlier date and obtain the CRTC letter or similar evidence of the underlying facts in that letter for use at the hearing before the chambers judge. More importantly, it is plain that the Menard evidence as well as Mr. Woodhead's letter and the information contained in the CRTC's letter should have been put before the arbitrator, who was the person in the best position to consider the weight of the evidence.
- [55] On Call sought to excuse its lack of diligence before the arbitrator on the basis that it considered that the arbitration agreement was repudiated when Telus disclosed, on a confidential basis, the arbitrator's interim award on jurisdiction. On Call applied to the arbitrator to terminate the arbitration, which was refused. That decision was appealed and dismissed by Dickson J. Madam Justice Dickson's decision was not handed down until after the arbitration hearing and Final Award. Nevertheless, On Call's position that it should be excused from exercising due diligence in putting its evidence before the arbitrator is untenable. Among several options available, On Call could have attended on the first day of the arbitration, reserved its right to appeal the termination decision, tendered the Menard affidavit or its equivalent, or sought an adjournment to permit it to marshal the evidence it now says proves that Telus was "illegally" charging On Call. However, On Call did none of those things and, as the arbitrator noted correctly in his Final Award, it did not seek a stay of the arbitration notwithstanding the arbitrator's direction that it should do so if it expected to halt the arbitration.
- [56] It is obvious that On Call, although it agreed to arbitrate its dispute with Telus, soon after execution of the arbitration agreement sought by all means to avoid or frustrate the arbitration. It made numerous unsuccessful applications to the arbitrator, the CRTC, and the Supreme Court alleging an array of wrongdoing including fraud, duress, and illegal conduct. All of these protracted proceedings potentially could have been avoided had On Call participated in the arbitration, filed substantive pleadings, filed the evidence it now seeks to rely on, and made arguments before the arbitrator.
- [57] Instead, On Call was, as Telus contended, contemptuous of the arbitration process. It failed before both Dickson J. and Boyd J. to establish arbitral error or legal error. It has repeatedly attempted to adduce evidence and argue issues that simply should have been before the arbitrator. In the result, On Call has created a process antithetical to the private, efficient, economical, and final objects of arbitration proceedings.

- [58] The evidence that On Call seeks to have admitted is tendered on the basis that it proves the Telfer affidavit to be false. As I have said, much time was devoted at the hearing of the appeal in an effort to persuade us that the Telfer affidavit was indeed false and that the Final Award should accordingly be set aside in its entirety. If, as On Call insists, the impugned remark in the Telfer affidavit is false, then it was incumbent on On Call to raise that submission before the arbitrator who was the adjudicator agreed to by the parties to determine the dispute between them. Mr. Telfer was present before the arbitrator and available to be cross-examined by On Call, but was not challenged because On Call made a conscious decision not to participate in the arbitration hearing. Had On Call made its challenge before the arbitrator, Telus would have been afforded an opportunity to explain its interpretation of the evidence. The evidence On Call now seeks to admit simply cannot be admitted to challenge the factual findings of the arbitrator.
- [59] Furthermore, it is plain that to accede to On Call's request would require us to resolve conflicting interpretations of evidence without the benefit afforded to a fact finder at first instance. This evidence, to be properly understood, required witnesses knowledgeable about the facts who could offer explanations as to the complexities of the tariffs applicable to Telus and relevant to On Call's dispute and whose explanations could be tested by cross-examination.
- [60] On Call has also failed to demonstrate that the evidence sought to be adduced could reasonably be expected to have affected the result. Madam Justice Boyd noted that On Call relied on Mr. Menard's evidence in its challenge to Mr. Telfer's evidence. However, as she stated (at para. 43) On Call could not challenge the Telfer affidavit because it was evidence of the factual matrix on which the arbitrator relied, and immune from review on an application for leave to appeal under s. 31. It is clear that the proposed evidence, if tendered before Boyd J. for the purpose of leave to appeal under s. 31, would have been rejected for the same reason, as an impermissible challenge to the factual matrix relied on by the arbitrator.
- [61] The arbitrator had before him the sworn evidence of Mr. Telfer and others that supported Telus' claim to being owed approximately \$810,670 plus indemnity costs of \$119,243. On Call chose not to challenge that evidence by anything other than the letter it delivered to Telus on the eve of the arbitration hearing. In my view, On Call has, by its decision not to participate in the arbitration, brought this result on itself.
- [62] In sum, On Call has not demonstrated due diligence nor that the evidence could be expected to have affected the result. On Call has, therefore, not satisfied the test in *Palmer* for the admission of fresh evidence, and the evidence it seeks to rely on should not be admitted.
- [63] Given this determination, it is unnecessary to address Telus' application to strike irrelevant portions of the evidence.

B. New Issues

- [64] I turn now to consider whether we should consider the new issues raised by On Call. Those issues, for ease of reference, concern whether the arbitrator erred by allegedly failing to apply the Telecommunications Act, awarding an amount that exceeded the amount Telus claimed, not determining the dispute on its merits, and allowing the Telfer affidavit to be adduced despite its late disclosure.
- [65] As this Court held in *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para. 26:
- [26] It is well-established that an issue not raised at trial and presented for the first time on appeal ought to be "most jealously scrutinized": *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 21; *Baker v. British Columbia Insurance Company* (1993), 76 B.C.L.R. (2d) 367 at para. 15 (C.A.). An appellate court will only permit a new issue to be entertained "where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so": *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 43 B.L.R. (3d) 244 at para. 102 (O.C.A.); cited with approval by the Supreme Court of Canada in *Quan v. Cusson*, 2009 SCC 62.
- [66] As Madam Justice Prowse stated in *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296, 97 B.C.A.C. 62, "the prohibition against permitting one party to raise a new issue on appeal for which the evidentiary groundwork was not fully laid in the trial court is primarily to prevent prejudice to the party against whom the issue is raised" (at para. 24). The rationale for this rule is that "evidence might have been led at trial if it had been known that the matter would be an issue on appeal" (*O'Bryan* at para. 23). New issues are more likely to be heard where they are issues of pure law that can be addressed solely on the record before the court: *Emmett v. Arbutus Bay Estates Ltd.* (1994), 48 B.C.A.C. 26 at para. 9 (C.A.). The onus is on the appellant to persuade the court that all of the facts required to address the issue are before the court as fully as if the issue had been argued at trial: *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 519 at para. 27, citing *R. v. Winfield*, 2009 YKCA 9 at para. 18.
- [67] On Call advanced no arguments in its factums or in its oral submissions as to why it should be permitted to raise any of its new grounds on appeal. On Call also did not advance any arguments in oral submissions to persuade us that all of the facts required to address the issues were already in the record and indeed, by its fresh evidence motion, implicitly acknowledged that all of the facts necessary to decide the issues were not in the record. Further, it submitted for the first time in its reply factum that Mr. Telfer made a material misrepresentation to the arbitrator and that the Final Award was accordingly "improperly procured". On Call says it would constitute an injustice to allow Telus to hide evidence that On Call submits demonstrates that Telus "illegally" charged for ADSL services.

- [68] Telus submits that the entire record and argument before the arbitrator was not put before the chambers judge because only those portions of the record relevant to the specific issues raised by On Call at the hearing were included. Similarly, the entire record was not put before us, even when one takes into account the fresh evidence On Call tendered at the appeal.
- [69] In these circumstances, absent a sufficient evidentiary record and findings of fact (from either the chambers judge or the arbitrator before whom the issues concerning the application of the Telecommunications Act, the correct quantum of the amounts due to Telus, the accuracy of the Telfer remark, and the admissibility of the Telfer affidavit should have been raised), I consider it would not be in the interests of justice to allow On Call to raise these issues at this very late date.
- [70] Having concluded that the fresh evidence should not be admitted and that On Call should not be permitted to raise new issues that were not raised before the chambers judge, I turn to the only ground of appeal properly before us.

C. Did the chambers judge err in refusing to set aside or in denying leave to appeal the Final Award on the basis that the arbitrator committed an arbitral error or erred in law in accepting and relying upon the Telfer affidavit?

- [71] The chambers judge addressed in detail On Call's submissions with respect to the Telfer affidavit. Because this is an appeal from the Supreme Court order, it is, in my view, instructive to set out the judge's findings:
- [26] While On Call did not attend at, nor participate in, the arbitration hearing, it had filed written submissions in advance of the hearing disputing, amongst other things, the accounts submitted by Ms. Zaf[e]ropoulos. Further, on the eve of the arbitration hearing, Ms. Quigley, the president of On Call, sent a letter dated November 15, 2009 to Telus' legal counsel, with a copy to the arbitrator, noting at numbered paragraph 3 of her letter:

Telus has asserted that there was a forbearance ruling on ADSL access from 2000 to 2006. Telus knows full well that this representation is a complete falsehood because there was no such tariff for which the CRTC could render a forbearance hearing.

- [27] At the hearing of this petition, On Call's counsel noted that a copy of that letter had been directed to the arbitrator, as I have just mentioned. While the letter does not specifically state it is a response to the Telfer affidavit, Mr. Ryan submits that on a review of the letter, the arbitrator, Mr. Clemens, knew, or should have known, that On Call was specifically challenging Mr. Telfer's evidence. In light of the fact that Telfer was Telus' own employee, that his evidence was tantamount to expert evidence, and that his evidence concerning the forbearance issue was in direct contradiction to that of On Call, Mr. Ryan submits that the arbitrator ought to have taken one or more steps.

- [28] First, he says the arbitrator should have refused to admit the Telfer affidavit in evidence since it was, in effect, expert evidence which he says could not properly be adduced from an employee of Telus, an individual whose evidence by definition was not the evidence of an independent expert.
- [29] Even accepting the arbitrator's decision to admit the evidence, he submits that in those circumstances, the arbitrator should have approached the Telfer affidavit with a good deal of caution and at least have insisted on calling his own evidence as he is allowed to do so under the rules of arbitration procedure. He submits the arbitrator ought to have called his own expert in the field, one who was independent of the parties, so as to give evidence on the forbearance issue, an issue which Mr. Ryan submits was critical in determining the issues of the accounts between the parties.
- [30] By failing to take these steps, On Call submits the arbitrator "exceeded his powers, thus committing an arbitral error under section 30(1)(a) of the Act".
- [31] In the alternative, On Call says this error was an error in law, justifying leave to appeal the award under section 31.
- [32] Firstly, addressing section 30, I am not persuaded that the arbitrator can be said to have "exceeded his powers in this case". A party can only complain the arbitrator has exceeded his jurisdiction where the arbitrator has purported to rule on an issue which is not before him, thus exceeding the jurisdiction provided for in the parties' arbitration agreement. In this case, I rely on the decision of our Court of Appeal in *BCIT (Student Association) v. BCIT*, 2000 BCCA 62 (an earlier decision to the one I have previously cited), at paragraph 12.
- [33] In this case the precise issues subject to arbitration were not identified in the Letter Agreement of February 14, 2008. Rather, the parties simply agreed in the letter that the arbitration would address "the outstanding issues between them". In his subsequent Interim Award concerning jurisdiction handed down March 13, 2009, Mr. Clemens ruled that:
- ... "the outstanding issues between them" means issues connected to the economic relationship between Teius and On Call with respect to ordering and providing services, including the accounts between the parties and related claims for payments or credits.
- [34] Further, at paragraph 65 of that Interim Award, in reviewing the issues raised, Mr. Clemens noted the various claims raised by On Call, including --
- claims of overcharge, services billed for but not provided, billing contrary to contract or governmental regulation or even fraud.
- [35] I take the reference to "billing contrary to governmental regulation" to be a reference to the tariff and forbearance issues raised and dealt with in the Telfer affidavit which is now the subject of On Call's complaint.

- [36] Thus, in my view, Mr. Clemens' consideration of the Telfer affidavit fell squarely within his jurisdiction as the arbitrator in this matter. The Telfer affidavit addressed the claims of overcharge, services billed but not provided for, as well as the tariffs and forbearance rulings which apply to those various claims. Mr. Clemens was entitled to consider that evidence since it bore directly on the matters in issue in the arbitration.
- [37] As a result, I reject the submission that in accepting and weighing the evidence in that affidavit the arbitrator can be said to have exceeded his powers or his jurisdiction such as to ground a petition under section 30.
- [38] I will now consider the alternative submission, which is that Mr. Clemens' consideration of the Telfer affidavit amounts to an error of law.
- [39] Once again I conclude that that argument must fail, and I say this for several reasons.
- [40] First, as I have noted earlier, the Telfer affidavit was not tendered as expert evidence, nor was it identified as such in the pre-arbitration hearings. Instead, the Telfer affidavit was treated as evidence adduced from an individual with a wealth of experience in the industry who had specific knowledge of many of the tariff issues at play here. I note that despite its knowledge that Telfer's affidavit evidence would be tendered, On Call never specifically objected to the admissibility of that evidence.
- [41] In my view, while Ms. Quigley's letter of November 15, 2009 constitutes a very loud criticism of the accuracy of the information contained in the Telus witness's affidavit, at best it is no more than an oblique challenge to the tendering of that evidence.
- [42] Further, in the context of the case authorities applicable to section 31, it must be recalled that findings of fact or of mixed fact and law are immune to appeal under section 31.
- [43] Relying on Quigley's detailed affidavit setting out the complex history of dealings with Telus and the contracts and tariffs which she says applied from time to time, On Call challenges Telfer's evidence. On Call also relies on a Mr. Menard's affidavit in this respect, which I will deal with later. In any case, there is a challenge to the factual matrix on which the arbitrator relied. But as the case authorities are clear, conflicts over the factual matrix are not ones which can be considered on an application for leave to appeal.
- [44] Finally, and perhaps most significantly, in order to ground an application for leave to appeal under section 31, On Call must persuade the court that the leave application meets one of the conditions precedent set out in section 31(2)(a), (b) or (c).
- [72] On appeal, On Call makes the same arguments it made to Boyd J. and submits she erred in failing to set aside the Final Award on the basis that it was arbitral error for the arbitrator to accept and rely on the Telfer affidavit.

- [73] On Call also repeats its argument before the chambers judge that the Telfer affidavit was opinion evidence. Since Mr. Telfer was not an expert, On Call submitted his evidence should not have been relied on, the arbitrator should have sought independent expert evidence for assistance, and Boyd J. erred in not so finding.
- [74] On Call also characterized the alleged error as an error of law for which leave to appeal should have been granted.
- [75] The context in which the chambers judge decided these issues comes from the Final Award, the relevant passages of which read as follows:
7. The hearing proceeded, as scheduled with direct evidence being presented, pursuant to my directions, by affidavits from Janna-Marie Zaferopoul[o]s, dated November 11, 2009 and November 26, 2009; Allan Dab[b], dated November 11, 2009; Lawrence Chong, sworn November 12, 2009; and Geoff Telfer, sworn November 12, 2009. Each of those witnesses was available at the hearing for cross examination, however no one appeared on behalf of the respondent. Following a careful and detailed review of the affidavits, and keeping in mind the complaints raised by On Call with respect to the billing by TELUS, to the extent they were apparent from the materials placed before me in the jurisdiction hearing, I asked questions of each of the witnesses in respect of their evidence and what I understood to be the concerns and complaints of On Call in respect of the TELUS claims.
 8. I note that in presenting evidence on behalf of TELUS claimed Ms. Zaferopoul[o]s was particularly careful in resolving any uncertain billing issues in favour of On Call, that is where there was an issue with respect to whether a billing to On Call was in doubt, that the billing was not included in the amounts claimed.
 9. I found the evidence from the other witnesses dealing with a number of the technical matters which had been raised by On Call in their correspondence and the submissions made by counsel on their behalf in the jurisdictional hearing to be quite helpful in understanding those issues.
 10. Following an examination of the evidence Mr. Wotherspoon made submissions on behalf of TELUS with respect to the claims made in the statement of claim. I should note that all of the affidavits which were put in evidence before me on this hearing and the written submissions followed by Mr. Wotherspoon at the hearing were provided to On Call in advance of the hearing as required by my pre-hearing directions.
- [76] On Call now says, first, that the Telfer affidavit contained "conclusions of law on how the regulatory framework under the TA [Telecommunications Act] applied to the disputed charges" and that, in accepting that evidence, the arbitrator permitted Mr. Telfer to usurp the arbitrator's role. Second, On Call submits the Telfer affidavit is expert evidence which was admitted contrary to the arbitration rules for the admission of expert evidence. In the alternative, On Call says (as it did in Supreme Court) that Mr. Telfer's evidence should not have been admitted because he lacked the requisite independence to provide an expert

opinion, and that the arbitrator should have conducted his own investigation into the issues in the Telfer affidavit.

[77] Section 1 of the Commercial Arbitration Act defines "arbitral error" as follows:

"arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

- (a) corrupt or fraudulent conduct;
- (b) bias;
- (c) exceeding the arbitrator's powers;
- (d) failure to observe the rules of natural justice;

[78] Specifically, On Call says the arbitrator exceeded his powers or failed to observe the rules of natural justice.

[79] As can be seen from the chambers judge's reasons at para. 40, she rejected the submission that the Telfer affidavit was expert evidence. In my opinion, the chambers judge was correct in her conclusion. Mr. Telfer's evidence was directed at the technical aspects of the services Telus provided to On Call and whether Telus charged for the services at rates charged by tariff or by contract. These were factual issues within Mr. Telfer's knowledge. He was a factual witness, not an expert witness. More importantly, On Call's challenge to the admission and reliance on the Telfer affidavit was, as Telus submits, a challenge to the factual matrix that is immune from review.

[80] On Call's submission that the Telfer affidavit contains conclusions of law is also without merit. On Call has not identified the legal conclusions or opinions the arbitrator is said to have relied on. Indeed, the only reference to Mr. Telfer made by the arbitrator in the Final Award was as one of the witnesses who dealt with "technical matters" which he found to be "quite helpful" in understanding the matters raised by On Call at the jurisdictional hearing.

[81] On Call nevertheless argued that Mr. Telfer's statement at para. 10 that, prior to March 2006, On Call had "subscribed to a forborne Internet ADSL service" went to the ultimate issue in the case. It says the arbitrator failed to apply adequate scrutiny to this statement and did not investigate the existence of a forbearance decision to substantiate what On Call interprets Mr. Telfer's statement to mean – that ADSL services were forborne from tariff application from 2000 to March 2006.

[82] The existence or not of a forbearance decision was the focus of On Call's challenge to the Final Award at the hearing of the appeal. There is no doubt that On Call has demanded many times that Telus produce a forbearance decision which it says is referred to in para. 10 of the Telfer affidavit. Telus says, and I accept, that it did not respond to those demands because the Final Award had been made and there was no remaining live issue between the parties. There followed bankruptcy proceedings in which On Call was adjudged bankrupt in August

2010. The trustee in bankruptcy did not demand production of the forbearance decision and the appeal was held in abeyance until August 2012.

- [83] Because On Call made the existence of a forbearance decision the centrepiece of this appeal, Telus provided a detailed explanation by reference to the Menard affidavit and an affidavit from Mr. Dabb, Telus' Vice President, Litigation. Attached to the Dabb affidavit is a letter addressed to Ms. Quigley's counsel from Mr. Dabb.
- [84] I need not review the details of Telus' explanation because these are factual matters that would have been addressed by the arbitrator had On Call raised the issue at the appropriate time. All that was required was for On Call to ask Mr. Telfer at the arbitration, "What is the meaning of your reference to forbearance in paragraph 10 of your affidavit?"
- [85] However, for the purposes of this appeal, the question is whether the chambers judge erred in holding that the arbitrator did not commit an arbitral error by accepting the Telfer affidavit and by not independently investigating the forbearance issues. In my opinion, it cannot be said the chambers judge so erred. As I have said, the arbitrator had before him the sworn evidence of Mr. Telfer and others (most significantly Ms. Zaferopoulos). I do not consider it open to us to overturn the chambers judge's factual finding that Ms. Quigley's letter of November 15, 2009 was at best no more than oblique challenge to the tendering of the Telfer affidavit and accordingly, insufficient notice to the arbitrator as to the precise nature of On Call's challenge. In my view, it is untenable for On Call to argue that the arbitrator committed arbitral error by not investigating an issue that was never squarely raised by On Call.
- [86] Nor in my opinion do these issues constitute a question of law sufficient to ground leave to appeal the award pursuant to s. 31 of the Commercial Arbitration Act. On Call did not articulate a question of law arising from the Telfer affidavit issues. As noted above, leave may only be granted on a question of law alone, not on a question of mixed fact and law.
- [87] On Call did not raise this issue as an alleged error of law before the chambers judge. Since this is an appeal from the chambers judge's decision not to grant On Call leave to appeal, it can hardly be said that she erred in refusing leave on a question of law not argued before her.
- [88] In my opinion, On Call has failed to establish that the chambers judge erred in the exercise of her discretion to refuse leave to appeal.
- [89] It will be obvious that On Call has raised many issues on this appeal, none of which I find meritorious. On Call has failed to establish, as it must do, that the chambers judge erred in dismissing On Call's petition or in granting Telus' petition.

[90] For all these reasons, I would dismiss the appeal with costs to Telus. I have not overlooked Telus' submission that it should be awarded special costs by reason of On Calls' improper allegations of fraud. In my view, it is time to put this protracted dispute to an end. On Call has been adjudged bankrupt and is presumably incapable of paying any costs award. Telus' request for special costs would require us to entertain written submissions from the parties which would only prolong the agony of deferred finality.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Neilson"

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