

CITATION: Belokon v. The Kyrgyz Republic et al., 2015 ONSC 5918
COURT FILE NO.: CV-15-10890-00CL
DATE: 20150925

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
VALERI BELOKON)	Peter J. Cavanagh and Chloe Snider, for the
Applicant)	Applicant
)	
– and –)	Aaron Rubinoff and John Siwec, for the
)	Respondent The Kyrgyz Republic
THE KYRGYZ REPUBLIC,)	
<u>KYRGYZALTYN JSC</u> and CENTERRA)	Matthew Latella, for the Respondent
GOLD INC.)	Kyrgyzaltyn JSC
)	
Respondents)	No one appearing for Centerra Gold Inc.
)	
)	HEARD: August 20, 2015
)	

REASONS FOR DECISION

JUSTICE W. MATHESON

[1] The applicant Valeri Belokon moves to strike out the affidavit of Rahat Aiylicheva sworn June 25, 2015, on the basis that it may prejudice the fair hearing of this application, is scandalous, frivolous or vexatious, or is an abuse of process.

[2] The respondent, the Kyrgyz Republic (the “Republic”), delivered the Aiylicheva affidavit in response to this application under the *International Commercial Arbitration Act*, R.S.O. 1990, c. 19 (the “ICAA”). The applicant seeks an order under the ICAA recognizing and making enforceable an arbitral award dated October 24, 2014 (the “Arbitral Award”) arising from an arbitration under the UNCITRAL rules.

[3] Ordinarily, the question of whether evidence should be struck out is properly left to the judge hearing the application on its merits, at the time of that hearing. However, in very limited circumstances, motions to strike out evidence may be granted by a different judge, at an earlier stage. This is one of those exceptional cases.

Key background

[4] As pleaded in his notice of application, Mr. Belokon is a Latvian citizen who invested in the Republic through the purchase of a bank – the Manas Bank. The Republic is a sovereign nation located in central Asia.

[5] Mr. Belokon commenced arbitration proceedings in 2011, alleging that the Republic expropriated his investment in the Manas Bank. He relied on a bilateral investment treaty entitled: Agreement between the Government of the Republic of Latvia and the Government of the Kyrgyz Republic on the Promotion and Protection of Investments (the “BIT”). He alleged breach of the BIT.

[6] The Republic did not challenge the Arbitral Tribunal’s jurisdiction in general. It did argue that part of the relief sought was not within the Arbitral Tribunal’s jurisdiction to order, but the Arbitral Tribunal did not grant that relief. The Republic also unsuccessfully challenged two members of the three-member arbitration panel. The parties agreed that the Secretary-General of the Permanent Court of Arbitration would decide the challenges. After receiving submissions, the Secretary-General dismissed the challenges.

[7] The procedure followed by the Arbitral Tribunal is set out in its Award, and included notice, pleadings, written and oral evidence and argument.

[8] As set out in the Arbitral Award, the main focus of the Republic’s defence to the claims made in the arbitration was alleged criminal activity of Manas Bank. In asserting that Government control of Manas Bank was and remained justified, the Republic made “grave allegations” to the effect that the Bank, the applicant and his employees “were guilty of money laundering and other serious criminal activities.” The Republic wishes to pursue those allegations in this Ontario application as well.

Arbitral Award

[9] Among other findings, the Arbitral Tribunal found that the Republic had indirectly expropriated the Manas Bank in violation of Article 5 of the BIT. The course of events, as found in the Arbitral Award, detailed the circumstances giving rise to this conclusion. In support of his claim for expropriation in contravention of the BIT, the applicant relied on five measures implemented by the Republic. In brief summary, the Arbitral Tribunal’s findings regarding those five measures were as follows:

- (1) The initial imposition of temporary administration in April 2010, after a revolution: the applicant did not dispute the need to take emergency measures, but argued “convincingly” that the temporary administration went beyond what was required to provide physical security to Manas Bank.

- (2) The ongoing imposition of temporary administration: the Arbitral Tribunal found that the Republic failed to respect the dividing line between general regulatory measures and the need not to be arbitrary, discriminatory or disproportionate.
- (3) The re-imposition of a temporary administration: the Tribunal found that this step was not compliant with Kyrgyz law.
- (4) The imposition of sequestration: The Republic claimed that this was justified by criminal proceedings against the Manas bank. The Arbitral Tribunal found those proceedings had achieved “very little save for two dismissals by the Kyrgyz courts – and the undeniable and effective destruction of the [applicant’s] investment.” The Arbitral Tribunal held the measure had “been pursued in an abusive and discriminatory fashion.”
- (5) The extension of the sequestration: The Arbitral Tribunal found this to be unjustified, concluding as follows: “A state cannot be said to be acting in the public interest and exercising its police power when it takes actions that are not authorized by its internal laws.”

[10] On expropriation, the Arbitral Tribunal concluded as follows:

215. The Tribunal concludes that the ongoing imposition of an administrative and sequestration regime on Manas Bank, with no end in sight, for a period of at least four year amounts to a disguised taking and expropriation of Manas Bank. The taking has not been for public purpose but rather serves the narrower interests of the Government. The [Republic] has not compensated the [applicant] for his lost property.

[11] The Arbitral Tribunal also found that the Republic had breached Articles 2(2) and 2(3) of the BIT by failing to provide the applicant with fair and equitable treatment and by acting in a manifestly arbitrary and unreasonable manner.

[12] The Arbitral Tribunal addressed the Republic’s evidence and submissions alleging that the applicant had engaged in criminal activities. In so doing, it considered the evidence from witnesses tendered by the Republic, including from Ms. Aiylicheva, and expert testimony from the same expert referenced in the Aiylicheva affidavit, East Star Capital, among other evidence.

[13] The Tribunal rejected the allegations made by the Republic, and found as follows:

158. If probative and substantial evidence of Manas Bank having being actively involved in money laundering had been produced and presented to the Tribunal, the claim under the BIT may have been defeated. It scarcely needs to be said that

investment protection is not intended to benefit criminals or investments based on or pursued by criminal activities.

...

162. It may of course be the case that state authorities are in a much better position than an international body to investigate allegedly criminal activities, including money laundering, by a subject of that state. But if state authorities, having thus been in a position to deploy their considerable powers into investigating criminal activities, come up empty handed to the extent that the local courts more than once have squashed the evidence and remanded the case for a further and more careful investigation, it is difficult to see how an international tribunal, in the absence of concrete evidence, could reach a different conclusion.

...

167. It should be recalled that the Kyrgyz prosecutors have had access to the records at Manas Bank from April 2010, but have failed successfully to mount a criminal case in the [Republic]. Nor was documentary evidence of wrongdoing presented at the December 2013 [arbitration] hearing.

...

170. ...From the evidence presented to it, the Tribunal is unable to deduce or infer that the [Republic] has proved that Manas Bank was involved in money laundering activities. Consequently, the Tribunal finds that [the applicant] is entitled to avail himself of the remedies of the BIT.

...

270. Criminal allegations against [the applicant] in the absence of evidentiary support (or even cogent explanations) infringe on his rights to enjoy the benefits of his investment. A particular enjoyment of property is the right to be associated with that investment. Where that association is improperly characterised as criminal, the impairment is evident. The perfunctory but persistent allegations against [the applicant] have curtailed his ability to manage his investment.

[14] The Arbitral Award required that the Republic pay US\$15,020,000 in respect of the value of the property that was expropriated, together with interest, fees and costs of the Arbitral Tribunal and the applicant's legal fees and disbursements.

[15] On January 23, 2015, the Republic commenced proceedings before the Paris Court of Appeal seeking the annulment of the Arbitral Award. Since Paris was the seat of the arbitration, the Paris Court of Appeal has jurisdiction to review the Arbitral Award and determine whether it should be annulled under French law. The Republic has filed an affidavit before me that indicates that the annulment proceedings are expected to pursue two grounds for relief. First, the Republic relies on the failure to disqualify the two tribunal members who had been challenged by it. Second, it relies on the alleged money laundering and other criminal activities. The same Aiylicheva affidavit has been filed in the annulment proceedings, regarding the second issue.

[16] The annulment proceedings are ongoing. The Republic has also sought a stay of the Arbitral Award from the Paris Court of Appeal. No decision about a stay has been reported to me.

The Aiylicheva affidavit

[17] As set out in her affidavit, Ms. Aiylicheva is a Chief Inspector of the Banks Inspection Division of the National Bank of the Republic and was involved in an audit and investigation of Manas Bank. The investigation began in April 2010, and several of the steps taken by the Republic applied to all foreign-owned banks, not just the Manas bank. The affidavit speaks about various historical events and some facts apparently gleaned from the investigation. The affidavit also contains some speculation, argument and weakly-founded conclusions.

[18] Despite repeated suggestions in the Republic's factum that the Aiylicheva affidavit contains "fresh" evidence, the affidavit does not demarcate any specific facts that were discovered after the Arbitral Tribunal hearings or Award. At the hearing of the motion before me, the Republic's counsel fairly agreed with this observation and indicated that they were relying on a comparison between the affidavit and the witness statement provided by this witness in the arbitration. I reject that approach. That witness statement is shorter, and certainly contains less conjecture, but it alone does not comprise the evidence before the Arbitral Tribunal on the issue of alleged criminal activity.

[19] In any event, the question of fresh evidence is beside the point. The evidence before me about the annulment procedure indicates that the Republic is entitled to put forward evidence in that process, and does not say it must meet a test for fresh evidence. Nor does the issue before me turn on that question.

[20] The applicant agrees that the Aiylicheva affidavit forms part of the annulment proceedings, and can be included in the responding material on this application in that capacity. However, the Republic does not simply seek to show what has transpired in the annulment proceedings. It seeks to rely on the Aiylicheva affidavit in support of a request that the Ontario

court consider and decide that the applicant has actually engaged in the alleged criminal activities. The Republic submits that the alleged criminal activity, which was not proved in the arbitration, ought to foreclose the recognition and enforcement of the Arbitral Award in Ontario.

Discussion

[21] The applicant relies on subparagraphs (b) and (c) of Rule 25.11, which provide that the court may strike out an affidavit if it is scandalous, frivolous or vexatious, or is an abuse of the process of the court.

[22] Generally, issues regarding the admissibility of affidavits filed on an application should be dealt with by the judge hearing the application, at that time: *876502 Ontario Inc. v. IF Propco Holdings (Ontario) 10 Ltd.* (1997), 37 O.R. (3d) 70 (Gen. Div) at p. 77; *Harding v. Spicer*, 2012 ONSC 4769 at para. 6.

[23] The parties agree that this general rule is subject to an exception, which is described in the Republic's factum as follows:

[34] The general rule under Rule 25.11 with respect to affidavits is subject to the following exception. An affidavit, or parts of an affidavit, will be struck out where the material is clearly scandalous and vexatious such as where it is clearly irrelevant and impugns the behaviour of a party. Only in such clear instances will the court intervene in advance of the application. [Citations omitted; emphasis added.]

[24] The applicant submits that this is one of those exceptional situations. Bearing in mind that questions of relevance are ordinarily best left to the judge dealing with the merits of the application, all or part of an affidavit may still be expunged in advance of that hearing if it introduces "matters that are scandalous in the sense that they are so extraneous to the issues in the application that their purpose and effect can only be to create prejudice against the [the opposite party]": *Albert v. York Condominium Corp. No. 46*, [2002] O.J. No. 1798 at para. 31.

[25] Where an affidavit is clearly irrelevant and seriously impugns the behaviour of the opposite party, it places that party in the invidious position of having to decide between responding to the irrelevant material with further irrelevant material or leaving serious allegations of misconduct unanswered on the record: *Albert v. York Condominium Corp. No. 46*, at paras. 26-28.

[26] This is such a case. Obviously, allegations of serious criminal activity impugn the applicant. If the Aylchieva affidavit stands, the applicant must respond to it or risk a serious finding against him.

[27] The applicant submits that the Aylchieva affidavit marks the first step in a process through which the Republic seeks to litigate, in Ontario, the question of whether or not the

alleged money laundering and other criminal activity occurred. The applicant submits that such a “trial within a trial” is clearly irrelevant to the questions to be decided on this application under the ICAA and would indeed be scandalous and prejudicial.

[28] The concern about a trial within a trial is not overstated. The Republic confirmed at the hearing of this motion that that is precisely what is intended. In response to questions from me, counsel advised that the Republic wants to ask the Ontario court to determine whether, on a balance of probabilities, the applicant committed the alleged criminal acts. When asked what law would apply to that determination, counsel indicated that it would be the same law the Arbitral Tribunal applied in considering these allegations in the arbitration. The Republic seeks to prove what it failed to prove before the Arbitral Tribunal, to avoid enforcement in Ontario.

[29] However complicated the process of defending the criminal allegations here may be, the first question that must be addressed on this motion is whether the Aiykchieva affidavit is clearly irrelevant to this application. If it is relevant, or not clearly irrelevant, as the Republic contends, it will not be struck out at this stage.

[30] The question of relevance must be considered within the context of the grounds upon which the Republic is resisting recognition and enforcement of the Arbitral Award in Ontario. The Republic raises a threshold objection in that regard. It submits that it ought not be obliged to decide the precise grounds upon which it will resist this application at this early stage. In support of that submission it relies on a class action case, *Andersen v. St. Jude Medical Inc.*, [2002] O.J. No. 4478, 2002 CanLII 32019 (ONSC) at para. 10. That case arises in the context of a certification motion, where the judge deciding the motion had not been informed of the grounds under which the defendants intended to challenge certification. For this reason, among other reasons suggesting that the evidence was relevant, the court declined to strike out portions of an affidavit.

[31] This ICAA application is not comparable to a class action certification motion. A certification motion is ordinarily the first major step in a proposed class action. It ordinarily precedes a determination of the merits of a claim. In that context, counsel might persuade a judge that the relevant issues were still being explored and the grounds for resisting certification did not need to be known that early in that process. In contrast, in this case, the parties have already had a full hearing about the merits of the claim that gave rise to the Arbitral Award and the Republic is obviously familiar with its procedural options. The Republic should be well able to decide upon what basis recognition and enforcement is resisted under the ICAA. Indeed, despite its preliminary objection, the Republic has made submissions about the specific sections of the ICAA under which it submits that the Aiykchieva affidavit is relevant, or not clearly irrelevant. They are addressed below.

Recognition and enforcement under the ICAA

[32] There is no dispute that the ICAA incorporates the UNCITRAL Model Law on International Commercial Arbitration, nor that Article 36 of the Model Law provides the only

grounds upon which the recognition and enforcement of an international arbitration award may be refused.

[33] The purpose of enacting the Model Law in Ontario was to establish a climate where international commercial arbitration could be resorted to with confidence that arbitrations conducted in accordance with agreements between parties would be enforced subject only to the limited defences under the Model Law: *Schreter v. Gasmac Inc.* (1992), 7 O.R. (3d) 608 (Gen. Div.) at p. 619.

[34] The Republic submits that the Aylchieva affidavit is relevant to three of the defences to recognition and enforcement under the Model Law, as follows:

- (i) that the arbitration agreement is “not valid under the law to which the parties have subjected it” (Article 36(1)(a)(i));
- (ii) that the Arbitral Award deals with a dispute “not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration” (Article 36(1)(a)(iii)); and,
- (iii) that the recognition and enforcement of the Arbitral Award would be contrary to the public policy of Ontario (Article 36(1)(b)(ii)).

[35] The Republic further submits that the Aylchieva affidavit is relevant to a potential request to adjourn the application under Article 36(2) of the Model Law pending the disposition of the annulment proceedings, which are estimated to be completed in 1.5 - 2 years.

Article 36(1)(a)(i)

[36] Article 36(1)(a)(i) applies where an arbitration agreement is invalid. However, in this case, the arbitration agreement is a bilateral treaty – the BIT – and the Republic does not submit that the BIT is invalid. It submits that the “fresh evidence” in the Aylchieva affidavit demonstrates that Manas Bank “does not warrant investment protection under the BIT and thus invalidates the arbitration agreement between the parties.” This is another way of saying that the defence of criminal activity, which failed before the Arbitral Tribunal, ought to succeed and disentitle the applicant from obtaining any relief under the BIT. It is not an issue of validity of the treaty, and does not provide a foundation for any potential relevance of the Aylchieva affidavit.

Article 36(1)(a)(iii)

[37] Article (1)(a)(iii) applies where the dispute did not fall within the terms of the submission to arbitration or contains decisions that were outside that scope.

[38] For a potential defence under this subsection, the Republic relies on a statement made by the Arbitral Tribunal in its reasons for decision, where the Tribunal said that investment protection under the BIT is not intended to benefit criminals or investments based on or pursued by criminal activities. The passage relied upon by the Republic, read in the context of the reasons of the Arbitral Tribunal, clearly relates to the potential merit of the defence based on criminal activity, not to whether the dispute falls within the submission to arbitration.

[39] The Arbitral Award makes it clear that there was no jurisdictional issue raised that precluded proceeding under the BIT. As it stated at paras. 182-6 of its reasons for decision:

JURISDICTION AND ADMISSABILITY

182. Pursuant to Article 9(2)(d) of the BIT, the [applicant] availed himself of the opportunity to submit the dispute to:

An ad hoc arbitral tribunal constituted under the Arbitration rules of [UNCITRAL], unless otherwise specified by the parties to the dispute.

183. The [applicant] used this option to initiate these proceedings.

184. The Parties subsequently confirmed that the 1976 version of the UNCITRAL Arbitration rules apply to this case.

185. The BIT does not identify a seat of arbitration. Article 16 (1) of the UNCITRAL Rules provides that unless the parties have agreed where the arbitration is to be held, “such place shall be determined by the Arbitral Tribunal”. After consulting with the Parties, the Tribunal selected Paris as the seat of arbitration.

186. The Respondent has not challenged the Tribunal’s jurisdiction in general, but has argued that three elements of the relief sought by the [applicant] “are not within the competence of the arbitration Tribunal and are therefore inadmissible”. The basis for this objection is that certain of the actions of which the [applicant] complains are not attributable to the Respondent, or that the relief so requested is not available under the terms of the BIT. These objections essentially pertain to the merits of the dispute and will be examined as such. [Emphasis added; footnotes omitted.]

[40] With respect to the three elements of relief that were objected to, none of that relief was granted, and it therefore cannot form a basis for resisting enforcement or for the Aiylicheva affidavit.

[41] The Republic submitted, on the motion before me, that it was open to it to challenge the jurisdiction of the Arbitral Tribunal in this application even if the challenge was not made before the Arbitral Tribunal. Even assuming that is the case, the argument before me was founded on a statement made by the Arbitral Tribunal itself. It is not open to the Republic to take that statement out of context. It forms part of the Arbitral Award. On a reading of the entire Award, it is clear that the alleged criminal activities were the main defence launched by the Republic to the claim before the Arbitral Tribunal. The statement made by the Arbitral Tribunal related to the potential impact of that defence. I accept for the purposes of this motion that the Aiychieva affidavit is relevant to that defence on the merits of the Arbitral Award. It is not, however, even potentially relevant to the ground to resist recognition and enforcement under Article 36(1)(a)(iii). It is an attempt to reopen the merits of the Arbitral Award in these Ontario proceedings, which is not permitted: *United Mexican States v. Cargill, Inc.*, 2011 ONCA 622, 107 O.R. (3d) 528 at paras. 47, 53.

Article 36(1)(b)(ii) – public policy

[42] As set out in *Schreter* at para. 50, the public policy defence under Article 36(1)(b)(ii) is intended to guard against the enforcement of an award that offends our local principles of justice and fairness in a fundamental way because the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal that cannot be seen to be tolerated or condoned by our courts.

[43] The public policy ground should be narrowly construed and should apply only where enforcement would violate our “most basic notions of morality and justice”: *Schreter* at pp. 623-4, citing *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984).

[44] Further, the public policy defence cannot be used to challenge a foreign arbitral award on its merits. As the Court in *Schreter* held at p. 623:

[I]f this court were to endorse the view that it should reopen the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute.

[45] The Republic initially submitted that the Arbitral Award must be “analyzed through the lens of the law of Ontario, rather than through law applied by the [Arbitral Tribunal] in rendering its award.” The Republic submitted that because money laundering is a crime in Ontario it constitutes a ground to resist recognition and enforcement under the public policy defence. In support of this submission, it put forward s. 462.31 of the *Criminal Code*, R.S.C. 1985, c. C-46. However, in oral submissions, counsel to the Republic clarified that it would be asking the

Ontario court to adjudicate upon the alleged criminal activities of the applicant based on the same law applied by the Arbitral Tribunal, Kyrgyz law, not the law applicable in Ontario.

[46] The Republic submitted that given the gravity of the criminal allegations, the Aylchieva affidavit should be considered by the Ontario court in order to ensure that the Ontario court does not facilitate the recognition and enforcement of a foreign arbitral award that is tainted by criminal activity and therefore contrary to Ontario's public policy. However, it also submitted that it did not need to actually prove that a crime had been committed, just that enforcement would offend our principles here in Ontario. This highlights the prejudicial nature of this proposed approach on the applicant.

[47] Even though the Republic acknowledged that the public policy defence cannot be used to challenge a foreign arbitral award on its merits, the Republic submitted that it was not attempting to do so. Quite the contrary, I conclude that this is exactly what the Republic wishes to do. It is attempting to "repackage" its main defence at the arbitration as a public policy objection to recognition and enforcement. It has put forward an affidavit from one of the witnesses whose evidence was received by the Arbitral Tribunal on the very allegations of alleged criminal activity that the Republic wishes to pursue here. It failed to prove those allegations before the Arbitral Tribunal. It seeks to try again in these Ontario proceedings. If a party could simply raise criminal allegations in an arbitration, fail to prove them, and embark on a trial of those same issues to resist enforcement, it would significantly undermine the purpose of the ICAA.

[48] It is well settled that the public policy defence cannot be used to challenge a foreign arbitral award on its merits. The Aylchieva affidavit is not relevant or potentially relevant to the public policy defence.

Article 36(2)

[49] Lastly, the Republic relies on Article 36(2) of the Model Law, which provides that if an application for setting aside or suspension of an award has been made to a court of the country in which the arbitral award was made, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision. The Republic submits that it may seek an adjournment pending disposition of the Paris annulment proceedings.

[50] There is no issue between the parties that the Republic may, on this application, put before the Ontario court a complete record of the annulment proceedings in Paris. This would include the Aylchieva affidavit, which has been filed in those proceedings. In that context, the Ontario court could consider the Aylchieva affidavit. This use of the affidavit does not give rise to the concern raised by the applicant that the Ontario court would be invited to conduct a trial about whether or not the alleged criminal activity took place. Obviously, the court considering such an adjournment request would not permit the Republic to relitigate the merits of the Arbitral Award with the goal of obtain a finding of criminal conduct in order to secure an adjournment. I am therefore not persuaded that the Aylchieva affidavit, in its proposed role rather than as part

of the annulment proceedings, is relevant or potentially relevant to an adjournment request under this Article.

[51] I therefore conclude that the Aiylicheva affidavit is clearly irrelevant to the defence of this application, and it is certainly scandalous. Its inclusion will likely cause what counsel to the Republic agreed could be a “massive” trial within this proceeding about the criminal allegations. I therefore exercise my discretion under Rule 25.11 and strike out the Aiylicheva affidavit. Given that outcome, I have not addressed the abuse of process ground also advanced by the applicant.

Order

[52] I grant the motion and strike out the Aiylicheva affidavit. In doing so, I emphasize that this does not foreclose the Republic from including that affidavit in its responding application materials solely for the purpose of including a complete record of the annulment proceedings before the Paris Court of Appeal.

[53] Further to the agreement between the parties on costs, the applicant, as the successful party, shall have his partial indemnity costs, fixed at \$25,000, paid by the Republic. The other respondent appearing on this motion, Kyrgyzaltyn JSC, neither seeks costs nor is ordered to pay costs.

Justice W. Matheson

Released: September 25, 2015

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ONTARIO

SUPERIOR COURT OF JUSTICE

VALERI BELOKON

Applicant

– and –

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC
and CENTERRA GOLD INC.

Respondents

REASONS FOR DECISION

Justice W. Matheson

Released: September 25, 2015