CITATION: The Russian Federation v. Luxtona Limited, 2021 ONSC 4604
DIVISIONAL COURT FILE NO.: 011/20
DATE: 20210630

2021 ONSC 4604 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MacLeod R.S.J., D.L. Corbett and Kristjanson JJ.

B E T W E E N:	)	
	)	
THE RUSSIAN FEDERATION	)	*John Terry, Myrian Seers, Melody Burke and*
	)	*Emily Sherkey*, for the Appellant
Appellant (Applicant)	)	
	)	
- and -	)	
	)	
LUXTONA LIMITED	)	*Lincoln Caylor, Ranjan K. Agarwal and Chris*
	)	*Gibson* for the Respondent
Respondent (Respondent)	)	
	)	
	)	**Heard by Videoconference:** Dec. 17, 2020

REASONS FOR DECISION

D.L. CORBETT J.:

[1] The Russian Federation brought an application under the UNCITRAL Model Law on International Commercial Arbitration (enacted in Ontario by Schedule 2 of the *International Commercial Arbitration Act* (the "ICAA")), to set aside an interim arbitral award finding that the Russian Federation had consented to arbitrate Luxtona's claims. The Russian Federation sought to admit evidence on the application that had not been before the tribunal. This is an appeal from the interlocutory decision of Penny J. declining to admit the Russian Federation's evidence (2019 ONSC 7558).

Background

[2] The respondent, Luxtona, is a former shareholder of Yukos (an energy company based in Russia). It alleges that the appellant, Russia, violated provisions of the *Energy Charter Treaty* relating to protection of investments, including Luxtona's investment in Yukos. Luxtona claims damages of US $701 million.

[3] Russia is a signatory of the *Treaty* but has never ratified it. Luxtona argues that, under article 45(1) of the *Treaty*, Russia agreed provisionally to apply the *Treaty*, including its arbitration

provisions, to the extent that this provisional application was not inconsistent with Russia's constitution, laws and regulations. Russia takes the position that it did not agree to apply the *Treaty* provisionally and that the arbitration provisions of the *Treaty* are inconsistent with Russian law.

[4] The parties appointed an arbitral tribunal, seated in Toronto, Ontario, Canada. The tribunal heard evidence and arguments on the jurisdictional issue. Both sides put forward extensive evidence before the tribunal on relevant Russian law. In a lengthy interim award, the tribunal found that it has jurisdiction to arbitrate Luxtona's claims against Russia.

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[5] Russia then applied to the Ontario Superior Court of Justice for an order setting aside the tribunal's interim award. The application was assigned to Dunphy J. on the Superior Court Commercial List.

[6] In support of its application, Russia filed new expert evidence on Russian law, evidence that had not been before the tribunal. Luxtona objected. Dunphy J. found that Russia was entitled as of right to adduce evidence and thus dismissed Luxtona's objection to it (2018 ONSC 2419).

[7] Dunphy J. left the Commercial List for another assignment and the application was re-assigned to Penny J., who remains seized of it. The parties asked Penny J. to decide further evidentiary issues respecting the new evidence adduced by Russia. During that inquiry, Penny J. raised questions about the legal basis for filing the new evidence in the first place. Penny J. concluded that, as the application judge, he was not bound by the prior interlocutory ruling of Dunphy J. He concluded that Russia was not entitled as of right to file evidence on the application, and could only do so if it could meet the stringent test for admission of "fresh evidence" or bring itself within one of the exceptions to the principle that review of an arbitral decision is based on the record before the tribunal.

Issues on Appeal

[8] There are two issues for this court to decide:

a. Did the application judge err in revisiting a previously decided issue?

b. If the answer is no, did the application judge err in finding that Russia is not entitled as of right to adduce evidence that was not before the tribunal?

Disposition

[9] I conclude that generally an application judge is not bound by evidentiary rulings of a prior application judge. While it is to be hoped that prior rulings can be used so that matters are not re-litigated when circumstances force a change of judge, there is but one application judge, in the same way that there is but one trial judge for a trial, and a judge at first instance generally may change his interlocutory rulings at any point before he is *functus officio*.

[10] On the merits of the ruling, I conclude that the hearing before the application judge is a hearing *de novo*, and the parties are not restricted to the record they placed before the tribunal on the jurisdictional issue. I so conclude because of the language of the *Model Law* and the consensus

in the international jurisprudence on this point. Ontario administrative law favours a deferential review of arbitral decisions, but this approach is not invariable, and the Supreme Court of Canada has been clear that the presumptive deferential review can be displaced when the legislature shows a contrary intention by the words chosen to describe the court's role. Further, it is desirable that there be a measure of consistency in the approach taken to these issues across jurisdictions, and this goal is reflected in language in the ICAA adopted by the legislature to implement the *Model Law*. The international consensus on this issue strongly supports the conclusion that the application below is a hearing *de novo* and not a review of the tribunal's decision. Therefore, for the reasons that follow, I conclude that the application judge erred on this point and that the parties are entitled to adduce evidence on the application as of right.

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Jurisdiction and Standard of Review

[11] Since the arbitration is seated in Ontario, Ontario courts have jurisdiction over applications arising from the arbitration by virtue of the *UNCITRAL Model Law on International Arbitration* (the "*Model Law*"), which has been enacted into law in Ontario.[1] The *Model Law*, arts. 6 and 16(3), provides that any party may apply to the court "to decide the matter" of the tribunal's jurisdiction where the tribunal has decided that it has jurisdiction in a preliminary award.

[12] The application judge's ruling is interlocutory and thus any appeal from it lies to this court, with leave, pursuant to s.19(1)(b) of the *Courts of Justice Act*.[2] Leave was granted on August 4, 2020 (per Backhouse, D.L. Corbett and Pattillo JJ.) (2020 ONSC 4668).

[13] The standard of review in this court of the application judge's interlocutory decision is correctness on questions of law and palpable and overriding error on questions of fact. Mixed questions of fact and law are reviewable in this court on a deferential standard except that any "extricable errors of law" are reviewable on a correctness standard.[3]

Issue #1: Was the Court Below Bound by the Prior Interlocutory Ruling?

[14] I need go no further than the decision of the Court of Appeal written by Paciocco J.A. in *R.* v. *R.V.* to explain why the application judge had the jurisdiction to revisit the prior interlocutory ruling.[4] That is because previous application judge could have reconsidered the ruling himself, at any point up to the time he became *functus officio* for the entire application.[5] "The power of a trial judge to reconsider earlier rulings made within the trial they are presiding over is clear."[6] The Court of Appeal lists a number of circumstances that could lead a trial judge to change a ruling, including: "A trial judge may also correct a decision that they discover was made in error."[7]

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[1] *International Commercial Arbitration Act, 2017*, SO 2017, c. 2, Scheds. 2 and 5.
[2] *Courts of Justice Act*, RSO 1990, c. C.34, s.19(1)(b).
[3] *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, para. 37; *Housen* v. *Nikolaisen*, [2002] SCR 235, paras. 8, 10, 19, 26-37.
[4] *R.* v. *R.V.*, 2018 ONCA 547, paras. 92-108.
[5] *R.* v. *R.V.*, 2018 ONCA 547, para. 100.
[6] *R.* v. *R.V.*, 2018 ONCA 547, para. 98.
[7] *R.* v. *R.V.*, 2018 ONCA 547, para. 103.

[15] There is no difference in status between a trial judge and an application judge. Where there is a change in application judge, his discretion to revisit past rulings is coextensive with that of a trial judge in an analogous position.

[16] The appellant pointed to situations described by Paciocco J.A. in *R.* v. *R.V.* and argued that the circumstances in this case do not fit within those examples – no new evidence has been discovered and there has been no change of circumstances respecting the record or the law. This argument fails to address the clear statement by Paciocco J.A. that a trial judge may correct an erroneous decision that he has made. That principle is not qualified, nor should it be, except that the trial judge should, of course, exercise this discretion "in the interests of justice".

[17] The application judge was satisfied that the prior ruling was in error. He concluded that the error would involve the parties assembling and the court adjudicating upon a substantial additional record that should not be considered on a review of the tribunal's interim award. Thus, he concluded that it was in the interests of justice to revisit the ruling so that the parties and the court would not waste further time and money assembling a potentially extensive record that was not admissible. On this logic this was a sound basis for the application judge to revisit the earlier ruling and he had the jurisdiction to enter into this inquiry and to make the ruling that he did.

Issue #2: The Proper Record Before the Application Judge

[18] The application judge found that he was bound by the Court of Appeal decision in *Mexico* v. *Cargill* and that, as a result, in Ontario, an application to review an interim arbitral award is a review and not a hearing *de novo*.[8] The respondent argues that the application judge was correct in this analysis, essentially for the reasons given by the application judge.

[19] The appellant argues that *Mexico* v. *Cargill* is not dispositive. It concerned a different kind of proceeding under the *Model Law*, and the Court of Appeal's language does not encompass the current application. The appellant argues that English authority, followed in several *Model Law* jurisdictions, holds that the jurisdictional application is a hearing *de novo*, and therefore the parties are not restricted to the record that was before the tribunal.

The Statutory Framework

[20] Article 16 of the *Model Law* provides:

> **Competence of arbitral tribunal to rule on its jurisdiction**
>
> (1) <u>The arbitral tribunal may rule on its own jurisdiction</u>, including any objections with respect to the existence or validity of the arbitration agreement….
>
> ….

[8] *Mexico* v. *Cargill*, 2011 ONCA 622.

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> (3) …. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.[9] (emphasis added)

[21] Subsection 11(1) of the *International Commercial Arbitration Act, 2017*, provides:

> If, pursuant to article 16(2) of the Model Law, an arbitral tribunal rules on a plea that it does not have jurisdiction, any party may apply to the Superior Court of Justice to decide the matter.[10] (emphasis added)

[22] The court is "to decide the matter". It is not "to review the tribunal's decision". "The matter", referenced in both art. 16(1) of the *Model Law* and s.11(1) of the *Act* is the issue of the tribunal's jurisdiction. This is clear language conferring original jurisdiction on the court to adjudicate the question of the tribunal's jurisdiction. This language is not qualified by a privative clause or terms of reference for the application. The court's task is entirely described by the phrase "decide the matter".

Mexico* v. *Cargill

[23] Luxtona argues that the application judge and this court are bound by the Court of Appeal decision in *Mexico* v. *Cargill*, in which the court found that proceedings in the Superior Court under the *Model Law* are a "review" of the tribunal award and not a hearing *de novo*. There is one problem with this argument: the proceedings in *Mexico* v. *Cargill* were brought under a different provision of the *Model Law*, which provides for a different test to be applied by the court.

[24] In *Mexico* v. *Cargill*, the dispute concerned claims by Cargill against Mexico under the *North America Free Trade Agreement*. No one challenged the tribunal's jurisdiction to hear and decide the dispute. However, on review, Mexico did challenge the tribunal's jurisdiction to award a certain kind of damages claimed by Cargill. This was a review of the tribunal's final decision, not on the basis that the tribunal lacked jurisdiction over the dispute pursuant to article 16 of the *Model Law*, but rather under article 34(2) of the *Model Law*, which prescribes the limited review before the court from a final award of the tribunal.[11]

[25] Article 34 of the *Model Law* provides:

> **Application for setting aside as exclusive recourse against arbitral award**
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> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

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[9] *International Commercial Arbitration Act, 2017*, SO 2017, c. 2, Sched. 2, art. 16.
[10] *International Commercial Arbitration Act, 2017*, SO 2017, c. 2, Sched 5, s.11(1).
[11] *Mexico* v. *Cargill*, 2011 ONCA 622, para. 14.

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(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

….

[26] Mexico relied on art. 34(2)(a)(iii) of the *Model Law*, arguing that Cargill was limited to claims in respect to its investment in Mexico, and was not entitled to lost profits that would have been earned by an affiliated American company that produced product for sale to its Mexican company for resale in Mexico.

[27] Feldman J.A., writing for the court, began her analysis with the following observations:

I agree that it is important to clearly define the standard of review to be applied by a court in reviewing an arbitral decision on the grounds set out in art. 34 of the Model Law. I also agree that importing and directly applying domestic concepts of standard of review, both from administrative law and from domestic review by appeal courts of

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trial decisions, may not be helpful to courts when conducting their review process of international arbitration awards under art. 34 of the Model Law.[12]

[28] Feldman J.A. then found that the starting point for analysis is the text of the applicable provision of the *Model Law*:

> The starting point for determining the appropriate standard of review to be applied… is the words of art. 34(2) of the *Model Law*…. The article provides that an award may only be set aside if the objecting party proves one of the enumerated deficiencies.[13]

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[29] The balance of this portion of Feldman J.A.'s analysis concerns the standard of review of the tribunal's decision. In concluding that the correctness standard applies, the court found that "when deciding its own jurisdiction, the tribunal has to be correct."[14] The court cautioned that the role of the court is "to identify and narrowly define any true question of jurisdiction."

Dallah* v. *Pakistan

[30] In *Mexico* v. *Cargill*, the Court of Appeal cited with approval the decision of the English Supreme Court in *Dallah* v. *Pakistan*.[15] In *Dallah*, an arbitral tribunal made an award against Pakistan which Dallah sought to enforce in England. Pakistan took the position that it had not consented or agreed to the arbitration. The tribunal found against Pakistan on this issue. The English Supreme Court found that the court's role was "to reassess the issue [of jurisdiction] itself" and not to review the tribunal's decision.[16]

> The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all.
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> … [T]he court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them.

[31] Feldman J.A. noted the different jurisdictional questions in issue in *Cargill* and in *Dallah*:

> In *Dallah*, the jurisdiction issue did not challenge the content of the award itself, but rather the ability of the tribunal to adjudicate: in particular, whether one party had committed to the arbitration process. In that context, the English Supreme Court's approach was to address the issue *de novo*, rather than as a review of the decision of

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[12] *Mexico* v. *Cargill*, 2011 ONCA 622, para. 30.
[13] *Mexico* v. *Cargill*, 2011 ONCA 622, para. 31.
[14] *Mexico* v. *Cargill*, 2011 ONCA 622, para. 48.
[15] *Mexico* v. *Cargill*, 2011 ONCA 622, paras. 36-38, citing *Dallah Real Estate and Tourism Holding Inc.* v. *Ministry of Religious Affairs of the Government of Pakistan*, [2011] AC 763, [2011] All ER 485 (UK SC).
[16] *Dallah* v. *Pakistan*, paras. 30-31, quoted in *Mexico* v. *Cargill*, para. 37.

> the tribunal. One could view this approach as a variant of applying the correctness standard. As the court pointed out, the decision of the tribunal is given *prima facie* credit, because the onus is on the challenging party to set it aside. But because the court was deciding the validity of the agreement issue *de novo*, it heard evidence, including expert evidence on the French law governing the issue of the validity of the agreement, the court concluded that the agreement was not valid, and therefore, the arbitration panel had no jurisdiction.
>
> In this case, the jurisdiction issue is quite different under art. 34(2)(a)(iii). The issue is whether the award itself complies with the submission to arbitration and, in particular, whether it "contains decisions on matters beyond the scope of the submission to arbitration". Under this subsection, the court is charged with reviewing the award and the submission to determine whether the tribunal stayed within its jurisdiction, based on the content of the submission, and the application of c. 11 of the NAFTA.[17]

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[32] The application judge found that *Cargill* stands for the proposition that an application to challenge the jurisdiction of an arbitral tribunal under the *Model Law* is a “review” to which a correctness standard applies, and not a *de novo* hearing. Based on the passages of *Cargill* set out above, I disagree with the application judge. The Court of Appeal found that a jurisdictional issue brought before the court pursuant to s.34(2)(a)(iii) is a “review”, circumscribed by the terms of s.34, to which a standard of correctness applies. The Court of Appeal did not decide whether an application under art. 16 is a “review” or a hearing *de novo*. It quoted with approval the English Supreme Court decision in *Dallah* but did not express approval (or disapproval) of its applicability to an application brought under art. 16 of the *Model Law*.

Weight of International Authority

[33] *Dallah* is a leading international authority on this point. It is the law in the United Kingdom and has been followed in many other respected jurisdictions, including other *Model Law* jurisdictions.[18] While the United Kingdom is not, itself, a *Model Law* jurisdiction, a detailed comparison of the underlying statutory bases in the United Kingdom and under the *Model Law* does not yield a persuasive foundation for distinguishing the nature of jurisdictional hearings under

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[17] *Mexico* v. *Cargill*, 2011 ONCA 622, paras. 38-39.

[18] *IMC Aviation Solutions v. Altain Khuder*, [2011] VSCA 248, paras. 265-270; *Lin Tiger Plastering v. Platinum Construction*, [2018] VSC 221, paras. 35, 39; *TCL Air Conditioner*, [2013] HCA 5, para. 12; *China Minmetals Materials*, 334 F.3d 274 (3d Cir. 2003), pp. 284, 289; Paris Court of Appeal, Pôle 1, Ch. 1, 25 avril 2017; *République Bolivarienne du Venezuela c/Garcia Armas*, RG no. 15/01040; Paris Court of Appeal, Pôle 1, Ch. 1, 12 avril 2016; *République de Moldavie c/ société Komstroy*, RG no. 13/22531, Rev. arb. 2016, 833, note C. Fouchard; Supreme Court of the Netherlands, 26 September 2014, ECLI:NL:HR:2014:2837 (*Ecuador/Chevron & Texaco*), ground 4.2; *Downer Construction. v. Silverfield Developments*, CIV 2004-404-4488, para. 56; *John G. Burns Limited v. Grange Construction*, [2013] IEHC 284, 2013 8 MCA, para. 24; *S Co v. B Co.,* [2014] HKCFI 1436, para. 35.

the two regimes. Further, the strong consensus of the decisions from *Model Law* jurisdictions points to following the approach taken in *Dallah*.

[34] The application judge cited two English decisions and one Singapore decision in support of a conclusion that there is no consensus on this point internationally. In my view, these cases are not persuasive of this conclusion.[19] The first of the English decisions, *Electrosteel* v. *Scan-Trans Shipping*, is a 1988 trial decision that pre-dates *Dallah* and has been disapproved in subsequent English decisions. In my view *Electrosteel* has been overtaken by *Dallah*, which is binding on the English lower courts. The second decision, *Primetrade AG* v. *The Ythan Ltd.*, does not stand for the proposition that the hearing is not a hearing *de novo* or that evidence is not permitted as of right. Rather, *Primetrade* finds that the court has the discretion to exclude relevant evidence where "it would result in substantial prejudice" that cannot be remedied by costs or an adjournment. In the result in *Primetrade*, the court admitted the contested evidence without it satisfying the much higher evidence for "fresh evidence" on appeal or review.

[35] The Singapore decision, likewise, does not appear to disrupt the international consensus. First, it is a trial level decision. Second, the court did not undertake a textual analysis of the pertinent provisions in the *Model Law* or the international jurisprudence. Third, three weeks after the decision, another trial court in Singapore, at the same level, came to the opposite conclusion after analysing the text of the law and international jurisprudence.[20] Fourth, the trial decision relied on by the application judge was overturned on appeal.[21] Fifth, the evidentiary issue on the final appeal was not whether the parties could adduce evidence as of right in the *de novo* hearing at first instance, but whether they could lead new evidence on appeal which had not been provided to the trial court during the hearing below.[22]

[36] Article 2A of the *Model Law* provides:

> **International origin and general principles**
>
> (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
>
> (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

[37] The "uniformity" principle in Article 2A(1) does not make international decisions binding in Ontario, but it makes them strongly persuasive. The legal regime on which *Dallah* is based is part of the "international origin" of the *Model Law*. There is an international consensus on the

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[19] *Government of Lao People's Democratic Republic v. Sanum Investment Ltd*., [2015] SGHC 15.
[20] *AQZ v. ARA*, [2015] SGHC 49, para. 59.
[21] *Government of Lao People's Democratic Republic v. Sanum Investment Ltd*., [2016] SGCA 57, paras. 42-43.
[22] *Government of Lao People's Democratic Republic v. Sanum Investment Ltd*., [2016] SGCA 57, paras. 23, 27.

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nature of the hearing before the application judge, and in my view that consensus ought to be followed in Ontario.

Summary

[38] In my view the text of the *Model Law*, adopted in Ontario law, prescribes a *de novo* hearing in a court application "to decide the matter" of the tribunal's jurisdiction. *Mexico* v. *Cargill* does not say otherwise. *Dallah* is strong authority to the contrary, and although the Court of Appeal decision in *Mexico* v. *Cargill* does not rule on this point, it does generally approve the reasoning in *Dallah*. The strong international consensus on this point favours the *Dallah* approach, and the *Model Law* itself encourages "uniformity" on such points. The onus is on the challenging party to set aside a tribunal's preliminary ruling on jurisdiction. But because the court is hearing the jurisdictional issue *de novo*, the parties are entitled as of right to adduce evidence, including expert evidence, relevant to the jurisdictional issue.

Disposition

[39] For these reasons, I would allow the appeal and set aside the decision of Penny J. with costs of the appeal and the motion for leave to appeal to the appellant from the respondent fixed in the agreed amount of $75,000, inclusive, payable within thirty days.

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D.L. Corbett J.

I agree:___________________________
MacLeod R.S.J.

I agree:___________________________
Kristjanson J.

Released: June 30, 2021

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