THE 5 MOST SIGNIFICANT CASES OF THE YEAR

Justice Lorne Sossin

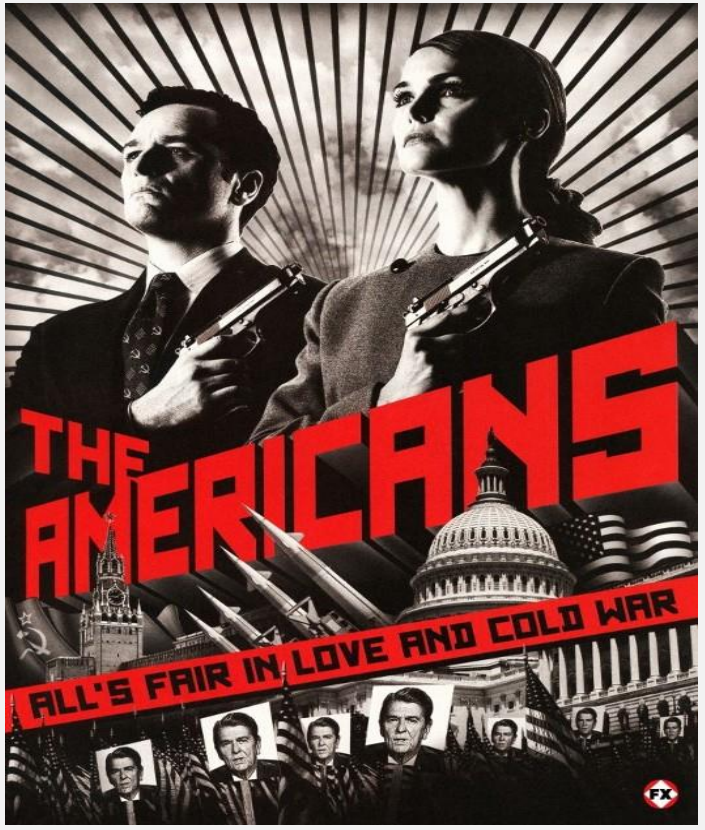
Ontario Superior Court of Justice

OJEN Summer Institute, July 28, 2020

OUTLINE

- The Top 5 Cases:
  - *Vavilov* (SCC 2019)
  - Reference re *Genetic Non-Discrimination Act* (SCC 2020)
  - *Araya v Nevsun Resources* (SCC 2020)
  - *Uber v Heller* (SCC 2020)
  - *R v Ahmad* (SCC 2020)
- Other notable developments at the SCC
- What to look for in the year to come?

1) - CANADA V. VAVILOV (SCC 2019)

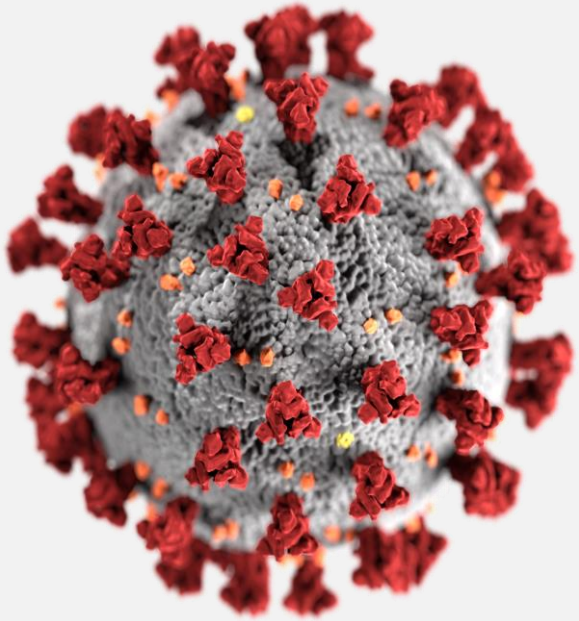


VAVILOV

- Vavilov was one of three cases known as the "administrative law trilogy." (The other two cases, decided in *Bell Canada v. Canada (Attorney General)*, were about Super Bowl ads.) *Vavilov* and the Super Bowl ad cases were about very different issues. But they all dealt with an area of administrative law called "standard of review."
- Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

TAKEAWAYS FROM VAVILOV

- The "culture of justification" guides the judicial review of the reasonableness of administrative decisions.



- The decision of the Registrar to deny Vavilov a passport was unreasonable - Vavilov retains his Canadian citizenship

2) - *REFERENCE RE GENETIC NON-DISCRIMINATION ACT* (SCC 2020)

REFERENCE RE GENETIC TESTING

- In a close 5-4 decision, the Supreme Court upheld the constitutionality of the *Genetic Testing Act*
- Justice Andromache Karakatsanis said the rules were about combating genetic discrimination and protecting health, and that Parliament had the power to make the rules because this fell under criminal law
  (Justices Abella and Martin agreed)
- Justice Michael Moldaver said the rules were about protecting health by making sure people had control over their genetic information, and that Parliament had the power to make the rules because this fell under criminal law
  (Justice Côté agreed)

REFERENCE RE GENETIC TESTING

- Justice Nicholas Kasirer said the rules affected only contracts and tried to prevent the misuse of people's genetic tests in order to promote their health, and that since provinces are responsible for making laws about contracts, it was outside of Parliament's power to make these rules (Chief Justice Wagner and Justices Brown and Rowe agreed)

REFERENCE RE GENETIC TESTING

- One strange and unprecedented aspect of the case was that, after Parliament enacted the *GNDA* in 2017, the then-Justice Minister Jody Wilson-Raybould took the position that the Act was not a valid exercise of Parliament's powers.
- This put counsel for the Attorney General of Canada who appeared before the SCC at the *GNDA Reference* hearing in an awkward position: he was there to argue *against* the constitutionality of a law that the Parliament of Canada itself had voted in favour of and enacted. Canada's AG argued unsuccessfully – along with the Attorneys General of Quebec, Saskatchewan and BC, as well as the Canadian Life and Health Insurance Association – that the *GNDA* was *not* a valid use of the criminal law power as it is aimed at regulating insurance companies, which fall under provincial jurisdiction in property and civil rights under s.92(13) of the *Constitution Act, 1867*.

TAKEAWAYS FROM REFERENCE RE GENETIC TESTING

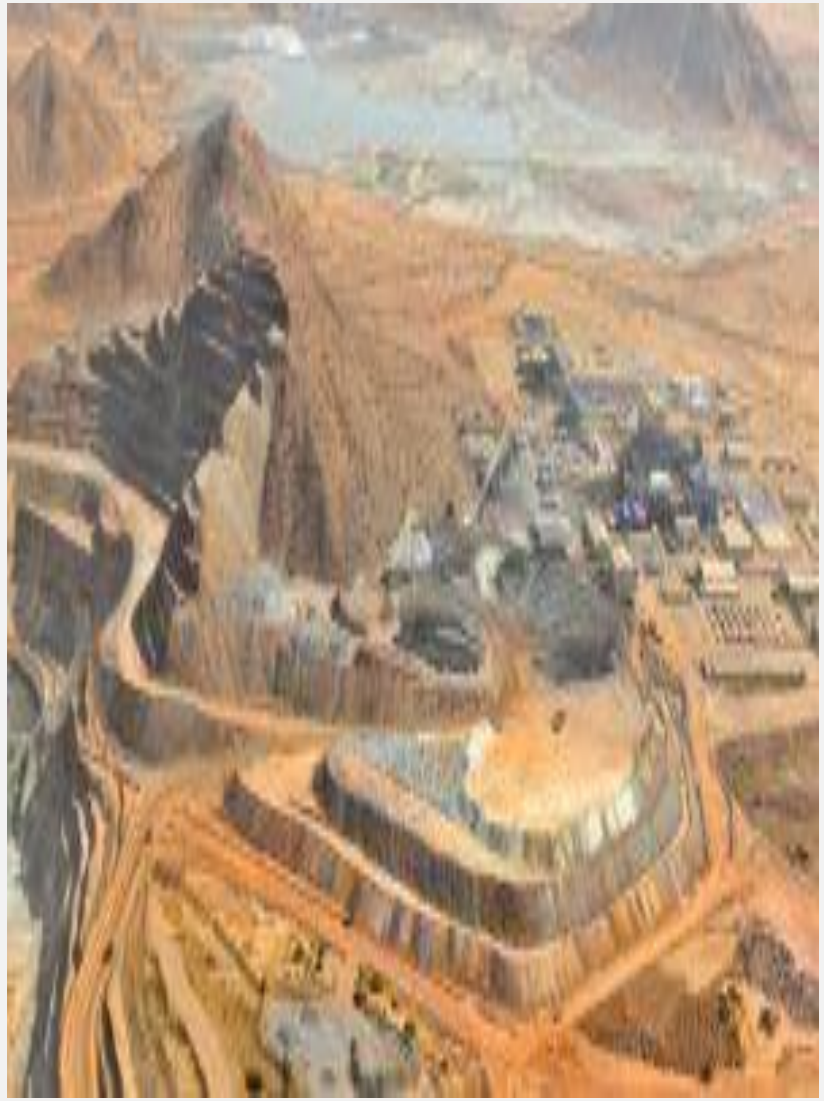
- Majority held that the essential character of the prohibitions in the *Act* represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy, equality and public health.
- Marcella Daye, a senior policy adviser at the Canadian Human Rights Commission, stated:
  - "Taking a genetic test that could save your life should not come at the price of you not being hired or promoted, or not being able to adopt a child or to travel, not being able to get insurance or access child care."

3) ARAYA V NEVSUN RESOURCES (SCC 2020)

- In a close 5-4 decision, the Supreme Court permitted a lawsuit against Nevsun Resources alleging it to proceed.
- In their pleadings, the Eritrean workers sought damages for breaches of domestic torts including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity
- The majority of judges at the Supreme Court of Canada said the "act of state doctrine" wasn't part of Canadian law.

ARAYA V. NEVSUN RESOURCES

- The majority said that "customary international law" is part of Canadian law, though. It said customary international law becomes part of Canadian law automatically. This is different than treaty law, which needs Parliament to pass a law to bring it into force. Because customary international law is part of Canadian law, courts could, in the right cases, find Canadian companies responsible for violating it.
- The Court didn't decide whether Nevsun was responsible for violating the workers' rights. It said that the workers' lawsuit could go forward. It said that the trial judge would have to decide whether Nevsun breached customary international law and—if it did—how it should be held responsible.

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TAKEAWAYS FROM NEVSUN

- [1] This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.
- [2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases.
- Per Justice Abella

4) UBER V HELLER (SCC 2020)

- **Majority**: Justice Rosalie Silberman Abella and Justice Malcolm Rowe dismissed the appeal (Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin, and Kasirer agreed)
- Heller provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, he had to accept the terms of Uber's standard form services agreement. Under the terms of the agreement, Heller was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. The fees represent most of Heller's annual income.

UBER V. HELLER

- In 2017, Heller started a class proceeding against Uber in Ontario for violations of employment standards legislation and $400 million in damages. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with Heller, while Heller argued the clause was unconscionable and therefore invalid.
- The majority agreed with Heller that the clause was unconscionable and invalid, and held that because of the extensive fees for initiating arbitration, there is a real prospect that if the matter is sent to be heard by an arbitrator, Heller's challenge to the validity of the arbitration agreement may never be resolved.

UBER V. HELLER

- **Concurring**: Justice Russell Brown said the agreement was invalid because it denied Mr. Heller access to justice by imposing undue hardship and undermining the rule of law, not because of unconscionability
- **Dissenting**: Justice Suzanne Côté said the courts should respect the parties' agreement to arbitrate, and would have allowed the appeal and entered a conditional stay of proceedings

What's next for Uber and the gig economy?

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TAKEAWAYS FROM UBER

- This decision has potentially significant implications for Canada's gig economy.
  - Companies may have to adapt to their respective jurisdictional worker protection laws like the *ESA* instead of contracting out of them with mandatory arbitration provisions.
  - If Uber drivers are eventually found to be "employees" instead of "contractors," Uber will have to update its employment contracts to reflect each province and territory's employment laws.
  - ICC mediation or arbitration provisions may lose favour because of the disproportionate costs faced by contracting individuals of limited means.

5) – R V AHMAD (SCC 2020)

- **Majority**: Justices Andromache Karakatsanis, Russell Brown, and Sheilah Martin dismissed the appeal in *Ahmad* and allowed the appeal in *Williams* (Justices Abella and Kasirer agreed)
- [4] We say our jurisprudence affirms that police cannot offer a person who answers a cell phone the opportunity to commit an offence without having formed reasonable suspicion that the person using that phone, or that phone number, is engaged in criminal activity. Whether the police are targeting a person, place or phone number, the legal standard for entrapment is a uniform one, requiring reasonable suspicion in *all* cases where police provide an opportunity to commit a criminal offence. Reasonable suspicion is a familiar legal standard that provides courts with the necessary objective basis on which to determine whether the police have justified their actions. A bare tip from an unverified source that someone is dealing drugs from a phone number cannot ground reasonable suspicion.

R. V. AHMAD

- **Dissenting in part**: Justice Michael Moldaver said the rules of entrapment needed to be updated to make sure they only catch abusive police conduct that undermines society's sense of justice and the rule of law, and would have dismissed both appeals (Chief Justice Wagner and Justices Côté and Rowe agreed)

TAKEAWAYS FROM AHMAD

- [25] ... A careful balancing of interests is as relevant in entrapment as it is in warrantless searches and detention. In each case, the reasonable suspicion standard is uniquely "designed to avoid indiscriminate and discriminatory" police … This is particularly critical in cases of entrapment, since entrapment is a "breeding ground for racial profiling" (D. M. Tanovich, "Rethinking the *Bona Fides* of Entrapment" (2011), 43 *U.B.C.L. Rev.* 417, at p. 432), and has "a disproportionate impact on poor and racialized communities" (pp. 417-18). Courts must be able to assess the extent to which the police, in seeking to form reasonable suspicion over a person or a place, rely upon overtly discriminatory or stereotypical thinking, or upon "intuition" or "hunches" that easily disguise unconscious racism and stereotyping …
- Per Karakatsanis, Brown and Martin JJ.

OTHER NOTABLE DEVELOPMENTS

1. First SCC Zoom hearing
2. Chief Justice questioned about systemic racism in historic press conference
3. First Year on the Court for Nickolas Kasirer; Last year on the Court for Rosalie Abella


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