TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v AHMAD, 2020 SCC 11

Date released: May 29, 2020
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18383/index.do
Companion Case: *R v Williams*

Facts

This decision of the Supreme Court of Canada (SCC) considered two similar cases – *R v Ahmad and R v Williams* – together because of their similar issues. In order to enforce the law, police must use investigative techniques to seek out crime while respecting the rights and freedoms of the communities they serve. At issue in this case is the balance police must strike in the context of dial-a-dope operations, in which drug deals are conducted through phone calls or texts. Both Ahmad and Williams argued the police did not have reasonable suspicion when they were offered the opportunity to sell drugs and both submitted the police illegally entrapped them in a situation where they sold drugs.

In the case of Ahmad, an officer received information that a person named "Romeo" was selling drugs through a specific phone number. Without investigating the reliability of the information, the officer called the phone number. Romeo answered the phone and they had a brief conversation. The officer asked for "2 soft," referring to two grams of powder cocaine. On the phone, the pair set a meeting place for the exchange of two small bags of cocaine for $140. The exchange was completed and Romeo (Ahmad) was later arrested.

In the case of Williams, an officer was given information about another person in Toronto selling cocaine named "Jay." The detective did not seek to confirm the tip before calling "Jay" directly. The officer told Jay he needed "80 hard," referring to $80 of crack cocaine. Jay suggested that they meet in person at a particular location. The two met and completed the first transaction. They later met again and completed a second transaction. The next month, the police arrested Jay (Williams).

Background on Entrapment

This case deals with the criminal law doctrine of entrapment as set out by the Court in *R v Mack*, [1988] 2 SCR 903.

Mack established that the police have the power to go beyond their normal investigative role and tempt people into committing criminal offences but outlined limitations to this power. When police offer an opportunity to commit a crime without a reasonable suspicion or they induce the commission of an offence, police commit entrapment. Entrapment can be claimed as a defence to the elements of the crime and, when established, can lead to a stay of proceedings, an order by the court to stop the proceeding.

The Court in *Mack* established two ways for an accused person to succeed in arguing entrapment. At issue in this appeal is the first part of the doctrine which says there can be entrapment when there is evidence the authorities provided an opportunity to commit an offence without a reasonable suspicion of criminal activity. Police can form a reasonable suspicion over either 1) a specific person who is engaged in criminal activity or 2) a specific person or people engaging in criminal activity at a specific location, referred to as a *bona fide* inquiry.

In *Ahmad* the Court states that the doctrine of entrapment protects a fundamental value in our society: that the ends do not justify the means. The requirement that there is a reasonable suspicion of criminal activity before police provide an opportunity to commit an offence ensures that, if challenged, police must disclose their decision-making processes, which allows courts to conduct a meaningful review of police conduct.

Procedural History

Following a contested trial, Ahmad was found guilty of one count of possession for the purpose of trafficking and two counts of possession of the proceeds of crime. He then applied for a stay of proceedings on the basis of entrapment. The trial judge concluded that Ahmad was not entrapped, as the police had formed a reasonable suspicion and corroborated their tip through the course of conversation before providing Ahmad the chance to sell drugs.

At trial, Williams admitted that the evidence established that he was guilty of trafficking and possessing the proceeds of crime but argued that the charges should be stayed on the basis of entrapment. The trial judge agreed and found that the police did not have reasonable suspicion that Williams was dealing drugs. He was, however, found guilty of firearm, ammunition, and breach of recognizance charges, as the police did nothing to encourage or facilitate those crimes.

Ahmad and *Williams* were then heard together at the Court of Appeal for Ontario. The Court looked to *R v Barnes* [1991] 1 SCR 449 to establish that a police officer was allowed to provide an

opportunity to commit a crime when they had a reasonable suspicion that criminal activity was taking place at a specific location. Further, the Court found that a specific location is not always geographic but can also include digital locations such as phone lines.

The Court of Appeal for Ontario dismissed Ahmad's appeal and upheld his convictions. For Williams, the Court of Appeal overturned the trial judge's finding that there was no reasonable suspicion based on the phone number and entered convictions on the trafficking and possession of the proceeds of crime charges for Williams.

Both Williams and Ahmed appealed these convictions to the Supreme Court of Canada.

Issue

1. Is there evidence of entrapment such that the convictions entered should be dismissed?
    a. When and how is reasonable suspicion established in the dial-a-dope context?
        i. For the purposes of the entrapment doctrine, can a phone number qualify as a place over which police may form a reasonable suspicion?
        ii. How does reasonable suspicion apply to dial-a-dope investigations?
        iii. How should courts review the words spoken during a police officer's call to a target?
        iv. What constitutes provision of an opportunity to traffic drugs during a phone call?

Decision

The Court found that in the case of Ahmad, there was no entrapment. Therefore, the Court dismissed the appeal and upheld the convictions. However, in the case of Williams, the Court found that there was entrapment, allowed the appeal, set aside the convictions entered by the Court of Appeal, and reinstated the stay of proceedings entered by the trial judge.

Ratio

The Court defined the entrapment doctrine in the context of dial-a-dope operations and established that a phone number can be a precise enough "location" over which to form a reasonable suspicion. In reaffirming that a reasonable suspicion must be obtained before offering the opportunity to commit an offence, the Court found that police cannot call any suspicious phone number and invite the commission of an offence without first substantiating their information through further investigation or conversation.

This decision was released amidst the protests against police brutality and racial injustice in both Canada and the U.S. and as such, has an increased importance in 2020. The Court stated that cases of entrapment have a disproportionate impact on poor and racialized communities and as such, the Court's standard of review should be rigorous to assess the extent to which police relied upon discriminatory, stereotypical, or racially charged assumptions in forming a reasonable suspicion.

The key takeaways are as follows:

a. "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." (para. 4)

b. the reasonable suspicion standard is uniquely 'designed to avoid indiscriminate and discriminatory' police conduct… This is particularly critical in cases of entrapment, since entrapment is a 'breeding ground for racial profiling' … and has 'a disproportionate impact on poor and racialized communities'… 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…" (para. 25, citations omitted)

Reasons

In a divided decision, the majority of the Court discussed the doctrine of entrapment and reaffirmed the framework set out in *Mack* and *Barnes*.

For the majority, Justices Karakatsanis, Brown, and Martin first determined whether or not a phone number was sufficiently precise to qualify as a "place" over which the police can form a reasonable suspicion, per the first branch of the entrapment doctrine as outlined in *Mack*. To ensure that innocent people can maintain privacy without the risk of being subject to investigation by the police, "places" in the entrapment doctrine should be precisely defined. The Court found that phone numbers can be precisely defined this way.

Next, the Court asked and answered the question of how a police officer can form a reasonable suspicion in the context of a dial-a-dope investigation. The Court found that a single tip received by police officers is insufficient to raise a reasonable suspicion. Additional information from conversations with the target, for example, can corroborate the tip to give the police a reasonable suspicion. Police should be careful in the course of a conversation, as a reasonable suspicion must be established *before* providing an opportunity to commit the crime.

The third question the Court answered was how courts should review the words spoken during a police officer's call to the target. The Crown argued it was wrong for the trial judge to review transcripts of the exchange between the targets and the police officers. The Court here rejected this argument finding that, because the officers had not formed a reasonable suspicion prior to the phone call, reviewing the words exchanged on the call was necessary.

Finally, the Court asked what constituted a provision of an opportunity to traffic drugs. The opportunity to commit an offence is offered when an officer says something to which the offence can be committed by answering "yes." The Court looked to the police conduct to determine if it closely resembled the commission of an offence, which, in this case, it did.

Applying these principles to the facts of the case, ultimately the Court found that the appeals resulted in different conclusions. In answering each appeal, the Court only answered one question: **whether the police had formed a reasonable suspicion at the time the officer provided the opportunity to commit a crime**. Based on conversation transcripts with Ahmad, the Court found that the police had formed a reasonable suspicion before providing the opportunity for Ahmad to commit the offence. Therefore, there was no entrapment.

The outcome in Williams was different. There was nothing in Williams' responses, like there was in Ahmad's, to suggest the phone number was being used to sell drugs *before* the police provided the opportunity to traffic. The majority of the Court found that the police had proceeded on an unsubstantiated assumption.

Justice Moldaver, writing the dissenting opinion on behalf of himself, Chief Justice Wagner, and Justices Côté and Rowe, held that the both appeals should be dismissed and convictions for both Ahmad and Williams upheld. In analyzing the approach taken by the majority, Justice Moldaver explained that the adopted approach to the doctrine of entrapment is inappropriate in the context of dial-a-dope operations.

While the majority makes a distinction between "investigative steps" and providing an "opportunity," the dissent held that the distinction between taking investigative steps and offering opportunities is often artificial. Instead, Justice Moldaver suggested courts should focus on whether society would view the officer's conduct as intolerable or abusive.

The dissenting justices proposed a solution for the doctrine of entrapment in this context. They suggest that police should be found to be acting pursuant to a *bona fide* inquiry where 1) their investigation was motivated by genuine law enforcement purposes;

2) they had a factually grounded basis for their investigation; and 3) their investigation was directed at investigating a specific type of crime within a tightly circumscribed location (whether physical or virtual). Applying this revised test to the case at hand, the dissent concludes that the police met each requirement. As such, the dissenting judges held that neither Williams nor Ahmad were entrapped.

DISCUSSION

1. In your own words, explain the meaning of "police entrapment".

2. In what way is a phone number similar to a location?

3. Why is it important for police to ensure they have a reasonable suspicion before they provide the opportunity to commit a crime?

4. Why did the majority reasons result in two different conclusions in Ahmad and Williams?

5. Should police be allowed to invite someone to commit an offence if they have a reasonable suspicion that that person had already committed that offence?

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UBER TECHNOLOGIES INC. v HELLER 2020 SCC 16

Date released: June 26, 2020
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do

Facts

The popular food delivery service app Uber Eats connects customers with restaurants in their neighborhoods. Customers order meals which are then delivered by the Uber drivers that pick up and deliver food in their area. In Toronto, David Heller is one of these drivers.

Prior to beginning his work with Uber Eats, Heller signed a standardized service agreement contract ("service agreement") with Uber that laid out the terms of his job. The agreement was "signed" through the Uber app where Heller accepted all of the terms without negotiation by "clicking to agree." These included a mandatory arbitration clause ("the arbitration clause") that said that if he had a legal issue with Uber, he would have to resolve it through mediation or arbitration, alternative, discussion-based methods of dispute resolution, at the International Chamber of Commerce (ICC) in Amsterdam, Netherlands.

However, to be able to initiate any process of mediation or arbitration in the Netherlands, he would have to pay $14,500 USD, in addition to extra fees for travel and accommodation. For Heller these fees would have amounted to almost the entire amount of his annual income working full-time for Uber.

Procedural History

In 2017, Heller started a class proceeding in the Ontario court system against Uber. The basis of his claim was that Uber's service agreement does not classify Uber drivers as employees, but rather as independent contractors who are not entitled to benefits from Ontario's *Employment Standards Act (ESA)*. Heller argued that in this way, Uber's service agreement illegally "contracts out" of the *ESA*.

In response to Heller's class action, Uber brought a motion to stay the class proceeding, which is a request to the Court to stop the proceeding from continuing. Uber instead asked that the dispute be resolved with arbitration in the

Netherlands, as had been agreed to in the service agreement. Heller argued it should be the Ontario courts to hear the dispute as the arbitration clause itself was invalid. The motion judge sided with Uber.

Heller appealed to the Court of Appeal for Ontario (ONCA). ONCA reversed the initial trial decision, and found that a court in Ontario could deal with this matter. The Court found that the arbitration agreement was invalid because it both illegally contracted out of the *ESA* and was unconscionable, meaning there was evidence of an extremely or "grossly unfair" bargain where one party had taken advantage of the inequality in bargaining power over the other.

Uber then appealed this decision to the Supreme Court of Canada (SCC).

Issues

1. Which jurisdiction has the authority to decide whether the arbitration clause in Uber's service agreement is valid?
2. If it is the Ontario court that has jurisdiction over this dispute, is the mandatory arbitration clause in Uber's standard service agreement contract unconscionable and therefore invalid?

Decision

Justices Abella and Rowe, writing for the majority of the Court, decided that it is the Ontario court that has authority to decide this matter. Further, the arbitration and choice of law clauses in Uber's service agreement were found to be unconscionable and therefore invalid.

Ratio

The majority reasons set out a new test for unconscionability which requires there to be evidence of 1) an improvident bargain and 2) an inequality of bargaining power. Employers must now pay careful attention to the terms included in their standardized agreements to ensure terms are accessible, especially where arbitration, mediation, and choice of law clauses are included. In today's gig economy, where temporary positions for short-term commitments to work are commonly governed by standardized contracts, this case has a far-reaching impact. Standard form contracts are created solely by one party and are commonly not open to negotiation. They can include terms that are not fully clear to the individual signing the contract. These types of contracts are now more vulnerable to legal action.

Reasons

The Court first answered the overarching question of who had the jurisdiction, or legal authority, to decide the case: the arbitrator in the Netherlands or an Ontario court. To do this, the Court first had to determine what legislation governed the Uber's service agreement: The *International Commercial Arbitration Act (ICAA)* or the *Arbitration Act, 1991*. Based on the facts and

pleadings in the case, the Court determined the dispute between Heller and Uber engaged issues related to employment relationships and was not commercial in nature. Thus, the *Arbitration Act, 1991* was found to apply.

The *Arbitration Act, 1991* instructs courts to stay proceedings if a matter can be decided with arbitration. But there can be exceptions to this rule. The Court found that since the cost of arbitration in the Netherlands is so high, Uber's arbitration agreement was inaccessible. The issue of accessibility has not been previously raised by the jurisprudence on this topic, and so the Court can depart from the general rule that the arbitrator should be first to resolve a dispute and instead allow the courts to determine the agreements validity.

After the Court decided it had the authority to answer whether or not the terms in Uber's service agreement were valid or not, it embarked to do so on the basis of the unconscionability doctrine in Canadian contract law. The majority found that unconscionability is an important aspect of contract law which protects vulnerable parties throughout process of creating a contract.

The Court asserted that there are two central aspects to look at when deciding if a clause in a contract is unconscionable:

> First, there must be evidence of an inequality in the bargaining power between parties, when one party cannot protect their own interests in the process of agreeing to a contract.
>
> Second, there must have been an improvident bargain, an agreement that disproportionately favours the stronger party in the agreement.

Next, the Court discussed this aspect of contract law in the context of standard form contracts, for example, those where you "Click to Agree" to all of the terms. The Court found that standard form contracts have the potential to create inequality between the parties where there is no opportunity for one party to bargain or negotiate terms, as is the issue in this case.

Turning back to the facts at hand, the Court was satisfied there was both 1) an inequality of bargaining power and 2) evidence of an improvident bargain between Uber and Heller.

The Court found there was an inequality of bargaining power mainly because the arbitration and choice of law clauses were part of a standard form contract to which Heller had no input. When signing up to be an Uber Eats driver, Heller had only two options: accept or reject. Further, the Court noted inequality because the standard form contract did not mention the large costs associated with the chosen

course of dispute resolution. Neither Heller, nor any other reasonable person in his position, could have known about these costs before agreeing to a condition like this.

In answering the second part of the test, on whether there was evidence of an improvident bargain, the Court contrasted the high costs associated with arbitration in the Netherlands with Heller's yearly salary working full time as an Uber driver ($20,800–$31,200 per year before taxes and expenses). The Court, again, emphasized that no reasonable person who understood all of these details in the contract would have agreed to this term.

To conclude, the majority stated that arbitration is meant to be a cost-effective method of resolving disputes and any agreement that effectively does the opposite cannot be valid.

Justice Brown wrote a concurring judgement, meaning he agreed with the ultimate conclusion of the majority's decision but for different reasons. Justice Brown said the majority's approach using unconscionability as the path to say the arbitration clause is not valid was unnecessary because there is already a legal principle that would provide the same answer. That principle is found in the public policy that people should have meaningful access to the legal system and judicial decisions. Given the high costs of the arbitration, Justice Brown found that arbitration clause should be invalid because in this case it was inaccessible and limited Heller's ability to access the legal system.

In a dissenting opinion, Justice Côté disagreed with her colleagues' findings that the *Arbitration Act, 1991* was the applicable legislation and with the majority's treatment of the unconscionability doctrine. In contrast to the majority, Justice Côté found that the *ICAA* was applicable and that Heller's initial claim should be heard by the arbitrator. Justice Côté ultimately would have ordered a conditional stay in proceedings, meaning that, unless Uber provided Heller with the funds to continue with the arbitration, the proceedings would come to a stop.

The key takeaways from the case:

a. 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.

b. 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.

c. ICC mediation or arbitration provisions may lose favour because of the disproportionate costs faced by contracting individuals of limited means.

DISCUSSION

1. What did Heller say was unfair about the agreement he signed with Uber?

2. What are some other examples of businesses or types of service that this decision may impact?

3. Why, in your opinion, is there a difference between benefits that are available to "employees" versus "independent contractors"?

4. In what way might the service agreement between Uber Eats and its drivers give one side a significant advantage over the other?

5. Have you ever agreed to terms of service without reading them thoroughly? Was the Court correct in finding that no reasonable person would have agreed to Uber's service agreement if they understood it completely?

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NEVSUN RESOURCES LTD. v ARAYA, 2020 SCC 5

Date released: February 28, 2020
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do

Facts

In 1995, the Eritrean government established a national conscription program, which required all Eritreans to complete military service or to assist with public projects, for 18 months. In 2002, Eritrea announced that the period of conscription would no longer be 18 months. Instead, all conscripts were to provide service for an indefinite amount of time. In this case, the plaintiffs were three conscripts sent to work at a mine. The mine is owned by a Canadian company, Nevsun Resources Ltd ("Nevsun"), the defendant.

All three workers claim that they were forced to provide labour in dangerous conditions. They say they were subjected to violent and inhumane treatment. As such, they started proceedings in British Columbia against Nevsun, seeking damages for breaches of domestic torts, including the tort of battery, negligence and unlawful confinement. They also claim damages for breaches of customary international law (CIL) which prohibits forced labour, slavery, inhuman treatment and crimes against humanity. CIL is a body of unwritten rules that arise from general and consistent international practices.

Note that this is not the trial for the case. Rather, Nevsun brought a motion to dismiss the workers' claims. Motions are brought to the court, at the request of a party, to obtain assistance with a legal issue. The court does not actually hear the case during a motion, but it can determine whether a trial can proceed. Nevsun brought a motion to ask the court to dismiss the lawsuit, arguing that the claims did not have a legally sound basis. They provided two arguments to support their claim. First, they argue that the act of state doctrine applies, which precludes domestic courts from assessing acts of a foreign government. Accordingly, Nevsun argued that the doctrine bars Canadian courts from examining Eritrean government's conscription program and its impact on the mine workers.

Second, Nevsun contended that claims based on CIL should be struck because they do not disclose a reasonable cause of action. They argued that domestic courts do not have the jurisdiction to remedy breaches of CIL.

Procedural History

Nevsun initiated the motion at the British Columbia Supreme Court (BCSC), where they asked the Court to strike the workers' claims. The judge denied the motion, finding that the act state of doctrine does not apply and that claims based on breaches of CIL can succeed in Canadian courts. Nevsun then appealed to the British Columbia Court of Appeal, which unanimously upheld the BCSC decision and dismissed the appeal.

Nevsun then appealed to the Supreme Court of Canada ("SCC").

Issues

The appeal focuses on two issues:

1. Whether the act of state doctrine forms part of Canadian common law; and
2. Whether the customary international law prohibitions against forced labour; slavery; cruel, inhuman treatment; and crimes against humanity can ground a claim for damages under Canadian law.

Decision

The majority dismissed the appeal. The Court held that the act of state doctrine does not form part of the Canadian common law and concluded that Nevsun failed to establish that it is "plain and obvious" that CIL claims have no reasonable likelihood of success.

Ratio

The SCC reaffirmed that the act of state doctrine is not part of Canadian law. Rather, Canadian courts apply private international law principles to determine whether they should enforce foreign laws. Further, the decision established that CIL is automatically incorporated into Canadian common law, without any need for legislative action. Therefore, courts are to treat CIL as any other law and ensure that all entities, whether it be a private corporation or state actor, obey CIL. This case has widened the role of domestic courts within the realm of international human rights law.

Reasons

The Act of State Doctrine is not Canadian law

On the issue of whether the act of state doctrine applies, the SCC held that the doctrine is not part of Canadian common law. Whereas English jurisprudence has routinely applied and reaffirmed the act of

state doctrine, Canada has developed its own approach when dealing with foreign legislation. When determining whether to enforce foreign laws, Canadian courts apply ordinary private international law principles. These principles generally call for deference and for the enforcement of foreign laws, unless such laws contravene public policy. Thus, the act of state doctrine does not stop Canadian courts from hearing the workers' claims.

Customary international law is part of Canadian law

According to the British Columbia's *Supreme Court Civil Rules*, a pleading can only be struck if it is "plain and obvious" that the claim has no reasonable prospect of succeeding at trial.

The SCC started its analysis by evaluating whether the prohibitions on forced labour, slavery, inhuman or degrading treatment and crimes against humanity, which form the foundation of the workers' claims, are part of CIL. In order to be recognized as a norm of CIL, the practice has to meet the following requirements:

1. The practice must be sufficiently general and widespread throughout the international community.
2. There must be a strong belief that the practice in question amounts to a legal obligation, not a mere habit. This is known as *opinio juris*.

However, within CIL, there is also a subset of norms known as *jus cogens*, or peremptory norms, which are norms profoundly and fundamentally accepted by the international community, from which opting out is not possible. For example, prohibitions against slavery, forced labour, and inhuman treatment have all attained the status of *jus cogens* because they are necessary to the international legal order.

The workers claim breaches not only of norms of CIL, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*.

According to the majority, CIL norms are automatically incorporated into Canadian law without any need for legislative action. This is done via the doctrine of adoption. Since CIL is part of Canadian common law, the SCC explains that it must be treated with the same respect as any other law. Moreover, the SCC highlights that CIL does not only apply to state actors. Private corporations, like Nevsun, must abide by international norms and can be held liable under CIL.

Therefore, the workers' claims are based on norms that are already recognized under Canadian law. As such, it is not "plain and obvious" that the plaintiffs' claims will fail.

The dissent reasoned that it is "plain and obvious" that the workers' claims are bound to fail. They reasoned that the majority overstepped its role as a court and that

only legislatures can determine whether international laws are adopted into the domestic legal system. They found the majority made the faulty presumption that the intent of the legislature is to comply with the international law norms. However, Parliament has the ability to pass legislation that violate norms of CIL, and such laws are not subject to review by the courts. Further, they held that corporate liability for human rights violations has not been recognized under CIL and Nevsun is not liable for violation of international law. They concluded that Canadian tort law is the appropriate remedy for the harms claimed and CIL cannot form the basis of claims in Canadian courts.

DISCUSSION

1. What is a motion? Why did the defendant bring a motion in this case?

2. In your own words, explain what customary international law is.

3. What is the Act of State doctrine? Why is it important?

4. What are some pros and cons of holding corporations liable under customary international law?

5. Who should be responsible for determining whether to make external laws part of Canadian law – courts or politicians? Why?

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CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) v VAVILOV, 2019 SCC 65

Date released: 2019 SCC 65
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18078/index.do

Facts

Alexander Vavilov was born in Toronto and believed that he was a Canadian citizen. It was only after his parents were arrested in the United States that he learned that they were actually "deep cover" Russian spies. Vavilov was born to foreign nationals working on a long-term assignment for the Russian foreign intelligence service. The false identities of his parents were taken on before his birth and were for the purpose of a "deep cover" espionage program directed by the Russian foreign intelligence service, which the United States Department of Justice labelled as the "illegals" program.

Vavilov's parents kept their affiliation with the Russian state unknown, and therefore never held any official diplomatic or consular status and were not granted any diplomatic privilege or immunity. Vavilov found out about his parents' identities when he was 16 years old after they were arrested in the United States for conspiracy to act as unregistered agents of a foreign government. Until then, he had no idea his parents were spies and he lived and identified as a Canadian and held a Canadian passport.

After two unsuccessful attempts to renew his Canadian passport, Vavilov was informed that he would need to obtain a certificate of Canadian citizenship before he would be issued a passport. Upon obtaining the certificate, he applied again and the Minister of Citizenship and Immigration eventually undertook (an undertaking is essentially a legal promise) to issue a new passport to him.

Vavilov never received his passport. He instead received a "procedural fairness letter" from the Canadian Registrar of Citizenship. The Registrar told him that he had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, following section 3(2)(a) of the *Citizenship Act*, he was not a citizen

of Canada. S. 3(2)(a) does not allow foreign delegates' children to be citizens of Canada by birth (the Registrar saw foreign spies as being foreign delegates). Therefore, even though Vavilov was born in Canada (and people born in Canada after 1977 are considered citizens), it was found that he fits the exception in s. 3(2)(a) since his parents were considered foreign delegates.

Issues

1. What standard of review should a court apply when the merits of an administrative decision are challenged?
2. How should courts conduct a reasonableness review in practice?

Procedural History

Vavilov appealed the Registrar's decision to the Federal Court of Canada. The Federal Court dismissed Vavilov's application for judicial review. Vavilov eventually got this decision overturned by a majority of the Federal Court of Appeal. The Minister of Citizenship and Immigration then appealed the Federal Court of Appeal decision to the Supreme Court of Canada (SCC).

This case is not only about the scenario at hand. Part of the reason that the Supreme Court granted leave (agreed to hear the appeal) was to give clarity on the applicable standard of review analysis in administrative decisions.

Decision

It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth. As such, the SCC upheld the Federal Court of Appeal's decision to quash the Registrar's decision.

Ratio

The Judges applied the analysis that they had themselves outlined (see below) and concluded that the standard to be used in reviewing the Registrar's decision is 'reasonableness', and not 'correctness'. There was no basis for departing from the reasonableness presumption, since there is no indication that the legislature intended a standard of review other than reasonableness to apply. As a result, the standard to be applied in reviewing the decision is reasonableness. In other words, the decision made by the Registrar only had to be evaluated on whether it was reasonable, and not whether it was correct.

The SCC decided that the Registrar's decision was not reasonable because the Registrar failed to justify her interpretation of s. 3(2). The majority considered other legislation and international treaties that informed the purpose of s. 3(2), reviewed jurisprudence on the interpretation of s. 3(2)(a), and looked at the potential consequences of the Registrar's

interpretation. The Majority concluded that looking at all the evidence together, there is strong support for the idea that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities (an example of a privilege or immunity is not being liable to lawsuit or prosecution under Canada's laws).

The SCC viewed it as undisputed that Vavilov's parents had not been granted any diplomatic privileges and immunities. Therefore, the general rule that persons born in Canada after February 14, 1977 are Canada citizens applies and Vavilov is a Canadian citizen.

Reasons

1. What standard of review should a court apply when the merits of an administrative decision are challenged?

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.

2. How should courts conduct a reasonableness review in practice?

The last major standard of review principle that comes out of the majority decision is guidance on how to perform a reasonableness review. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. They note that the focus of reasonableness review must take into account both the decision maker's reasoning process for a decision, as well as the outcome that was reached. To see if a decision is "reasonable," the reviewing court should ask if the decision demonstrates important characteristics of reasonableness. This includes justification for the decision, transparency, and intelligibility. All of these characteristics should be justified related to the relevant fact and legal issues of the decision.

The burden of proof is on the party that is challenging the decision and trying to show that it is unreasonable. The court that reviews the decision must be satisfied

that there are serious problems and shortcomings in the decision and that the decision does not show the necessary degrees of justification, transparency, and intelligibility.

The majority outlined two specific ways in which an administrative decision can be unreasonable: an unreasonable decision based on internally incoherent reasoning (like circular reasoning, false dilemmas or unfounded generalizations) and a decision can be unreasonable if it is not justified in relation to the law and facts that are relevant to the decision. For example, the decision not being based on past practices or decisions or misrepresenting the principles of statutory interpretation.

DISCUSSION

1. What is the difference between reasonableness and correctness?

2. What does deference mean?

3. Do you agree that the correct standard in this case is reasonableness?

4. If Vavilov's parents had been given diplomatic privileges and immunities, do you think it would still be fair to strip someone of Canadian citizenship when they were born in Canada? What if Vavilov had known about his parents' real identities or even helped them?

5. In many cases, the Supreme Court of Canada does not give reasons for why they did or did not grant leave. In this case, it was primarily because they wanted to clarify the law on standard of review in administrative decisions in Canada. Do you think the Supreme Court should be clearer about their decision to allow appeals?

TOP FIVE 2020

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2020 cases were selected and discussed by Mr. Justice Lorne Sossin, then of the Ontario Superior Court of Justice and currently of the Court of Appeal for Ontario. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

REFERENCE RE GENETIC NON-DISCRIMINATION ACT, 2020 SCC 17

Date released: July 10, 2020
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18417/index.do

Facts

Section 91(27) of the *Constitution Act*, 1867 gives Parliament power to make criminal law. In 2017, Parliament enacted the *Genetic Non-Discrimination Act* ("the Act"). Section 2 of the Act defines a genetic test as a test that analyzes genetic material for health-related purposes. Sections 3, 4, and 5 establish prohibitions relating to genetic tests, such that individuals cannot be forced to take genetic tests or disclose genetic test results as a condition of obtaining some advantages. Section 6 provides an exemption to certain health care providers and researchers. Section 7 establishes a punishment for contravening sections 3 to 5.

Procedural History

The Government of Quebec referred the constitutionality of ss. 1 to 7 of the Act to the Quebec Court of Appeal, asking whether the provisions were outside of Parliament's jurisdiction over criminal law under s. 91(27) of the *Constitution Act*, 1867. In simple terms, the government of Quebec asked the court if Parliament is constitutionally allowed to enact these provisions or if it is outside of their power.

The Quebec Court of Appeal concluded that the Act exceeded Parliament's criminal law authority given by the Constitution. The Canadian Coalition for Genetic Fairness, an intervener in the Court of Appeal, appealed the matter to the Supreme Court of Canada (SCC).

Issue

The only issue before the Court was whether Parliament had the power under s. 91(27) of the *Constitution Act*, 1867, to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act*.

Decision

The majority of the SCC, in a 5-4 split, decided that ss. 1 to 7 of the Act represent a valid exercise of Parliament's power over criminal law set out at s. 91(27).

Ratio

Three of the majority justices (Abella, Karakatsanis and Martin JJ.) held that the pith and substance (which means the "essential character") of the provisions was to preserve individual control over their detailed personal information disclosed by genetic tests, in the broad areas of contracting and the provision of goods and services, in order to address Canadians' fears that their genetic test results will be used against them and to prevent discrimination based on that information. The remaining two majority justices (Moldaver and Côté JJ.) found that the pith and substance of ss. 1 to 7 was to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing.

Reasons

According to Abella, Karakatsanis, and Martin JJ. (Moldaver and Côté JJ. agreeing on this point), s. 91(27) gives Parliament the exclusive authority to make laws in relation to the criminal law. A law will be valid criminal law if, in pith and substance,

(1) it consists of a prohibition
(2) accompanied by a penalty and
(3) backed by a criminal law purpose. Here, as there were undoubtedly prohibitions accompanied by penalties, the only issue was whether ss. 1 to 7 of the Act were supported by a criminal law purpose.

A law is backed by a criminal law purpose if the law, in pith and substance, represents Parliament's response to a threat of harm to a public interest traditionally protected by the criminal law, such as peace, order, security, health and morality, or to a threat of harm to another similar interest. As long as Parliament is addressing a reasoned (or "reasonable") apprehension of harm to one or more of these public interests, no degree of seriousness of harm needs to be proved before it can make criminal law.

DISCUSSION

1. What is a "criminal law purpose"?

2. What is "pith and substance"?

3. Does this case give too much power to Parliament to create criminal law? Why or why not?

4. Do you agree with the majority of the SCC that the pith and substance of the Act served a criminal law purpose? If not, what alternative purpose does it serve?

5. The SCC said in this case that no specific degree of seriousness needs to be proven as long as the reasoned apprehension of harm exists. Is this a strong enough standard to determine what can and cannot become criminal law?