

Last Year's Top Decisions**Top 10 business decisions of 2019: From orphan wells to Vavilov trilogy**By **Julius Melnitzer**

Julius Melnitzer

(February 14, 2020, 8:15 AM EST) -- As the second in our two-part series listing the Top 10 business decisions of 2019, here are the five cases that lead the class, in ascending order.

5. *Canada (Commissioner of Competition) v. Vancouver Airport Authority* 2019 Comp Trib 6

A focus of intense interest among competition law and scholars, this decision from the Competition Tribunal provides several important clarifications and developments relating to the law governing abuse of dominance.

The case dealt with the Vancouver International Airport's limitation of in-flight catering services to two providers and refusals to grant licences to others. The tribunal ruled that there was no clear and convincing evidence demonstrating that prices would be lower in the relevant market but for the airport's exclusionary conduct.

The key takeaways are:

- The determination of who has a "plausible competitive interest" in the relevant market for the purpose of the abuse of dominance provisions is subject to a very low evidentiary threshold;
- The case marks the first time that the "legitimate business justification" principle has been successfully invoked by a respondent. "The reasons provide crucial guidance as to how the tribunal might apply the principle in determining whether a respondent acted with the requisite anti-competitive purpose," said Julie Rosenthal, who with colleagues Calvin Goldman, Michael Koch, Richard Annan, Ryan Cookson and Sarah Stothart, formed the Goodmans LLP team that successfully represented the Vancouver Airport Authority; and
- The "regulated conduct" defence does not apply to the *Competition Act's* non-criminal provisions, such as s. 79 abuse of dominance proceedings.

4. *Pioneer Corp. v. Godfrey* 2019 SCC 42

This Supreme Court of Canada (SCC) decision established that so-called "umbrella purchasers" — purchasers of a non-price-fixed product whose price allegedly increased due to market forces resulting from a conspiracy — can be included as plaintiffs in Canadian price-fixing class actions.

The ruling settled a highly controversial issue, as evidenced by previously conflicting judgments from appellate courts in Ontario and British Columbia.

"I would say that including umbrella purchasers is an untoward and improper expansion of the class because it makes certain defendants responsible for the sale of the product by parties who are not participants in the litigation and over whom these defendants have no control," said Rob Kwinter of Blake, Cassels & Graydon, who with colleague Evangelina Kriaris led the team representing a trio of Samsung companies who were defendants in the case.

However that may be, the inclusion of umbrella purchasers stands in direct opposition to the stance taken by U.S. courts. Because many Canadian competition actions have their roots in U.S. enforcement proceedings, Canadian "copycat" cases will have classes that are broader in scope than the corresponding U.S. actions.

3. *Orphan Well Association v. Grant Thornton Ltd.* 2019 SCC 5

There can be no denying the impact on the Alberta oil and gas community of the SCC's ruling that neither the abandonment obligations nor licence transfer restrictions under Alberta's regulatory regime allow the trustee of a bankrupt estate to disclaim liability for a defunct company's environmental obligations.

"The upshot is that compliance with regulatory orders must occur before security holders are paid," said Ken Lenz in Blake, Cassels & Graydon LLP's Calgary office, who led the team representing the Orphan Well Association and the Alberta Energy Regulator. "And that applies to the hundreds of thousands of wells, amounting to one-quarter of Alberta's land mass, that require remediation."

The decision will significantly impact secured lenders' decisions regarding oil and gas companies, particularly juniors and intermediates requiring capital to support growth and survive in a difficult economic environment.

It could also impact priorities in insolvencies in which the estate must deal with other regulatory obligations incurred by the defunct company.

"I'm not sure just how it will apply to other regulatory regimes, but the decision could draw attention in cases involving securities and pension law, among others," Lenz said.

2. *Reference re Environmental Management Act (British Columbia)* 2019 BCCA 181

The British Columbia Court of Appeal's unanimous ruling against B.C.'s attempts to block the Trans Mountain expansion project (*Reference re Environmental Management Act (British Columbia)* 2019 BCCA 181) is now final, having been upheld in early 2020 by a unanimous SCC decision, *Reference re Environmental Management Act* 2020 SCC 1, which adopted the Court of Appeal's reasons from the bench.

The Court of Appeal concluded that the pith and substance of the B.C. legislation, which would have given the province the ability to control the amount of heavy oil coming into the province, were clearly aimed at federal matters and therefore unconstitutional.

Michael Marion, who led the Borden Ladner Gervais LLP team representing the Canadian Energy Pipeline Association, says the decision's broader significance lies in the certainty it creates.

"Disputes about which level of government has jurisdiction create regulatory uncertainty which, in turn, creates a disincentive for investment," he said. "This case was a clear statement that confirmed the exclusive federal jurisdiction over interprovincial transportation undertakings, which was needed in order to get one step closer to having the Trans Mountain Pipeline constructed."

1. *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65; *Bell Canada v. Canada (Attorney General)* 2019 SCC 66; *National Football League v. Canada (Attorney General)* [2018] S.C.C.A. No. 28.

These three cases, known as the *Vavilov* trilogy, have been hailed as the most important administrative law decisions in a decade — not only from an academic but also from a practical perspective.

"There are many regulatory and administrative law regimes that affect business, and the trilogy will provide much more clarity about the rules that apply in reviewing decisions made pursuant to these regimes," said Paul Daly, the university research chair in administrative law at the University of Ottawa.

Steve Mason, who led the McCarthy Tétrault LLP team that represented the National Football League (NFL), agrees.

"The trilogy replaces *Dunsmuir v. New Brunswick* 2008 SCC 9 and sets the standard by which all administrative tribunals will be reviewed for years and years," he said. "In simplifying the analysis for determining whether a court must accord deference to an administrative decision, the court has made things more certain for business."

All administrative decisions, the court ruled, will now presumptively be upheld on review so long as they are "reasonable." But questions of law, including statutory interpretation, will be reviewed on a "correctness" basis where the governing legislation provides for a right of appeal.

"So, where a statutory appeal exists, a business is entitled to a correct decision, not an incorrect one that is allowed stand on review merely because the court feels it's reasonable," Mason said. "And even where a reasonableness standard applies, the SCC has put forward a structured way of assessing reasonableness that places more importance on the logic of the decision as opposed to whether it's simply justifiable and transparent."

This is the second of a two-part series. Read part one: Top 10 business decisions of 2019: From bankruptcy to beer.

Julius Melnitzer is a freelance legal affairs journalist based in Toronto. He can be reached at melnitzer@sympatico.ca.

Photo credit / Bedrin-Alexander ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.

© 2020, The Lawyer's Daily. All rights reserved.