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The Impact of *Vavilov*: Reasonableness and Vulnerability

Lorne Sossin

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I. INTRODUCTION

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1] and *Bell Canada v. Canada (Attorney General)*[2] (the "Admin Law Trilogy"), the Supreme Court of Canada embarked on an ambitious revamp of the Canadian law of judicial review of administrative decisions. The Court's lead decision, *Vavilov*, has broad implications for Canadian public law. Specifically, in this comment, I explore the Court's introduction of an important, new contextual factor to the reasonableness analysis — that of the impact of an impugned decision on those affected by it, and particularly, those with existing vulnerabilities.

Other contributions to this volume explore the facts and decisions in the Admin Law Trilogy as a whole,[3] so I need not review them again here. The debate in the wake of *Vavilov* has concerned how much of the Court's pre-trilogy, *Dunsmuir*[4] standard of review framework remains in place, and how much has changed. In many senses, *Vavilov* represents simply the next, incremental step in the Court's development of deference. For example, while the standard of review of reasonableness was emerging as a "default" after *Dunsmuir*, *Vavilov* recognized an overarching presumption of reasonableness review unless one of two exceptions prevailed (first, where legislation mandates a standard or review or a statutory appeal, and second, where the rule of law requires that the standard of correctness applies, as in constitutional decisions).

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[1] [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.) [hereinafter "*Vavilov*"].

[2] [2019] S.C.J. No. 66, 2019 SCC 66 (S.C.C.) [hereinafter "*Bell Canada*"].

[3] See Paul Daly, "*Vavilov* and the Culture of Justification in Contemporary Administrative Law" and Audrey Macklin, "Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) After *Vavilov*!", both in this volume.

[4] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.) [hereinafter "*Dunsmuir*"].

Some aspects of the standard of review determination, however, were dramatically altered — for example, the Court rejected the long-standing view that decision-makers were entitled to the same deference whether their decisions were subject to statutory appeals or judicial review was provided. In *Vavilov*, the majority of the Supreme Court held that all statutory appeals (unless a specific standard of review was legislated) would henceforth be reviewed on the appellate standard of correctness for questions of law, and palpable and overriding error for questions of fact,[5] rather than the more deferential standard of reasonableness (see paras. 36-52). This departure from a series of well-accepted precedents led Abella and Karakatsanis JJ. to write a spirited set of concurring reasons taking issue with this aspect of the revamped framework of judicial review. Much of the initial commentary on the Admin Law Trilogy has focused on this debate.[6]

Given the presumption of reasonableness, however, the bulk of *Vavilov* addresses the conceptual framework by which Courts should undertake the reasonableness analysis. The wide diversity of settings of administrative decision-making continues to put pressure, both conceptually and practically, on any attempt to superimpose a single framework on the substantive review of administrative action. The Court's emphasis on a contextual approach in *Vavilov* attempts to account for this diversity. For the most part, this contextual framework recycles factors that also were recognized in *Dunsmuir* and earlier case law.

Another new aspect of the judicial review framework, however, has received relatively scant attention. For the first time, in *Vavilov*, the Supreme Court expressly acknowledged that the determination of reasonableness may depend on the impact of a decision on an affected party. On this point, the majority held,

> It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
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> Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe

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[5] As set out in *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, 2002 SCC 33, at para. 8 (S.C.C.).

[6] See Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (January 15, 2020), Ottawa Faculty of Law Working Paper No. 2020-09, online: <https://ssrn.com/abstract=3519681>.

> or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.
>
> *Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law*.[7]

In this brief comment, I first examine the ways in which the impact of decisions already has been integrated into the judicial review framework for procedural fairness. I then turn to this shift in *Vavilov* and its implications for the judicial review framework for substantive decision-making.

1. Fairness and Impact

Notwithstanding the Supreme Court's repeated references to the framework for judicial review in *Vavilov*, that case dealt with only one aspect of judicial review — substantive decision-making. In other words, in *Vavilov*, the Court considered the scope of courts to review *what* administrative decision-makers have decided and how much deference should be afforded the decision-makers.

The framework for judicial review of administrative decisions on substantive grounds had undergone significant evolution since its origins in the 1979 *CUPE v. New Brunswick Liquor Corp.* Supreme Court decision.[8] While the methodology for determining deference had evolved, its focus remained on the statutory context of the decision and the expertise of the decision-maker.

In particular, the standard of review analysis turned instead on other contextual factors, such as the pragmatic and functional approach set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,[9] among other cases. While the expertise of the decision-maker made a difference, as well as the statutory backdrop of the decision, the identity, capacity or vulnerability of the person affected by a decision appeared to play no role whatsoever in the substantive review of administrative decisions.[10] In short, deference has never before turned on the impact

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[7] *Vavilov*, at paras. 133-135 [emphasis added]. See also, Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (January 15, 2020), Ottawa Faculty of Law Working Paper No. 2020-09, online: <https://ssrn.com/abstract=3519681>.

[8] [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.).

[9] [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.).

[10] There have been some exceptions to this rule, where the impact of a decision on an affected party has been cited as a factor in the substantive review analysis; *e.g.*, *Canada v.*

a particular decision might have on an affected party.

The erasure of affected parties from the substantive review analysis under administrative law was in stark contrast to the express inclusion of affected parties in the procedural fairness judicial review analysis. As the Supreme Court set out a generation ago in *Baker v. Canada (Minister of Citizenship and Immigration)*,[11] the contextual factors by which a reviewing court determines the degree of fairness owed by the decision-maker includes "the importance of the decision to the individuals affected". Justice L'Heureux-Dubé, writing for the Court in *Baker*, held,

> A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:
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> > A high standard of justice is required when the right to continue in one's profession or employment is at stake ... . A disciplinary suspension can have grave and permanent consequences upon a professional career.
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> As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:
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> > In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.
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> The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.[12]

This aspect of the *Baker* framework for determining a decision-maker's duty of fairness in particular circumstances has been widely applied. As the Federal Court subsequently put it: "In *Baker*, the Supreme Court recognized that the more profound an impact the decision will have on an individual's life, the more stringent the procedural safeguards will be."[13]

Kabul Farms Inc., [2016] F.C.J. No. 480, 2016 FCA 143 (F.C.A.).

[11] [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

[12] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 25 (S.C.C.).

[13] *Ola Display Corp. v. Canada (National Research Council)*, [2013] F.C.J. No. 468, 2013 FC 423, at para. 35 (F.C.).

For example, in *Hillary v. Canada (Minister of Citizenship and Immigration)*,[14] the Federal Court of Appeal relied on the factor in determining a "high" degree of fairness in an appeal by a permanent resident against removal.

> Subsection 167(2) provides specific content to the right to be represented at a hearing before the Board. Thus, a failure by the Board to comply with the express and implied procedural duties imposed by its enabling statute may constitute a breach of a principle of natural justice. The factors listed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28, indicate that the content of the duty of fairness in an appeal to the IAD by a permanent resident against removal is high. Particularly important in this regard are: *the nature of the individual interest at stake; the broadly judicial nature of the IAD's decision-making process; and, in the present case, Mr Hillary's particular vulnerability because of his mental illness*.[15]

As Bielby J. of the Alberta Court of Queen's Bench observed, sometimes whole categories of vulnerability could be recognized, relying on the *Baker* framework: "When an individual's employment is at stake, a particularly high standard of justice is required and the process leading to the decision must adhere to a high standard of procedural fairness."[16]

While this attention to impact and vulnerability has been developed in a number of cases in the procedural context, there remain several important unanswered questions in how these ideas will be understood by courts applying the concept of "heightened responsibility" in the wake of *Vavilov*.

Exploring the range of such questions lies outside the scope of this brief comment, but some of the most important include: Should impact and vulnerability themselves be determined along a spectrum? For example, a decision with mild impact on someone with significant vulnerability may be more harmful than a decision with more significant impact on someone with less vulnerability, but how are such distinctions to be addressed in the assessment of a decision-maker's reasons? Are determinations of vulnerability to be made based on individual circumstances or can "whole categories" be recognized, as Bielby J. suggests, such as the vulnerability inherent in all those who are incarcerated, or all those seeking refugee status, or those living with certain kinds of cognitive disabilities or suffering from certain illnesses, and so forth?[17]

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[14] [2011] F.C.J. No. 184, 2011 FCA 51 (F.C.A.).

[15] *Hillary v. Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 184, 2011 FCA 51, at para. 36 (F.C.A.) [emphasis added].

[16] *Alberta Union of Provincial Employees v. Caritas Health Group*, [2006] A.J. No. 893, 2006 ABQB 550, at para. 25 (Alta. Q.B.).

[17] With respect to critical assessments of the processes by which vulnerability is determined, see for example, Sheila Wildeman, Laura Dunn & Cheluchi Onyemelukwe, "Incapacity in Canada: Review of Laws and Policies for Research Involving Decisionally Impaired Adults" (2013) 21 American Journal of Geriatric Psychiatry 314; Mary Liston,

Similarly, are there specific areas of decision-making, where impact on vulnerability can generally be presumed, such as social benefits law, or as discussed below in relation to *Vavilov*, decision-making on citizenship? Conversely, are there areas where impact and vulnerability are unlikely to arise, perhaps in certain international trade, intellectual property or settings of financial regulation?

While cases applying *Baker* sometimes refer to the vulnerability of a person or group of people affected by a decision, there is rarely any examination of the scope or dynamics of vulnerability. In other words, the Court states that a person or group is vulnerable without examining what makes them so. For example, in *V. (W.) v. Strike*, Bell J. stated: "Taking into account the *Baker* factors and the fact that *the Board deals with a very vulnerable population*, I conclude that the duty of procedural fairness in these circumstances required the Presiding Member to make specific inquiries of W.V. as to his intentions when he advised he was leaving to go to yard."[18]

Vulnerability, of course, also can be a diffuse concept. Feminist legal theorist Martha Fineman, for example, has posited vulnerability as "*the* primal human condition", since all people are susceptible to change and are or may be depending on others, and therefore at risk of harm.[19] For others, vulnerability involves a specific set of qualities that makes a person at risk of harm. For example, "vulnerable persons" are defined by the Immigration and Review Board Guideline as "individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity."[20]

"Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process" in John Bell, Mark Elliott, Jason Varuhas & Philip Murray, eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016) 213-42; and Jen Raso, "The In-Between Space of Administrative Justice: Reconciling Norms at the Front-Lines of Social Assistance Agencies" in Jason Varuhas & Shona Wilson Stark, eds., *Frontiers of Public Law* (Oxford: Hart, 2019).

[18] [2018] O.J. No. 972, 2018 ONSC 1263, at para. 27 (Ont. S.C.J.) [emphasis added].

[19] See Martha Fineman, "Vulnerability and Inevitable Inequality" (December 13, 2017), Oslo Law Review, Vol. 4, pp. 133-149, Emory Legal Studies Research Paper, at 11, available at SSRN: <https://ssrn.com/abstract=3087441>. See also Martha Albertson Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics" in Anna Grear & Martha Albertson Fineman, eds., *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (New York: Routledge, 2016); Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 Yale J.L. & Feminism 1.

[20] See Immigration and Refugee Board of Canada, "Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB", s. 2.1, online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx#a2>.

Courts have yet to grapple with the scope of vulnerability in substantive judicial review settings as until *Vavilov*, there was very little reason to do so. In this sense, the most significant effect of *Vavilov* may well be to spotlight vulnerability, and the lived experience of those affected by administrative decisions more generally, in the reasonableness analysis. Or, put differently, the Court raises a new and far-reaching question in *Vavilov* as to whether decision-makers can be reasonable if they have not turned their mind to the impact of their decisions, and in turn, to the vulnerabilities of those affected by their decisions.

I turn now to how the significance of impact arises in *Vavilov*, and why this represents a meaningful shift in Canadian public law.

2. Impact and *Vavilov*

As calls to include impact and vulnerability in the standard of review analysis are not new, it is a fair question to ask why now? Prior to the Admin Law Trilogy, the Supreme Court announced that it was considering a broader re-examination of the standard of review framework. As a result, 27 interveners were permitted to make submissions during the hearing of the Admin Law Trilogy, in addition to the Supreme Court's own two appointed *amici curiae*.[21]

This array of parties and interveners led to an outpouring of perspectives and views on judicial review. Some advocated treating certain decision-making contexts in different ways — so, for example, a different level of scrutiny might apply to discretionary refugee decisions than economic regulatory findings (which the Supreme Court rejected). Others advanced the idea that statutory appeals should be treated differently than judicial reviews (which the majority of the Supreme Court adopted). For my part, I returned to the distinction between the relative success of the Court's procedural fairness jurisprudence in contrast to the relative struggles of the substantive review jurisprudence. I raised the possibility that one explanation for this distinction was that the duty of fairness framework expressly referred to the impact of a decision on the affected party, while the substantive review framework did not.

In a blog series marking the 10th anniversary of *Dunsmuir*, in an entry entitled, "*Dunsmuir* – Plus ça change Redux",[22] I observed that public law narratives like the standard of review framework under *Dunsmuir* can be problematic where those who actually make the decisions and those who actually are affected by the decisions are

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[21] See online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37748/FM260_Amici-Curiae_Daniel-Jutras-Audrey-Boctor.pdf>.

[22] See online: <https://www.administrativelawmatters.com/blog/2018/03/07/dunsmuir-plus-ca-change-redux-lorne-sossin/>, which in turn summarized an analysis developed in more detail in Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581. See also Lorne Sossin, "The Complexity of Coherence: Justice LeBel's Administrative Law" (2015) 70 S.C.L.R. (2d) 145-64.

completely missing from the analysis. For example, whether the parties affected by a statutory decision are vulnerable or powerful, whether repeat players or a one-time participant, played no role whatsoever in determining or applying the standard of review in the previous *Dunsmuir* framework. The abstraction of the standard of review analysis from the facts and circumstances of actual cases lay at the root of the Court's struggles for consistency and coherence. It is this exercise in abstraction that led Binnie J. in his pointed, concurring reasons in *Dunsmuir* to decry the "law office metaphysics".[23]

The logic of including the impact on the party and the context of the decision-maker in the analytic framework for procedural fairness is that the accountability of executive action under administrative law in a constitutional democracy is best understood as holistic. This exercise cannot be completed just by considering statutes and classifying types of decisions. The people involved, and how a decision may affect their lives, introduces a vital variable into the judicial review framework.

This more truly holistic approach also has been adopted in other peer jurisdictions. For example, writing for the New Zealand High Court in *Wolf v. Minister of Immigration*, Wild J. summed up the applicable framework there as follows:

> Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: *upon who made it*; by what process; what the decision involves (ie its subject matter and the level of policy content in it) *and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them.*[24]

This concept also builds on the principle of "anxious scrutiny" as developed in the U.K., where the importance of a matter has been recognized as leading to a more rigorous examination by the Court on judicial review.[25] The principle is often traced to the statement by Lord Bridge in the U.K. House of Lords judgment in *Budgaycay v. Secretary of State for the Home Department*:

> I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz. that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity

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[23] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 122 (S.C.C.).

[24] [2004] NZAR 414, at para. 47 (H.C.) [emphasis added].

[25] See generally, Paul Craig, "Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application" (March 16, 2015), [2015] Public Law 60, Oxford Legal Studies Research Paper No. 20/2015, online: <https://ssrn.com/abstract=2595190>.

> of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[26]

In the U.K. context, anxious scrutiny has been understood both as a duty on the original decision-maker and a duty on the court conducting judicial review. This duty is part of a broader proportionality analysis in the U.K., which also finds expression in the Canadian context to constitutional adjudication (especially in relation to section 1 of the Charter,[27] and to the balancing exercise of Charter values).

Without the ability to talk about how impact and vulnerability might legitimately affect the rationale for deference, Canadian courts engaged in judicial review prior to *Vavilov* sometimes appeared to bend the determination of reasonableness to fit the necessities and equities of particular cases. In my view, recognizing the complexity of *de facto* considerations in a more authentic *de jure* doctrinal analysis will improve the administration of justice and ultimately enhance public confidence in the justice system. The questions, however, is whether *Vavilov* advances this goal?

My earlier argument envisioned that additional scrutiny or deference may flow from a consideration of impact on affected parties. This position is in some tension with the Supreme Court's view that reasonableness is a single standard of review rather than a spectrum, a view maintained in *Vavilov*. The majority of the Court elided this tension by focusing on a "heightened responsibility" on the part of decision-makers to justify in their reasons that impact has been considered.[28] In other words, while deference remains static, the degree of justification required of a decision-maker to meet the reasonableness threshold may vary according to the impact a decision has on an affected party.

At first glance, this aspect of *Vavilov* hardly seems earth-shaking. Not only is it focused primarily on justification (as opposed to deference), but it is the last of seven contextual factors listed (after "governing statutory scheme", "other statutory or common law", "principles of statutory interpretation", "evidence before the decision-maker", "submissions of the parties" and "past practices and past decisions") in a category of contextual factors to be considered in a holistic reasonableness analysis. These factors are not even exhaustive. The majority in *Vavilov* clarified:

> It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing

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[26] [1987] A.C. 514, at 531 (H.L.).

[27] *Canadian Charter of Rights and Freedom*s, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[28] *Vavilov*, at para. 135.

> statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; *and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.*
>
> A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified both with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.[29]

Applied to the facts and circumstances of *Vavilov*, the majority highlighted that the impact of the citizenship determination for Mr. Vavilov was significant. The majority described the effect of a revocation of citizenship as "a kind of political death".[30] The majority held that the Registrar's failure to justify her decision with respect to the serious impact of the decision on Mr. Vavilov, together with the other concerns with the application of the relevant legislation and jurisprudence, justified a finding that the denial of citizenship to Mr. Vavilov was unreasonable. The majority observed that the factors leading to the finding of unreasonableness, including the impact of the decision on Mr. Vavilov, should not be viewed in isolation: "Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision."[31]

Since *Vavilov*, several lower court cases have examined many aspects of the new framework.[32] The contextual factor on the impact of the decision on affected parties, however, has yet to be examined or applied in depth.

In *Dhaliwal v. Canada (Public Safety and Emergency Preparedness)*, Norris J. included this reference in his justifications for finding grounds to grant a stay against the removal of a person who remained in Canada without status after the expiry of his study permit:

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[29] *Vavilov*, at paras. 106-107 [emphasis added].

[30] *Vavilov*, at para. 193, citing A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014) 40 Queen's L.J. 1, at 7-8.

[31] *Vavilov*, at para. 194.

[32] For discussion, see Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (March 2020), *Paul Daly, Administrative Law Matters* (blog), online: <https://www.administrativelawmatters.com/blog/2020/01/16/new-paper-the-vavilov-framework-and-the-future-of-canadian-administrative-law/>.

> AND UPON considering that the reviewing court will also be guided by the principle that "[c]entral to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov* at para 133). *Given the authority granted to the Inland Enforcement Officer and the significant implications for the applicant flowing from a denial of his request for a deferral, there is a "heightened responsibility" on the part of the Officer to ensure that the reasons given "demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law"* (*Vavilov* at para 135);[33]

In *Thangeswaran v. Canada (Public Safety and Emergency Preparedness)*, Ahmed J. referenced this passage from *Vavilov* in outlining the applicable standard of reasonableness to a judicial review of a humanitarian and compassionate determination.[34] Justice Ahmed found the decision unreasonable in relation to its treatment of certain medical evidence.

A similar conclusion followed Gascon J.'s analysis of the treatment of new evidence in a refugee determination in *Khan v. Canada (Minister of Citizenship and Immigration)*:

> An administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). *A decision will not be reasonable if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point* (*Vavilov* at para 103). *This is especially true where a decision has particularly harsh consequences for the affected individual, such as "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood"* (*Vavilov* at para 133). *Here, the consequences of refusing the new evidence are particularly severe and harsh for Mr. Khan and his refugee claim, and such a situation called for the RAD to "explain why [his] decision best reflects the legislature's intention" and the case law on the relevance factor* (*Vavilov* at para 133). I find that, in the particular circumstances of this case, the RAD has not done so. To echo the language of the Supreme Court in *Vavilov*, the omitted aspects of the analysis on the refusal of Mr. Khan's new evidence causes me "to lose confidence in the outcome reached" by the RAD (*Vavilov* at para 122; *Canada Post* at paras 52-53).[35]

Other decisions in this early phase of applying *Vavilov* follow a similar pattern. Once a flaw affecting the reasonableness of the decision is identified, the impact on the affected party is cited as a factor further justifying the conclusion that the reasons

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[33] 2020 CanLII 7806 [emphasis added].

[34] [2020] F.C.J. No. 126, 2020 FC 91, at para. 37 (F.C.).

[35] [2020] F.C.J. No. 413, 2020 FC 438, at para. 37 (F.C.) [emphasis added].

were inadequate, and therefore that the decision was unreasonable.[36] What has yet to emerge is a decision where the outcome of a reasonableness analysis itself is determined by the "heightened responsibility" on decision-makers to justify that the impact of the decision on affected parties has been considered appropriately.

What are some of the scenarios that could arise where the impact of the decision on the parties affected by the decision could make a material difference to the outcome of a judicial review? At least to begin with, it may make sense to look to where procedural justice requirements have been heightened as a result of vulnerability under the case law applying *Baker* (for example, the reference to mental health issues in *Hillary*, discussed above).[37] In other words, a decision-maker applying the same statutory provision in two different cases — one involving an applicant with no existing vulnerabilities, where the outcome will be of minor consequence, and a second one involving a vulnerable applicant, where the outcome will be severe harm — will have a heightened responsibility to demonstrate that the vulnerability of the second applicant, and the severe consequences for that applicant, have been expressly considered by the decision-maker. On this view of *Vavilov*, the same set of reasons could be found to meet the reasonableness threshold in the context of the sophisticated party and to be unreasonable in the context of second applicant's vulnerabilities.

Beyond the context of vulnerability, the majority in *Vavilov* also opens the door to the relevance of impact in the analysis of reasonableness more broadly. As set out above, the majority referred to a "principle of responsive justification" that arises where there has been "particularly harsh consequences for affected individuals". The Court stated that this include "decisions with consequences that threaten an individual's life, liberty, dignity or livelihood".

Courts have only begun to explore impact in this broader sense. For instance, in *Coldwater First Nation v. Canada (Attorney General)*,[38] the Federal Court of Appeal referenced this aspect of *Vavilov* to emphasize the impact of the duty to consult to the "long-term relationships" between Indigenous Peoples and the Crown. The Court concludes that, "This affects the extent and quality of the reasons that the Governor in Council is expected to provide in support of its decision."[39] The implications of this approach could be significant for a host of decisions affecting such relationships, though for the moment, this linkage remains vague. While the scope of "responsive justification" is potentially vast, its applicability is clearest, and

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[36] See also *Alsaloussi v. Canada (Attorney General)*, [2020] F.C.J. No. 405, 2020 FC 364, at para. 79 (F.C.).

[37] See note 14 above. See also *Clarke v. Canada (Citizenship and Immigration)*, [2018] F.C.J. No. 251, 2018 FC 267, at para. 11 (F.C.).

[38] [2020] F.C.J. No. 149, 2020 FCA 34 (F.C.A.).

[39] *Coldwater First Nation v. Canada (Attorney General)*, [2020] F.C.J. No. 149, 2020 FCA 34, at para. 62 (F.C.A.).

I would suggest, most relevant, where the impact at issue affects people with existing vulnerabilities.

II. CONCLUSION

In *Vavilov*, the Supreme Court has undertaken a significant renovation of Canada's judicial review framework. This new framework may well allay some of the concerns with the standard of review jurisprudence and clarify the methodology of the reasonableness analysis.

In my view, however, for the reasons set out above, *Vavilov* may well come to be remembered most for something entirely different; that is, the inclusion, for the first time, of the impact on those affected by administrative decisions as an express element of the reasonableness analysis. The focus on impact, in turn, may well lead to a more considered and coherent approach to vulnerability in Canadian administrative law. In this way, the focus of substantive review will no longer be solely on the legislation and executive decision-makers alone, but finally on the lived experience of those people affected by decisions too.

The examination of impact, in this sense, may well be the lasting impact of *Vavilov*.