

Victims are Entitled to Reasons –

An Application of Procedural Fairness After *Vavilov* to Survivors in Sexual Assault Cases

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INTRODUCTION

Sexual assaults remain a prevalent occurrence in Canada and around the world. This is in part due to how the justice system responds to survivors who report sexual assaults. The word, survivor, will be used throughout this poster to refer to the complainant or victim.

This research analyzed how *Canada (Minister of Citizenship and Immigration) v. Vavilov* affects the decision-making process and the necessity for police and prosecutors to give reasons for decisions in sexual assault cases.



The inclusion of a ‘heightened responsibility to vulnerable people and the consequences that threaten an individual’s life, liberty, dignity or livelihood’ quoted by the majority in *Vavilov* require police and prosecutors to give written reasons to a survivor when they do not proceed with a charge or prosecution.

THE PROBLEMS IN SEXUAL ASSAULT CASES

Sexual Assault Myths and Bias

The first is the propensity for prosecutors, police, lawyers and the general public to rely on sexual assault myths and bias.

Potential Repeat Offenders

The second is the large number of sexual assault offenders who make up a large proportion of rapes. This shows that when the police and prosecutors decide who is charged or prosecuted, it is essential to consider the potential repeat offenders that could be set free if decision-making criteria are not adequate.

Incorrect Assessment

The third area of concern is how intoxication affects the reliability of evidence. This creates an issue for prosecutors and police: a prosecutor could make an incorrect assessment to prosecute a case because assuming intoxication will make the survivor unreliable. Issues with incorrect assessment can culminate in low charges and prosecution rates.

Low Reporting and Low Charges/Prosecutions

The last concern addressed is the evident low reporting of sexual assault cases and low percentage of prosecutions and charges of sexual assault.

HOW DID VAVILOV CHANGE THE REQUIREMENT TO GIVE REASONS?

“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 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.”

This decision has implications for the procedural fairness provided to survivors in sexual assault cases. It is examined first through reviewing decisions where this passage has been cited that may impact police charging and crown counsel prosecution decisions. Secondly, this research determined if this procedural protection is available for survivors in sexual assault cases in police charging decisions and prosecution decisions.

IS JUDICIAL REVIEW APPLICABLE AND IS PROCEDURAL PROTECTION OWED?



In cases post *Vavilov* there has been a trend towards the importance of giving reasons to circumstances that significantly affect one’s life and that those reasons must be justified. Including that reasons did not meet the level of transparency and justification that was demanded in *Vavilov* among the ‘most vulnerable.’ The ‘heightened responsibility’ noted in *Vavilov*, at para 135, was also pointed out as a justification that reasons were not reasonable. In addition, a court noted the importance of considering the impacts on one’s mental health, such as chances of suicide, in conducting the analysis set in *Vavilov* at para 133-135. This precedent may significantly affect sexual assault cases where survivors have adverse mental health effects after a sexual assault.

Saskatchewan was the primary jurisdiction that was analyzed for police power. It was found that through statutes procedural protection was owed to survivors. This included that anyone can complain about the police to the Public Complaints Commission, a decision from the commission can be appealed and guidelines such as the policy manual can also be used to create legitimate expectations for survivors including specific guidelines about intimate partner violence.

Federal prosecutors and other provincial jurisdictions were analyzed for prosecutor power and the applicability of judicial review applying to their prosecution decisions. There is an enhanced necessity for procedural fairness required for survivors in sexual assault cases. Crown counsel is obliged to make decisions according to the guidelines. The guidelines include that there is a principle of prosecutorial independence entrenched in the legal system, and while the “Crown is not legally required to give reasons for core decision making [but,] it may be advisable in certain circumstances to offer an explanation... to maintain public confidence in the administration of justice.” The Public Prosecution Service of Canada outlines the procedure to submit complaints about federal prosecutors under the *Canadian Victims Bill of Rights* (CVBR). The policy outlines that any victim or a person on behalf of a victim can submit a complaint, and if they are unhappy with the result, they can further appeal the decision. It should be noted that guidelines such as the following policy can also create legitimate expectations for survivors in receiving the duty of procedural fairness.

NOTE: The PPSC Deskbook was published in 2014; therefore, the applicability of these guidelines may have changed since the *Vavilov* decision which noted the importance on ‘vulnerable’ individuals and a ‘heightened responsibility of decision-makers.

In addition, procedural fairness would likely be required under the common law threshold. A survivor’s rights, privileges, or interests will be affected if there is a decision to proceed with a charge against an accused or decision to prosecute. Three factors determine a general duty to act fairly: firstly, this is a decision of a final nature when police or prosecutor decides not to go forward with a charge/prosecution that ends the process for the survivor. Second, the relationship between a survivor and the police and prosecutors is one where the survivor is vulnerable to the decision-maker, and the decision affects the public. Third, the effect on a survivor is that it affects their potential safety in the future, their mental health, which may cause additional harm, and their rights to be protected under the *Canadian Victims Bill of Rights*. All factors point to enhanced protection. In addition, based on the framework for procedural fairness, this analysis would show that a greater level of procedural protection is owed as at least three factors show increased procedural fairness requirements.

ADDITIONAL PROTECTION POST VAVILOV

Because of the prevalence of myths and stereotypes as indicated earlier in sexual assault cases, reasons are a way to show that the decision was ‘justified, transparent and intelligible’. This is the only way that shows that bias and sexual assault myths were not used in the decision-making process.

The importance of the passage is the majority’s inclusion of ‘dignity’ at para 133. If the survivor is not given reasons for why a charging decision or prosecution is not moved forward, it affects the survivor’s dignity as the survivor feels violated and has no recourse to try to achieve justice. This may result in mental health issues in the future and be a severe or harsh consequence, especially if mental health issues lead to suicidal thoughts. The court in *Vavilov* noted the importance for decision-makers to consider the implications of the decision to the affected individual, and if these factors are not considered, the decision would likely be unreasonable.

BENEFITS OF WRITTEN REASONS



Decrease Bias: Ensuring that all police and prosecutors provide reasons for not proceeding with a charge or prosecution will increase awareness of decision-making criteria and help eliminate bias.



Increase the Effectiveness of Trauma-Informed Training: Ensuring an understanding of a trauma-informed approach to sexual assault and using reasons to reflect on this understanding makes an investigation more transparent and likely more effective.



More Accountability for Police and Prosecutors and Increase Charges/ Prosecutions: Check and balance to the discretion for these decisions influenced by several legal and extralegal considerations. Show that police considered the matter which may increase police accountability and decrease unfounded cases.

REFERENCES/ACKNOWLEDGEMENTS

See link for references:

https://usaskca1-my.sharepoint.com/:b:/g/personal/vlp194_usask_ca/EfLDbO1J7yBDkCpRea6HamiBr2O2749As6p6WkivGbaYYg?e=knjZvy

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