PLUS CA CHANGE…

The Record on Judicial Review

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TODAY'S DISCUSSION

1. Evidentiary Rules in a post-*Dunsmuir* World

2. Background and Historical Position on "the Record"

3. The Impact of *Dunsmuir* & *Dore* on the Scope of Judicial Review

4. Potential Problems Mixing a Historical View of "the Record" with Today's Judicial Review Analysis

5. Real World Examples

6. Possible Solutions

Evidentiary Rules in a Post-*Dunsmuir* World: Modernizing the Scope of Admissible Evidence on Judicial Review

28 Can. J. Admin. L. & Prac. 323

- Thesis:
  - *Dunsmuir* and *Dore* signaled a shift in the approach to judicial review in Canada – away from "jurisdiction" and towards "reasonableness"
  - As the grounds of judicial review shift, so does the evidence relevant to establishing an entitlement to relief
  - While grounds of review have shifted considerably, the approach to admissible evidence has not meaningfully changed since the early 20th century
  - We argued that changes to law of substantive review must be coupled with changes to the approach to admissible evidence on review

Evidentiary Rules in a Post-*Dunsmuir* World: Modernizing the Scope of Admissible Evidence on Judicial Review

- Approached the issue from the perspective of users of the administrative law system, as opposed to that of tribunals or decision-makers

- Focused on non-adjudicative decision-making in particular, where the record is informal and not solely established by adversarial parties

- A starting point for discussion, as opposed to suggesting the only solution

Background and Historical Position on “the Record”

The Historical Position of Courts on “the Record”

The Historical Position

- Initially, in England and in Canada, judicial review was conducted on the basis of the "record" before the decision-maker
- The "record" was generally limited to:
  - The document that initiated the proceedings;
  - The pleadings, if any; and
  - The decision rendered
- The "record" would generally *not* include:
  - The evidence that was before the decision-maker; and
  - The reasons for the decision, unless incorporated into the "decision"
- The "evidence" and the "reasons" were considered "extrinsic" to the record.

The Historical Position

- This rule was closely tied to the scope of judicial review that existed at the time:
  - Judicial review only available to challenge the jurisdiction of the decision-maker;
  - *Certorari* did not lie for errors – of fact or of law – made within the decision-maker's jurisdiction unless the legal error appeared "on the face of the record"
  - Insufficient evidence to support the decision was *not* an available ground of review; and
  - Decisions made outside the quasi-judicial setting (i.e. non-adjudicative decisions) were rarely subject to substantive review.

The Historical Position

R v. Nat Bell Liquors Ltd., [1922] All ER 335 (JCPC)

- "A justice who convicts without evidence is doing something which he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of jurisdiction which he has, and not a usurpation of a jurisdiction, which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can thereafter be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that the conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it set aside, the real conclusion is that there never was any jurisdiction at all".

The Historical Position

Link between scope of judicial review and admissible evidence made by Lord Denning in *R. v. Northumberland Compensation Appeal Tribunal*, [1952] 1 All ER 122 (Eng. CA):

- "The next question which arises is whether affidavit evidence is admissible on an application for *certiorari*. When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, for the simple reason that the error must appear on the record itself".

The Historical Position

- Judicial review was limited to ensuring that the decision was made within jurisdiction, and that the proceedings, on the face of the record, were regular and according to law.
- No evidence, even evidence that had been before the decision-maker, was admissible to show the decision was wrong or unreasonable on the merits.
- Affidavit evidence was only admissible to show a violation of procedural fairness, or that the decision-maker “never ought to have begun the inquiry”.
- So long as decision-maker acted within its jurisdiction and in a manner that was procedurally fair, the substantive reasonableness of the decision was not an available ground of review

The Historical Position

- Canadian courts generally adopted and endorsed the rule, and its rationale, from the English cases
- *Keeprite Workers' Independent Union v. Keeprite Products Ltd*. (1980 - ONCA) (Labour Arbitration)

  "the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error."
- *Kinexus Bioinformatics Corporation v. Asad* (2010 – BCSC) (Human Rights Tribunal)

  "The general rule with respect to the admissibility of extrinsic material is that it is, except in very special circumstances, inadmissible… it may be admissible for the limited purpose of showing a lack of a jurisdiction or a denial of natural justice."

The Historical Position

- Thus, most Canadian courts, with a few recent exceptions, permit parties to tender evidence that is extrinsic to "the record" only where violations of procedural fairness, fraud, or other errors as to jurisdiction are asserted.

- Both the old evidentiary rule and its rationale persists today, notwithstanding the significant changes to the scope of judicial review, culminating in *Dunsmuir* and *Dore*.

So What Exactly Has Changed?

Overview: The Impact of *Dunsmuir* and *Dore*

- Judicial review in Canada today bears little resemblance to a purely "jurisdictional" conception of judicial review
- Moved from the concept of jurisdictional error and error "on the face of the record", to a more flexible and holistic standard of review analysis
  - Which permits the scrutiny for either substantive correctness (almost never) or reasonableness (almost all the time) on the merits
- Decisions like *Northumberland* and *Nat Bell Liquor* read like judgments from a bygone era, yet their evidentiary prescriptions remain

Nat Bell Liquors vs. *Dunsmuir* & *Dore*

- *Nat Bell Liquors*: "A justice who convicts without evidence is doing something which he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of jurisdiction which he has, and not a usurpation of a jurisdiction, which he has not."
- *Dunsmuir*: "In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
- *Dore*: "On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play"

The Impact of *Dunsmuir*

- *CNR*: "*Dunsmuir* is not limited to judicial review of tribunal decisions" it applies to "various administrative bodies", "all exercises of public authority", "those who exercise statutory powers", and "administrative decision makers".
- Not just to adjudicative decision makers
  - City Council By Laws - *Catalyst Paper* (2012 – SCC)
  - Law Society Rules - *Green v. Law Society* (2017 - SCC)
  - Governor-in-Council decisions (*Canadian National Railway* (2014 – SCC)
  - Correctional Officers (*Mission Institute v. Khela* (2014 – SCC)
  - Ministerial Orders (*Agraira v. Canada* (2013 – SCC)
- All can be impugned based on whether the outcome is reasonable, justifiable, and "defensible in respect of the facts and the law"

The Impact of *Dore*

- Recognition that administrative decision makers can breach *Charter* rights
- All *must* make decisions that proportionately balance the severity of the interference of the *Charter* protection with the statutory objectives
- *Charter* analyses are very fact dependent – must show extent of the breach and impact

The Impact of *Dunsmuir* and *Dore*

- The SCC refocused the judicial review process on ensuring an adequate justificatory process and the substantive reasonableness of the decision rendered
- A now total abandonment of the purely jurisdictional conception of judicial review
  - A concept on "judicial life support" (Hon. Joseph Robertson, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Markham: LexisNexis, 2014)
  - Shameless plug: L. Wihak, "Wither the Correctness Standard of Review? *Dunsmuir* Six Years Later" (2014) 27 Can J Admin L & Prac 173
- But in determining admissible evidence, we still focus on breaches of natural justice and "jurisdictional error"

The Impact of *Dunsmuir* and *Dore*

Simplified Example

- *Old Rule*: A Decision may be overturned if X is present
- *Old Evidentiary Rule*: Only evidence relevant to X is admissible
- *Consequence*: All relevant evidence admissible

- *New Rule*: A Decision may be overturned if X, Y or Z are present
- *Old Evidentiary Rule*: Only evidence relevant to X is admissible
- *Consequence*: Some relevant evidence (Y & Z) is inadmissible – can undermine new rules Y and Z

When Two Worlds Collide

- Historic rule and rationale linked to the grounds of review available at the time the rule was adopted.
- The various restrictions on the scope of judicial review have been lifted, supplanted, modified, and revised significantly, which now undermines the assumptions underlying the evidentiary rule
- The shift over the years in the scope of judicial review, crystallizing in *Dunsmuir* and *Dore*, now opens up fundamentally different, and arguably broader, arguments with which to impugn an administrative decision
- So the rule of evidence should adapt in kind

When Two Worlds Collide:

- But the rules have not been adapted.
- *Hartwig v. Saskatchewan (Commissioner of Inquiry),* 2007 SKCA 74, per Richards J.A. (as he then was):

> [19] It is readily apparent therefore that the scope of judicial review has evolved significantly in the 55 years since the *Northumberland* case was decided. In contrast, the conception of what is properly before the court in a judicial review application has been largely static. As a result, we are currently at a point where, on one hand, the factual findings of administrative decision-makers made within jurisdiction can be reviewed from the perspective of reasonableness but, on the other hand, the evidence on which those findings are made cannot be put before the courts. This situation frequently creates serious injustices and precludes meaningful review. In my opinion, there is a pressing need to bring the law concerning the materials which can be placed before the courts in judicial review applications into line with the substance of contemporary administrative law doctrine.

When Two Worlds Collide:

- There has been some statutory intervention – Saskatchewan is an outlier
- Statutes that set out what the record will include for the purposes of judicial review
- See e.g. definition of "record of proceeding" in *JRPA*, including documents (s-s (d)) and transcripts of oral evidence (s-s (e))
- Legislative interventions still tend to limit the evidence admissible on judicial review to the evidence – the record – that was put before the decision-maker
- Seems to presume an adjudicative decision

When Two Worlds Collide:

- Good policy reasons to continue to restrict the "record" or evidence admissible on judicial review in many circumstances
- But we suggest that a more flexible, principled approach to this issue is required
- Should have a good reason to exclude evidence – not inflexible application of outdated rules
- Blanket exclusionary rule, with limited narrow exceptions, is particularly problematic in at least two categories of cases

When Two Worlds Collide:

1) Non-adjudicative setting – no natural justice, little opportunity to file evidence, evidence might be compiled by decision maker not adversarial parties

2) Where *Charter* rights and values are implicated – often no meaningful opportunity to tender full evidence of impact, or Charter implications may not be clear before decision is made

Non-adjudicative Decisions:

- Many administrative decisions are not made in the context of a tribunal or adjudicative setting, but are nonetheless subject to judicial review on the same *Dunsmuir* standard
- To reiterate, this includes:
  - City by-laws;
  - Professional rules and regulations;
  - Decisions of Ministers or their delegates exercising discretionary statutory powers;
  - Policy decisions of administrative bodies;
  - Administrative decisions;
  - Cabinet decisions

Non-adjudicative Decisions:

- In each of these cases, the comprehensiveness of the record for the purposes of meaningful judicial review, and a reasonable opportunity to contribute to it, will vary along with the degree of procedural fairness owed by the decision-maker and the underlying context

- The obligation on the decision-maker to provide, and the right of the parties to receive, reasons for the decision – indicating why the decision-maker rejected the arguments or evidence put forward in support of the party's position – will also vary

Non-adjudicative Decisions:

- Procedures and process may be *ad hoc*, and sometimes no procedural fairness obligations will be owed at all;
- Decision-maker may not need to give the opportunity for submissions or evidence from any interested party who may subsequently seek to challenge the decision on judicial review;
- Opportunity to respond may also be limited by statute (e.g. 14 days to respond) – what if expert evidence is required?
- Decision-maker may collect their own evidence – unlike tribunals, they are not a passive or disinterested adjudicator, but may be invested in an outcome

Non-adjudicative Decisions:

- So, how do we determine what the “record” is in a case like this?

- And whether the decision is nevertheless defensible in light of the facts and the law, and reflects transparency, intelligibility and justification?

Non-adjudicative Decisions:

- Broad discretion over what goes in the “record” in non-adjudicative settings could allow decision-makers to insulate or immunize themselves from meaningful scrutiny

- Can be innocent and defensible, perhaps due to the process governing the decision

- Or can be for more culpable reasons, such as lack of due diligence or artificially or purposefully limiting the range of considerations taken into account in making the decision

Charter Values

- Statutory purpose of the legislative regime often relevant – may need evidence the decision maker did not consider to show purpose;
- And testing assertions regarding the impact of certain public action on the rights and freedoms of affected parties
- Not always possible or practical to provide comprehensive Charter evidence in administrative decision-making

Charter Values

- Evidence could be needed:
  - To establish the purpose and intention of the legislative or rule-making authority (ie. Legislative facts)
  - To identify the "severity of the interference" with the *Charter* rights or interests inflicted by the administrative decision, and
  - Whether they can be balanced proportionately against the statutory purpose (i.e. social and adjudicative facts)

Charter Values

- Administrative decisions that engage *Charter* values also arise outside the adjudicative setting - the potential for prejudice and unfairness is particularly acute.
- May be impractical for a party to provide evidence to the decision-maker demonstrating the impact of the decision on their *Charter* interests.
- Applying the old rule, particularly when a decision-maker effectively controls the contents of the "record", could impose significant harm upon the *Charter* interests of impacted parties

Charter Values

- Could significantly impact the ability of reviewing courts to effect meaningful judicial review for *Charter* compliance and adherence to constitutional norms.
- Constitutional challenges to legislation – no limit based on material "before" the legislature – focus on the effects or impact on *Charter* rights
- Should breaches of *Charter* rights be based on material that was or was not considered by decision-maker?

Hypothetical #1: Ministry of Health

- Delegated decision-maker to decide whether to approve Pharmacy in “public interest”
- Preliminary decision to not approve pharmacy, due to complex audit alleging significant filing errors, extrapolated data, and anonymous allegations of wrongdoing
- Statute says 15 days to provide submissions, after which “final” decision will be made
- Submissions made re: both factual allegations and public interest;
- Little time or opportunity for detailed affidavit or documentary evidence from community members, expert report on methodology, impact on *Charter* rights, all relevant to “public interest” etc.

Hypothetical #2: Professional By-Law

- Majority of profession wants restrictions on incentive programs, but statute says must show “harm” to public;
- Professional association does own research and passes bylaw based on a single study showing harm;
- No meaningful consideration of contrary evidence, therefore not “before” decision-maker;
- New participant – no opportunity to file evidence before decision made, but argues decision was unreasonable, and has publicly-available evidence showing single study is clearly wrong

Hypothetical #3: City Administrator

- Corporation applies to build new factory;
- Statute says City cannot approve if evidence shows a severe environmental impact;
- City administrator reviews evidence, says that there was no significant environmental impact on ground-water, and approves license;
- Environmental advocacy group says it has public interest standing, and Board failed to consider evidence of severe harm to fisheries

Hypothetical #4: *Ad hoc* policies

- Government adopts *ad hoc* policy aimed at providing relief against an economic downturn in the forestry industry
- Companies can apply for relief from the requirement to pay certain administrative fees that are a condition of forestry licenses
- Policy not adopted through a formal regulation, or specifically authorized by statute. No explanation how the stated criteria will be applied, and no formal application form
- Company X applies for relief, and provides information it feels is relevant to its request
- ADM sends letter stating that it has considered "all relevant information that may have an effect on the decision", and denies relief
- Company is aware of information – including Govt. information – that questions reasonableness of denying relief

Hypothetical #5 – City Bylaw Banning Camps

- City proposes bylaw to outlaw camping in public places;
- Requests public submissions, and various persons say this will discriminate (e.g. disability) and impact section 7 rights;
- City rejects claim as “speculative” and claims the impact “minimal”, relying on its own experts – passes bylaw;
- No member of the public “filed” expert evidence, but discriminatory and harmful impact can be proven

Starting the Discussion:

- Basic claim: approach to evidence on judicial review has not developed in tandem with substantive administrative law;
- This leads to circumstances where substantive arguments are hypothetically available, but cannot be proven;
- Some courts have begun to recognize the need for change – new exceptions are made;
- Others continue to apply the old evidentiary rule, regardless of the context of the decision

Starting the Discussion:

- *Hartwig, supra*:

  *"*It is necessary to revisit and revise traditional notions about the scope of the material properly before a court on a judicial review application.

  …

  The parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make. If a tribunal decision can be challenged because it involves a patently unreasonable finding of fact, then the evidence underpinning that fact should be available for the Court to consider. This is ultimately a sounder and more transparent approach to this issue than one couched in terms of the sometimes elusive notion of 'jurisdiction' or framed around the complex and rather uncertain and unsatisfactory body of case law relating to the concept of decisions based on 'no evidence'"

Starting the Discussion:

- Principle from *Hartwig* and *SELI Canada* – that parties to a judicial review application should generally be "able to put before a reviewing court all of the material which bears on the arguments they are entitled to make" – should apply generally

- And particularly in the two situations we have focused on today – non-adjudicative decisions and cases with impact on *Charter* rights

- When faced with the issue of whether to permit "extrinsic" evidence on judicial review, reviewing courts should not be constrained by a rigid and inflexible exclusionary rule, with limited categorical exceptions

Starting the Discussion:

- Alternative approach: residual discretion to consider whether – in light of the arguments available on the judicial review application, the nature and purpose of the evidence sought to be admitted, and the nature of the processes before the decision-maker – the evidence ought to be at least *prima facie* admissible

Limiting Principles

- There remain valid concerns regarding admitting "extrinsic" evidence on judicial review applications

- And particularly evidence that was not "before" the original decision-maker

- These include
  - Risk that the "new" evidence leads to what are essentially *de novo* hearings, especially in adjudicative setting
  - That the reviewing court might delve into questions that were not adequately canvassed in evidence at the tribunal or before the decision-maker

Limiting Principles

- We propose that the following factors might influence a reviewing court's exercise of its discretion to admit "extrinsic" evidence:
  - The nature of the decision under review – adjudicative vs. non-adjudicative, whether decision-maker has an "interest" the in outcome, etc.
  - Was there an adequate opportunity to put the evidence before the decision-maker at first instance, and to have that evidence meaningfully considered and ruled upon?
- Good reason to not permit extrinsic evidence in the context of adjudicative tribunals, or other decisions that attract a high degree of procedural fairness, and these factors remain compelling in this context

Limiting Principles

- Approach to admissibility of evidence in adjudicative settings should not blind us to the fact that it may be unduly restrictive in other situations where the admission of evidence is more sensible
- *SELI Canada*:

> "It is true that extensive affidavits or transcripts will assist a party who sets out to abuse the process of the court by trying to turn a judicial review application into a hearing *de novo*. A court need not tolerate such a practice, and can refuse to admit affidavit evidence if it is not relevant to a genuine ground of judicial review. The fear of abuse should not be a basis for refusing to admit affidavit evidence where it is filed in support of a recognized basis for judicial review"

Other Solutions?

- Creation of a new exception?
  - See, e.g., *Saskatchewan (Workers' Compensation Board) v. Gjerde*, 2016 SKCA 30
- Deviation from the one-size-fits-all "reasonableness" standard, applicable to all exercises of administrative decision-making
  - *Catalyst* and *Green* – limiting the grounds for judicial review, close to the previous "jurisdictional" standard
- Expansion of procedural fairness obligations in certain non-adjudicative decision-making settings?

Conclusions

- We hope that courts (and possibly legislatures) will recognize the issues we have addressed in our paper and in this presentation

- And that whatever the approach, it is one that recognizes the need for evidentiary rules on judicial review that operate in tandem with and are linked to the substantive rules of administrative law

- Should be sensitive to context, and the fact that parties impacted by administrative decisions do not always have lawyers at the outset, and cannot always compile a full evidentiary record in more ad hoc and flexible administrative law settings

Questions?

Thank you

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