

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

*Lauren J. Wihak & Benjamin J. Oliphant**

*As the scope of judicial review in Canada has undergone a significant shift in the past decade, the rules of evidence admissible on judicial review have fallen behind. To a large extent, courts continue to limit the admissibility of evidence to situations involving alleged “jurisdictional errors” or a breach of the duty of fairness. This paper seeks to demonstrate how applying these old rules of evidence can, in certain circumstances, frustrate a courts’ modern role on judicial review, particularly following cases like *Dunsmuir* and *Doré*. The authors propose a general rule permitting parties to adduce evidence necessary to the arguments they are permitted to make, subject always to the courts’ discretion to exclude such evidence where there was a meaningful opportunity or expectation that the evidence be put before the decision maker at first instance. While courts should remain alert to the fact that a judicial review is not a trial de novo, the authors suggest that the courts’ task should not be bedeviled by outdated rules of evidence based on a conception of judicial review that has long since lost its currency.*

*Pendant que le cadre d’application du contrôle judiciaire au Canada subissait d’importants changements au cours de la dernière décennie, les règles concernant l’admissibilité de la preuve lors d’un contrôle judiciaire, pour leur part, n’ont pas évolué au même rythme. Dans une large mesure, les tribunaux continuent de limiter l’admissibilité de la preuve aux situations dans lesquelles des “ erreurs juridictionnelles ” ou des violations au devoir d’équité sont alléguées. Dans cet article, les auteurs cherchent à démontrer que la manière avec laquelle l’application de ces anciennes règles de preuve peut, dans certaines circonstances, restreindre le rôle des tribunaux modernes dans le cadre d’un contrôle judiciaire, plus particulièrement à la suite des affaires *Dunsmuir* et *Doré*. Ils proposent une règle générale permettant aux parties de déposer en preuve les éléments nécessaires au soutien de leurs arguments qu’ils sont autorisés à présenter, sous réserve, en tout temps, du pouvoir discrétionnaire des tribunaux d’exclure de tels éléments de preuve dans les cas où il y avait une occasion ou une attente réelle que ces éléments soient soumis au décideur de la première instance. Bien que les tribunaux doivent se*

* Both Associates at Gall Legge Grant & Munroe LLP, in Vancouver. We would like to thank our colleagues Peter A. Gall, Q.C. and Geoff Plant, Q.C., as well as the Honourable Madam Justice Georgina Jackson, the Honourable Madam Justice Mary Newbury, and Professor Paul Daly, for their very helpful comments on various drafts of this paper or on the issues addressed in this paper more generally. Any errors or omissions remain our own.

souvenir qu'un contrôle judiciaire ne constitue pas un nouveau procès, les auteurs suggèrent que la tâche des tribunaux ne devrait pas être gênée par des règles de preuve appartenant à une autre époque et fondées sur une conception du contrôle judiciaire qui a depuis longtemps perdu de sa pertinence.

1. INTRODUCTION

*New Brunswick (Board of Management) v. Dunsmuir*¹ marked a decisive shift in the Supreme Court of Canada's approach to judicial review in this country, and its impact continues to be felt across administrative law in Canada. Much has already been written on the impact of *Dunsmuir* and the subsequent jurisprudence applying the Court's modernized, refined approach to administrative law standards of review. This paper's ambition, however, is far more modest. We aim to highlight what is in our view a subtle but important implication of *Dunsmuir* and other recent decisions like *Doré c. Québec (Tribunal des professions)*,² from both a practical and jurisprudential perspective: the approach to the admissibility of evidence on applications for judicial review.

Initially, in England and in Canada, the judicial review of administrative action was conducted primarily on the basis of the "record" before the administrative decision maker. The record was generally limited to the document which initiated the proceedings, the pleadings, if any, and the decision rendered. Typically, the record would *not* include the evidence before the decision maker, nor the reasons given for the decision, unless the decision maker chose to incorporate them in the decision ultimately rendered. All other evidence and material was considered "extrinsic" to the record of the proceeding and, in most cases, was not admissible on judicial review.

Historically, this evidentiary rule was closely tied to the scope of judicial review that existed at the time the rule was first set out. At that time, judicial review was only available to challenge the jurisdiction of the decision maker; *certiorari* did not lie for errors — of fact or of law — made within a decision maker's jurisdiction,³ unless a legal error appeared on the "face of the record";⁴ insufficient evidence to support the decision was not an available ground of

¹ *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125 (S.C.C.) [*Dunsmuir*]. As Madam Justice Abella observed, the *Dunsmuir* decision has been 'transformative': *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, 2011 CarswellNfld 414, 2011 CarswellNfld 415 (S.C.C.) [*Newfoundland Nurses*] at para. 1.

² *Dunsmuir*, *ibid.*; *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049 (S.C.C.) [*Doré*].

³ See generally *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 2007 CarswellSask 348 (Sask. C.A.) at paras. 14-16 [*Hartwig*]; *C.S.W.U., Local 1611 v. SELI Canada Inc.*, 2011 BCCA 353, 2011 CarswellBC 2168 (B.C. C.A.) at paras. 26-33 [*SELI*] ("The limited definition of the record resulted in judicial review for error of fact being a practical impossibility").

⁴ However, even this ground of review could in any event be precluded by a privative clause

review;⁵ and decisions made outside of a quasi-judicial setting were rarely subject to substantive review.⁶

Following *Dunsmuir* and *Doré*, a courts' role on judicial review has shifted considerably. Presently, the focus of judicial review is not whether the decision was legitimately made within the decision maker's "jurisdiction" — a concept that is now on "judicial life support"⁷ to the extent it remains at all⁸ — nor whether a legal error appears on the "face of the record".⁹ Rather, judicial review is now directed towards determining the existence (or absence) of "justification, transparency and intelligibility within the decision-making process", and towards whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".¹⁰ Judicial review is more readily available for all types of administrative decisions and, importantly, also captures decisions of administrative decision makers that are more *ad hoc*, "legislative" or policy-based in nature. Finally, where a judicial review application involves an allegation that *Charter* rights or values are implicated by a decision, the courts must go further still, and determine whether the decision rendered adequately protects the *Charter* guarantees engaged, in order to "ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue".¹¹

Despite these significant changes to the scope of judicial review of administrative action in Canada, the old, historic rules restricting the content of the record on judicial review, and the admissibility of "extrinsic" evidence on

in the applicable legislation. See *Yellow Cab Ltd. v. Alberta (Industrial Relations Board)*, 1980 CarswellAlta 319, 1980 CarswellAlta 98, [1980] 2 S.C.R. 761 (S.C.C.).

⁵ See Freya Kristjanson, "The Record on Judicial Review" (2013) 41 *Advocates' Q* 387 at 388 [Kristjanson].

⁶ See *Culhane v. British Columbia (Attorney General)*, 1980 CarswellBC 7, 18 B.C.L.R. 239, [1980] B.C.J. No. 1556 (B.C. C.A.) [*Culhane*] at para. 18 ("Until fairly recently, the commonly held view was that *certiorari* was available only if the tribunal was exercising a judicial function, or a quasi-judicial function".) And see the review in *B. v. Canada (Department of Manpower & Immigration)*, 1975 CarswellNat 56, 1975 CarswellNat 56F, [1975] F.C. 602 (Fed. T.D.) at para. 20.

⁷ See Hon. Joseph Robertson in *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Markham: LexisNexis, 2014) at 9 [*Judicial Deference to Administrative Tribunals in Canada*].

⁸ *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069 (S.C.C.) at paras. 33-44 [*ATA*]; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, 2014 CarswellNat 1625, 2014 CarswellNat 1626 (S.C.C.) at para. 61 [*CNR*]. See also L.J. Wihak, "Wither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014) 27 *Can J Admin L & Prac* 173 at 184-188 [Wihak].

⁹ *SELI*, *supra*, note 3, at paras. 53-64.

¹⁰ *Dunsmuir*, *supra*, note 1, at paras. 47-48.

¹¹ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, 2015 CarswellQue 1533, 2015 CarswellQue 1534 (S.C.C.) [*Loyola*] at para. 4, citing *Doré*, *supra*, note 2.

judicial review generally, to a large extent persist. We suggest that continuing to restrict the evidence admissible on a judicial review on the basis of these rules can, in certain cases, lead to incongruence and injustice, particularly when applied to specific types of administrative decisions. These concerns are most salient with respect to the decisions of non-adjudicative or quasi-legislative decision makers, and can be especially pernicious when it comes to administrative decisions that are alleged to infringe upon or engage *Charter* rights and interests.

Our purpose in this paper is to suggest that the law relating to the admissibility of evidence on judicial review should be permitted to develop in tandem with, and in a manner responsive to, the shift in the scope and rationale of judicial review in Canada. While a general rule prohibiting the filing of “extrinsic” evidence on applications for judicial review may still permit meaningful judicial review in many cases, it is not, we suggest, conducive to meaningful judicial review in all cases, at least not on the standards of scrutiny developed in cases like *Dunsmuir* and *Doré*. In our view, the approach to the admissibility of evidence on judicial review should be realigned with the modern scope of judicial review, and should once again be tied to the substantive arguments available to parties on review.

We begin by explaining the historical evidentiary rule and its rationale, and demonstrate that courts in Canada today continue to apply both, at least to some extent. We then briefly describe the shift in the conceptual basis and scope of judicial review in Canada, reaching its pinnacle in *Dunsmuir* and *Doré*, and seek to show how the historic rules of evidence are not easily reconcilable with the modern approach to judicial review in Canada. We then suggest that the approach to the admissibility of evidence on judicial review requires adaptation and modernization, and outline several circumstances in administrative decision making where adhering to the old historic rule could lead to particular injustice. Having identified the problem, we then hope to offer some ideas for a more principled approach to the admissibility of evidence on judicial review that, on the one hand, recognizes the limited role of courts on judicial review and ensures that judicial review does not become a *de novo* hearing on the merits, while on the other hand is nevertheless sufficiently robust and flexible to permit meaningful judicial review for substantive reasonableness.

What we offer is by no means intended as a last word on this topic but, rather, what we hope is a useful starting point for discussion. Our ultimate purpose is to suggest that, just as the common law of judicial review has proved adaptable over time, the common law approach to evidence on judicial review be permitted to adapt as well.

2. THE HISTORICAL POSITION AND RATIONALE

In Canada, an oft-cited authority for limiting the evidence on judicial review is the English case of *R. v. Northumberland Compensation Appeal Tribunal*.¹² In that case, Lord Denning described the contents of the record as including “the

document which initiates the proceedings, pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them".¹³ Lord Denning made clear that restricting the record to these types of materials was tied to the scope, at that time, of judicial review:

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, admissible, for the simple reason that the error must appear on the record itself: see *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128.¹⁴

The historical link between these evidentiary restrictions and the scope of judicial review is further illustrated by the authority relied upon by Lord Denning: *Nat Bell Liquors*.¹⁵ In that case, the question was whether various depositions tendered in an effort to undermine a conviction under the *Liquor Control Act* were admissible on judicial review. The House of Lords held that they were not. Lord Sumner emphasized that there was no question that the magistrate was qualified and had jurisdiction to hear the matter, and there was no indication that the magistrate was biased, interested or had engaged in any fraud.¹⁶ As such, the depositions were not legally relevant, because they attempted to impugn the *merits* of the decision, and not the decision maker's jurisdiction to make it.

Lord Sumner characterized the appellant's position as suggesting that the lack of evidence in support of a decision was "the same as want of jurisdiction to take evidence at all", and that extrinsic evidence was admissible for those purposes. Lord Sumner found that this position was "clearly" erroneous:

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 a 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

¹² *R. v. Northumberland Compensation Appeal Tribunal* (1951), [1952] 1 All E.R. 122 (Eng. C.A.) [*Northumberland*]. See also Kristjanson, *supra*, note 5, at 388-389.

¹³ *Northumberland, ibid.*, at 131.

¹⁴ *Ibid.*

¹⁵ *R. v. Nat Bell Liquors Ltd.*, 1922 CarswellAlta 195, [1922] All E.R. Rep. 335 (Jud. Com. of Privy Coun.) [*Nat Bell Liquors*].

¹⁶ *Ibid.*, at 348-9.

was *coram non iudice*. 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 is set aside, the real conclusion is that there never was any jurisdiction at all.¹⁷

In short, the notion “[t]hat the superior court should be bound by the record [was] inherent in the nature of the case”, given the strictly jurisdictional conception of judicial review applied at that time.¹⁸

When these evidentiary rules were developed, then, the courts’ role on review was limited to ensuring that “the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law.”¹⁹ In the absence of an allegation that the decision maker did not have jurisdiction to render the decision, extrinsic evidence demonstrating that the decision maker was wrong on the merits — even egregiously so — was not admissible, because it did not go to the question of jurisdiction. Affidavit evidence was only admissible to show a violation of procedural fairness or that the magistrate “never ought to have begun the inquiry”.²⁰ In short, so long as an administrative decision maker acted within its jurisdiction and in a manner that was procedurally fair, the substantive reasonableness of the decision was not a basis for review, and so no evidence could be tendered for that purpose.

Canadian courts, following these English authorities, have generally adopted these “strict limits”²¹ on the admissibility of evidence on judicial review, and endorsed the rule’s rationale. *Waverly (Village)* provides a helpful summary of

¹⁷ *Ibid.*, at 350-351.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, at 353, citing *R. v. Bolton* (1841), 1 Q.B. 66 (Eng. Q.B.).

²⁰ *Brittain v. Kinnaird*, 129 E.R. 789, 1 Brod. & Bing. 432, 4 Moore, C.P. 50, 21 Digest 195 at p. 412 (“The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.”)

²¹ Kristjanson, *supra*, note 5, at 387. And see DJM Brown & JE Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 1998) at §6:5420 [Brown & Evans]. See also S. Blake, *Administrative Law in Canada*, (4th ed.), at 198 (“Only material that was considered by the tribunal in coming to its decision is relevant on judicial review. It is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal’s statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible. The tribunal’s findings of fact may not be challenged with evidence that was not put before the tribunal. Fresh evidence, discovered since the tribunal made its decision, is not admissible on judicial review.”)

the default, common law position of Canadian courts. In that case, Clube CJSC expressly ties the restrictive evidentiary rule to the permissible scope of review:

The role of the courts on judicial review is not to exercise a supervisory role over the tribunal or Minister nor to investigate the correctness of the decision. A *certiorari* application is not an appeal. The court's role is very limited. It must be based upon jurisdictional error, denial of natural justice or error of law in the face of the record and the court must exercise judicial discretion and practice curial deference. The review encompasses the propriety of the process resulting in the decision, not the appropriateness of the result.²²

Other Canadian jurisdictions have taken the same approach, and continue to apply it today, to varying degrees. While by no means a comprehensive review, a few examples illustrate the general thrust of the case law.²³ In *Keeprite*, the Ontario Court of Appeal held that affidavits — even those only seeking to establish the evidence that had been before the decision maker — “are admissible only to the extent that they show jurisdictional error”, a proposition which continues to be applied by Ontario courts.²⁴ Similarly, the Federal Court of

²² *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)*, 1993 CarswellNS 201, 126 N.S.R. (2d) 147 (N.S. S.C. [In Chambers]) at p. 149 [N.S.R.], affirmed 1994 CarswellNS 92 (N.S. C.A.), leave to appeal refused (1995), 26 Admin. L.R. (2d) 302 (note) (S.C.C.). See also *Culhane, supra*, note 6, at para. 18: “As a general rule, the remedy of *certiorari* is available only on the issue of jurisdiction — jurisdiction in the sense of: Did the tribunal have the capacity to hear and determine the matter? The error as to jurisdiction must appear on the face of the record and, accordingly, extrinsic evidence is not admissible to show the lack of jurisdiction. *Certiorari* is available, also, in cases in which the problem has been treated as one of jurisdiction, even though it is not jurisdiction in the sense of capacity. These cases have been categorized as involving a “defect of jurisdiction”, a “lack of jurisdiction”, or a “denial of natural justice”. In cases of this kind, extrinsic evidence is admissible to show the defect of jurisdiction or the denial of natural justice, e.g., bias (. . .).”

²³ We understand that it is perilous to seek to summarize a large body of case law, spanning decades, jurisdictions and circumstances, on an issue that is generally considered to be an exercise of discretion by the judge hearing the application. Indeed, given the mercurial state of administrative law over the past half-century, it is likely that any general proposition will be wrong in certain specifics. It is particularly perilous where the rules in question have begun to change (see Part III below). We must by necessity speak in generalities, with the caveat that the general approach may not obtain in every instance. For a more thorough review of the relevant rules and exceptions to it, see Kristjansen, *supra*, note 5.

²⁴ *Keeprite Workers' Independent Union v. Keeprite Products Ltd.*, 1980 CarswellOnt 762, 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (Ont. C.A.) at p. 521 [O.R.], leave to appeal refused (1980), 35 N.R. 85 (note) (S.C.C.) [*Keeprite*]. *Keeprite* continues to be applied regularly in Ontario. See *Hinds v. Ontario (Superintendent of Pensions)*, 2002 CarswellOnt 408, 58 O.R. (3d) 367 (Ont. C.A.) at paras. 18-23; *Crêpe It Up! v. Hamilton*, 2014 ONSC 6721, 2014 CarswellOnt 17080 (Ont. Div. Ct.) at paras. 16-17; *Society of Energy Professionals v. Ontario Power Generation Inc.*, 2014 ONSC 6693, 2014 CarswellOnt 17819 (Ont. Div. Ct.) at para. 51; *Wong v. Globe and Mail Inc.*, 2014 ONSC 6372, 2014 CarswellOnt 15512 (Ont. Div. Ct.) at para. 68; *142445 Ontario Ltd. v. I.B.E.W., Local 636*, 2009 CarswellOnt

Appeal applies the old evidentiary rules,²⁵ highlighting concerns that admitting evidence on judicial review could lead to what is in effect a trial *de novo*;²⁶ the Manitoba Court of Appeal has held that “on judicial review (or statutory appeal) affidavit evidence extrinsic to the record may be introduced only in very limited circumstances. . . where they are necessary to prove error going to jurisdiction which cannot be proved on the record”;²⁷ and British Columbia courts continue to stress that the discretion to admit extrinsic evidence must be “exercised sparingly, and only in an exceptional case”, such as those involving a lack of jurisdiction or a breach of natural justice.²⁸

2701, [2009] O.J. No. 2011 (Ont. Div. Ct.) at para. 18; *Warren v. Ontario (Labour Relations Board)*, 2012 ONSC 1735, 2012 CarswellOnt 4796, 292 O.A.C. 303 (Ont. Div. Ct.) at para. 9.

²⁵ *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 2012 CarswellNat 126, 2012 CarswellNat 487 (F.C.A.) at para. 19 [*Association of Universities*]. The Court noted the recognized exceptions to the rule, including where the information provides “background”, may demonstrate a violation of procedural fairness, or show that there was “no evidence” before the decision maker, but held that beyond that, external evidence remains generally inadmissible on judicial review in federal courts. See also *Gitxsan Treaty Society v. H.E.U.* (1999), 1999 CarswellNat 1488, 1999 CarswellNat 3056, (*sub nom.* *Gitxsan Treaty Society v. Hospital Employees’ Union*) [2000] 1 F.C. 135 (Fed. C.A.) [*Gitxsan Treaty Society*], where Rothstein J.A. (as he then was) relied on *Nat Bell Liquors* and decisions following it, in the course of excluding extrinsic evidence: “In *In re McEwen*, Rinfret J. refers to the seminal case of *Rex v. Nat Bell Liquors Limited* in which Lord Sumner, delivering the judgment of the Privy Council, squarely addressed the issue. Having regard to the dicta of Lord Sumner, I think the applicant is correct that on judicial review evidence extrinsic to the record before the tribunal whose decision is being reviewed may be introduced. However, the opportunity to do so is limited to those circumstances in which the only way to get at the want of jurisdiction is by the bringing of such new evidence before the reviewing Court.”

²⁶ As discussed further below, in our view, the risk that judicial reviews will become trials *de novo* remains a perfectly valid concern, but one that can be managed and does not, in our view, require a blanket evidentiary rule.

²⁷ *AOV Adults Only Video Ltd. v. Manitoba (Director, Workplace Safety & Health Division)*, 2003 MBCA 81, 2003 CarswellMan 239 (Man. C.A.) at para. 34 [*AOV*]. For more recent decisions applying *AOV*, *Johnstone v. Manitoba (Director of Employment & Income Assistance)*, 2007 MBCA 148, 2007 CarswellMan 491 (Man. C.A. [In Chambers]) at paras. 22-24 and *Samborski Garden Supplies Ltd. v. Manitoba*, 2014 MBQB 203, 2014 CarswellMan 659 (Man. Q.B.) at para. 10 (“Although the applicant also filed two affidavits in support of this application, it agrees that they are inadmissible because, on a judicial review, affidavit evidence extrinsic to the record will be admitted only where necessary to prove an error going to jurisdiction which cannot be proven from the record”).

²⁸ See e.g. *Asad v. Kinexus Bioinformatics Corp.*, 2010 BCSC 33, 2010 CarswellBC 38 (B.C. S.C.) at paras. 17-20; *Economical Mutual Insurance Co. v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903, 2013 CarswellBC 1503 (B.C. S.C.) at paras. 62-63; *Ross v. British Columbia (Human Rights Tribunal)*, 2009 CarswellBC 4313 (B.C. S.C.) at paras. 26-27.

Thus, many Canadian courts continue to permit parties to tender evidence extrinsic to the record on judicial review only where violations of procedural fairness, fraud, or other errors going to the decision maker's jurisdiction are asserted.²⁹ Beyond these limited exceptions, however, evidence beyond that which makes up the "record" has frequently been found to be inadmissible.³⁰

Although cursory, this review suggests that both the old historical evidentiary rule and its rationale persists in courts across Canada, notwithstanding the significant changes to the scope of judicial review, culminating in *Dunsmuir* and *Doré*. We turn to that issue now.

3. THE NEW SCOPE OF JUDICIAL REVIEW AND THE NEED FOR NEW EVIDENTIARY RULES

As described above, the rationale for restricting the evidence that is admissible on judicial review to a limited "record" is inextricably linked to the grounds of judicial review available at the time the rule was adopted.³¹ To the extent that the court's role on judicial review was essentially limited to determining errors of jurisdiction, the admissibility of extrinsic affidavit evidence was rare and largely unnecessary. It was generally permitted in relation to two narrow grounds of review only: with respect to errors alleging

²⁹ See generally Brown & Evans, *supra*, note 21, at §6:5300, where the authors describe certain other minor exceptions, most of which can be explained in relation to concerns over fairness to the parties. See e.g. *St. John's Transportation Commission, Re*, 1998 CarswellNfld 36, (*sub nom.* *St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662*) 161 Nfld. & P.E.I.R. 199 (Nfld. T.D.).

³⁰ See e.g. *Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at paras. 146-148, affirmed 2015 CarswellBC 2215 (B.C. C.A.). And see *Society of the Friends of Strathcona Park v. British Columbia (Minister of Environment)*, 2013 BCSC 1105, 2013 CarswellBC 1900 (B.C. S.C.) at paras. 104-106 ("There is no allegation of bias or procedural unfairness and as such the challenged affidavits are not admissible under that exception. . . . Judicial review is not a rehearing of the application on its merits. It is an assessment of whether the decision on the record was reasonable. To the extent that the petitioners seek to add factual matters that were not before the committee for consideration or provide opinions on the merits of the decision or what the decision ought to have been, or provide argument, they go beyond background and are not admissible. . . I admit the evidence objected to but only for the limited purposes I have set out, and the affidavits to the extent that they contain argument, opinion or seek to add facts not before the decision-maker, or simply re-argue the permit application, are not admissible upon this judicial review.")

³¹ Whether the Court's view of the record drove the substantive grounds of judicial review, or the other way around, is subject to some academic debate. See Philip Murray's contribution in Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016 (forthcoming)) and Annon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Oxford: Clarendon Press, 1965). However this issue need not detail us here; our thesis is driven by the fact that the two — rules of evidence and permissible scope of review — should be re-linked, regardless of which has historically been the chicken and which the egg.

procedural unfairness (including bias, fraud, etc.); and where there was an allegation that there was no evidence available to the decision maker upon which it could have based its decision.³²

Needless to say, the present scope of judicial review in Canada no longer bears any resemblance to this purely “jurisdictional” conception of judicial review. The approach has shifted from a categorical one based on the concepts of jurisdiction and legal errors on the face of the record, to a more flexible and holistic standard of review analysis that scrutinizes the substantive correctness or reasonableness of administrative decisions on the merits, albeit with a considerable measure of deference.³³ Decisions like *Northumberland* and *Nat Bell Liquors* read like judgments from a bygone era, and yet, their evidentiary proscriptions remain.

This is not the place for a thorough review of the changes to substantive judicial review in Canadian administrative law that have taken place over the past four or five decades, a task of immense difficulty.³⁴ Suffice it to say for our purposes that various restrictions on the scope of judicial review have been lifted, supplanted, modified and revised significantly over the years, undermining the assumptions animating the evidentiary rule established in decisions like *Nat Bell Liquors* and *Northumberland*. This jurisprudential evolution crystallized in *Dunsmuir*.³⁵

³² As noted in *Association of Universities*, *supra*, note 25, Courts would occasionally receive affidavit evidence where there was an assertion that *no* evidence was available in support of a material finding. However, for this allegation to be successful, there had to be *literally* no evidence to support the decision. See e.g. *H.F.I.A., Local 110 v. Construction & General Workers’ Union, Local 92*, 1986 ABCA 142, 1986 CarswellAlta 535 (Alta. C.A.) at paras. 25-29. Similarly, in *Keeprite*, *supra*, note 24, at para. 25, the Court found that to “treat the complete lack of evidence on the finding respecting what was admitted to Mr. Macaulay as a ground for quashing the award would be to go beyond the Court’s limited supervisory function and to exercise one of an appellate nature”. The Court found that it may only admit such evidence where there is a “complete absence of any testimony on a definite and essential point”, and emphasized that the key remains the search for jurisdictional error.

³³ Kristjanson, *supra*, note 5, at 390-391.

³⁴ This task was heroically tackled by the Hon. Joseph Robertson in *Judicial Deference to Administrative Tribunals in Canada*, *supra*, note 7.

³⁵ To use but a few examples, courts in Canada began to review for errors of fact made within a decision maker’s jurisdiction. See e.g. *W.W. Lester (1978) Ltd. v. U.A., Local 740*, 1990 CarswellNfld 68, 1990 CarswellNfld 139, [1990] 3 S.C.R. 644 (S.C.C.); *Blanchard v. Control Data Canada Ltd.*, 1984 CarswellQue 75, 1984 CarswellQue 94, [1984] 2 S.C.R. 476 (S.C.C.) at p. 494 [S.C.R.], *per* Lamer J. and *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CarswellOnt 244, 1997 CarswellOnt 245, [1997] 1 S.C.R. 487 (S.C.C.) at paras. 45-48. The Courts also became gradually more forthright in reviewing the substantive “reasonableness” (or, at least, the patent unreasonableness) of decisions made *within* that jurisdiction (see e.g. *Syndicat national des employés de la commission scolaire régionale de l’Outaouais v. U.E.S., local 298*, 1988 CarswellQue 125, 1988 CarswellQue 148, (*sub nom.* Union des employés de service, local 298 v. Bibeault)

In *Dunsmuir*, the Supreme Court sought to explain, organize and simplify all these fundamental changes in the doctrine, purpose, and scope of judicial review, which had become “unduly burdened with law office metaphysics”.³⁶ The Court confirmed that in reviewing an administrative decision, the courts not only may, *but must*, look to both the reasoning and justification process employed by the decision maker, as well as to the ultimate merits of the decision rendered:

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.³⁷

All bodies or persons exercising public authority under statute³⁸ may have their decisions judicially reviewed under the *Dunsmuir* framework, both with respect to the cogency of the reasoning process and to ensure the ultimate outcome is reasonably “defensible in respect of the facts and law”. By refocusing the exercise on judicial review to ensuring an adequate justificatory process and the substantive reasonableness of the decision rendered, the Supreme Court has effectively abandoned the purely jurisdictional conception of judicial review, upon which the old evidentiary rules are based.³⁹

A second major shift that has affected the scope of judicial review, confirmed in *Doré c. Québec (Tribunal des professions)*, is with respect to administrative decisions that engage *Charter* rights and values.⁴⁰ As the survey of the

[1988] 2 S.C.R. 1048 (S.C.C.), and came to review more thoroughly non-adjudicative or quasi-legislative decisions (see e.g. *Culhane*, *supra*, note 6, at para. 18).

³⁶ *Dunsmuir*, *supra*, note 1, at para. 122, per Binnie J.

³⁷ *Ibid.*, at para. 47.

³⁸ Importantly, as we will discuss further below, the Supreme Court of Canada has stated that the *Dunsmuir* approach to judicial review applies to all types of administrative decision makers, covering the spectrum of decision-making from quasi-judicial tribunals to purely discretionary policy-making.

³⁹ This may reflect the essentially artificial nature of the shifting rules relating to a determination that certain errors were “jurisdictional” in nature — thereby justifying judicial intervention — which all too often had come to involve close scrutiny of both the facts underlying a legal conclusion (this was primarily done through asserting that certain factual findings were legal prerequisites to finding jurisdiction, according to the ‘preliminary and collateral facts’ doctrine) and the reasonableness of that conclusion. In any event, while *Dunsmuir* notionally kept alive the category of questions of true jurisdiction or *vires*, for the purposes of establishing the kinds of cases that would still attract review for correctness, even this concept now seems to have been overtaken by jurisprudence subsequent to *Dunsmuir*. See, *ATA*, *supra*, note 8, at para. 34-8; *CNR*, *supra*, note 8, at para. 61; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, 2013 CarswellBC 3618, 2013 CarswellBC 3619, (*sub nom.* McLean v. British Columbia (Securities Commission)) [2013] 3 S.C.R. 895 (S.C.C.) at para. 25; and see generally Wihak, *supra*, note 8.

⁴⁰ The Supreme Court of Canada has long held that to the extent an administrative

jurisprudence in *Doré* shows, the Supreme Court wavered for a number of years as to whether the exercise of statutory discretion alleged to have been exercised in a manner inconsistent with the *Charter* should be subject to an *Oakes* section 1 justification analysis or an administrative law review for reasonableness.⁴¹ In *Doré*, the Court adopted the latter approach:

How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. (. . .)

Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, “courts must accord some leeway to the legislator” in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure “falls within a range of reasonable alternatives”. The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, “falls within a range of possible, acceptable outcomes” (para. 47).⁴²

To a large extent, both *Dunsmuir* and *Doré* reflect the pinnacle of a jurisprudential evolution that has taken place over the course of the last several decades, as opposed to any stark break with the past. Nevertheless, they are useful guideposts, and reveal just how far administrative law has evolved in Canada from the days in which the restrictive evidentiary rules that are the subject of this paper were first set out.

For our purposes, the important point is that the question before the courts on judicial review, at least in Canada, is no longer limited to review for jurisdictional error, procedural irregularities, or identifying an error on the face of the record. Rather, courts now unabashedly review administrative decisions not only to ensure that the process leading to a decision is reasonable, but that the justification provided and ultimate result are, as well.⁴³ This shift, in our

decision-maker exercises statutory discretion, he or she must do so in accordance with the *Charter*. See, e.g., *Slaight Communications*.

⁴¹ *Doré*, *supra*, note 2, at paras. 24-45.

⁴² *Ibid.*, at paras. 55-56.

⁴³ This review may involve not only the reasons actually given by a decision maker, but the reasons that *could* have been offered in support of the decision: *Newfoundland Nurses*, *supra*, note 1, at paras. 11-12; *Agraira v. Canada (Minister of Public Safety and*

view, opens up different and broader arguments with which to impugn an administrative decision, and the rules of evidence should adapt in kind.

4. THE NEED FOR CHANGE: OLD EVIDENTIARY RULES OUT OF STEP WITH MODERN SCOPE OF JUDICIAL REVIEW

While many of the key assumptions underlying the restrictive evidentiary rules in judicial review have been thoroughly undermined, both leading up to and after *Dunsmuir* and *Doré*, the evidentiary rules have remained largely in place.⁴⁴ As Justice Richards (as he then was) of the Saskatchewan Court of Appeal noted in *Hartwig*, while “the scope of judicial review has evolved significantly in the 55 years since the *Northumberland* case was decided. . . the conception of what is properly before the court in a judicial review application has been largely static”.⁴⁵ Indeed, in so far as these rules were historically based on a narrow “jurisdictional” conception of judicial review, which according to the Supreme Court of Canada is a category of review that may no longer exist at all,⁴⁶ surely it is time to revisit them.⁴⁷

In our view, just as at the time *Northumberland* was decided, courts today should strive to maintain a conceptual linkage between the approach to evidence admissible on judicial review and the arguments parties are permitted to make on the merits — otherwise, vestigial evidentiary rules may undermine or obstruct the meaningful exercise of the courts’ present review function.

Emergency Preparedness), 2013 SCC 36, 2013 CarswellNat 1983, 2013 CarswellNat 1984 (S.C.C.) [*Agraira*] at paras. 57-58; and *ATA*, *supra*, note 8, at paras. 52-54.

⁴⁴ As noted in Part 2 above, many Canadian courts have remained steadfast on the general inadmissibility of “extrinsic evidence” available on a judicial review, even as the bases for these rules have been gradually eroded. While we in no way suggest that these cases and others were wrongly decided, given the state of the law at the date they were decided, we nevertheless suggest that the rationale animating the rule, and therefore its continued justification on the basis of that rationale, cannot be easily reconciled with the current, modernized Canadian approach to judicial review.

⁴⁵ *Hartwig*, *supra*, note 3, at para. 19.

⁴⁶ See *supra*, notes 6 and 7.

⁴⁷ We pause here to note that we are not suggesting that courts are now, at least in practice, necessarily any more or less deferential on judicial review than they were on a more “jurisdictional” approach to judicial review. That may be so in some cases, and not in others. Indeed, review for jurisdictional error was conspicuously — perhaps notoriously — pliable, and the judicial temperament and enthusiasm for judicial review has ebbed and flowed (see *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, 1979 CarswellNB 17, 1979 CarswellNB 17F, [1979] 2 S.C.R. 227 (S.C.C.) at p. 233 [S.C.R.]; *Syndicat des professeurs du Collège de Lévis-Lauzon v. Cégep de Lévis-Lauzon*, 1985 CarswellQue 108, 1985 CarswellQue 86, [1985] 1 S.C.R. 596 (S.C.C.) at p. 609 [S.C.R.]). On balance, courts may be even less interventionist now, post-*Dunsmuir*, where deference reigns widely even in those areas, such as questions of law, which have historically been rigorously scrutinized (see generally Wihak, *supra*, note 8).

As such, while we agree that there are good reasons to continue to restrict the “record” or evidence admissible on judicial review in many circumstances,⁴⁸ we suggest that a more flexible, principled approach to this issue is required.⁴⁹ In our view, a blanket exclusionary rule, with limited narrow exceptions, is particularly problematic in at least two categories of cases: first, where the administrative decision is not made in the context of a tribunal or a quasi-judicial setting, and therefore is made without a full complement of procedural fairness protections and a fair opportunity for all affected parties to tender relevant evidence, and an obligation on the decision maker to consider that evidence; and second, where *Charter* rights and values are implicated by the decision. Needless to say, the potential for injustice is compounded where both these factors exist.

(a) Non-Adjudicative Administrative Decisions

Many administrative decisions, perhaps even the majority of them, are not made in an adjudicative context, and the affected parties are not always given a full opportunity to make submissions — much less file extensive evidence, call witnesses, or tender expert reports — prior to a decision being rendered. Nevertheless, the *Dunsmuir* analysis applies along the spectrum of administrative decision-making in Canada to all exercises of public authority, whether they arise in a tribunal setting or not: the *Dunsmuir* “framework applies to administrative decision makers generally and not just to administrative tribunals”.⁵⁰ Importantly, this can range from the purely adjudicative to the purely policy-based or quasi-legislative, and all manner of decisions falling somewhere in between.

Therefore, the “reasonableness” standard,⁵¹ and the obligation to render a decision that is “defensible in light of the facts and the law” applies to all decision makers exercising public authority and statutory discretion, whether or not all potentially affected parties are given extensive participatory rights or the opportunity to tender a full body of evidence before the decision is made. For example, the *Dunsmuir* framework has been applied to City bylaws,⁵² decisions of Ministers exercising discretionary powers under public statutes,⁵³ policy

⁴⁸ See part 4(d), below.

⁴⁹ While one of us is skeptical of overly discretionary rules of substantive law — particularly constitutional law — we both acknowledge that Judges are undoubtedly the masters of procedure in their own courts, and in the best position to determine rules of fairness and efficiency that apply in that setting.

⁵⁰ See *Dunsmuir*, *supra*, note 1, at para. 28; *CNR*, *supra*, note 8, at para. 53. See also *Areva Resources Canada Inc. v. Saskatchewan (Ministry of Energy and Resources)*, 2013 SKCA 79, 2013 CarswellSask 501 (Sask. C.A.) at para. 76, leave to appeal refused 2014 CarswellSask 55, 2014 CarswellSask 56 (S.C.C.) (“the *Dunsmuir* approach is one of general application”).

⁵¹ Even if this standard is itself flexible, and one that takes “its colour from the context”. See *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, (*sub nom.* Canada (Citizenship & Immigration) v. Khosa) [2009] 1 S.C.R. 339 (S.C.C.) at para. 59.

decisions of administrative bodies;⁵⁴ administrative decisions respecting prisoner transfers,⁵⁵ and the decisions of the Governor in Council (i.e. Cabinet).⁵⁶ Needless to say, the context in which these decisions are made varies considerably. In our view, what is most significant in these circumstances is that the comprehensiveness of the record sufficient for the purposes of meaningful judicial review, and the reasonable opportunity to contribute to it, will vary along with that context.

To some extent, the opportunity to contribute to the record prior to the decision being rendered depends on the amount of procedural fairness and natural justice owed to applicants or affected citizens in the context of non-adjudicative decisions, which will fluctuate significantly depending upon the circumstances in which the decision is rendered.⁵⁷ As a result, the ability, opportunity or obligation for the affected individual or party to provide the decision maker with relevant information or evidence, and to have that evidence and information meaningfully considered, before the decision is made, will vary along with these procedural rights. The obligation of 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 and evidence put forward in support of the party's arguments, will also vary.

Sometimes, these opportunities and obligations will be extensive, even outside of a tribunal setting.⁵⁸ However, in other non-adjudicative or quasi-

⁵² *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, 2012 CarswellBC 17, 2012 CarswellBC 18, [2012] 1 S.C.R. 5 (S.C.C.) [*Catalyst*].

⁵³ *Halifax (Regional Municipality) v. Canada (Public Works & Government Services)*, 2012 SCC 29, 2012 CarswellNat 1826, 2012 CarswellNat 1827, [2012] 2 S.C.R. 108 (S.C.C.); *Agraira*, *supra*, note 43.

⁵⁴ *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, 2009 CarswellNat 2717, 2009 CarswellNat 2718, (*sub nom.* *Bell Canada v. Bell Aliant Regional Communications*) [2009] 2 S.C.R. 764 (S.C.C.)

⁵⁵ *Khela v. Mission Institution*, 2014 SCC 24, 2014 CarswellBC 778, 2014 CarswellBC 779 (S.C.C.) at para. 73.

⁵⁶ *CNR*, *supra*, note 8.

⁵⁷ We do not here suggest that the lack of opportunity to lead evidence or information before the decision-maker or the failure to deliver reasons is in all such cases a breach of procedural fairness. To the contrary, it is precisely because of the rather limited procedural protections in these types of situations that Courts may need to revise their approach to admissible evidence. With the introduction of a standard of substantive reasonableness that looks for “intelligibility, transparency, and justification” in the decision-making process, the nature and quality of the evidence and information before the decision maker, and the reasons for accepting or rejecting that evidence, is unquestionably relevant now to substantive judicial review. This is not just a procedural fairness issue; substantive review in light of *Dunsmuir* contemplates these issues as *indicia* of reasonableness.

⁵⁸ For instance, in the context of a Ministerial deportation order, a non-adjudicative decision, procedural rights — and the opportunity to provide evidence and the duty to give reasons — will normally be extensive. See, e.g., *Donaldson v. Canada (Minister of*

legislative settings, such as the passing of by-laws or other delegated legislation or the application of government policies, procedural fairness obligations will be slim to non-existent and the impact of the decision may be wide-ranging and not limited to a small and easily ascertainable number of persons. In these types of cases, the process, procedures and relevant criteria for making the decision may be undefined or *ad hoc*, and may not even be made public. The administrative decision maker — a Minister, a professional regulatory body, or official in a government Ministry, for example — may have no obligation to consider any specific evidence, or any evidence at all, with respect to the impact and justifiability of the proposed administrative decision, or to provide a fulsome account of the evidence that was considered or not considered in rendering it. Indeed, generally speaking, no duty of fairness will arise at all in the context of delegated legislation⁵⁹ or regulations,⁶⁰ the enactment of Ministerial guidelines and rules,⁶¹ administrative decisions of a “legislative” nature,⁶² or with respect to “purely ministerial” and “general policy” decisions.⁶³

The absence of any duty of fairness in these circumstances means that the decision maker need not give the opportunity for, much less consider, the submissions, information, or evidence of any, much less all, interested parties who may subsequently seek to challenge the decision on judicial review.⁶⁴ Even where parties are permitted to make submissions prior to a decision being

Citizenship & Immigration), 2003 FCT 100, 2003 CarswellNat 1404, 2003 CarswellNat 343 (Fed. T.D.). When these protections are afforded, the current definition of the scope of the record is likely sufficient to permit meaningful judicial review, as the parties will be under a reasonable expectation to provide all relevant evidence to the decision maker at first instance.

⁵⁹ See e.g. *Inuit Tapirisat of Canada v. Canada (Attorney General)*, 1980 CarswellNat 633, 1980 CarswellNat 633F, [1980] 2 S.C.R. 735 (S.C.C.) and *Bates v. Lord Hailsham of St. Marylebone*, [1972] 1 W.L.R. 1373 (Eng. Ch. Div.) at p. 1378. While the Courts no longer suggest that *no* duty of fairness can be owed outside of an adjudicative or quasi-judicial setting, procedural protections and opportunities to provide submissions and evidence may be limited in these circumstances.

⁶⁰ See *Brown & Evans*, *supra*, note 21, at §7:2331.

⁶¹ *Ibid.*, at §7:2332.

⁶² According to *Brown and Evans*, *ibid.*, at §7:2330, this is a broad category, that has been found to include: “a Cabinet’s authority to issue an order-in-council authorizing a telephone company to charge a higher tariff than that approved following a rate-making hearing conducted by an independent regulatory agency; the granting of a permit; providing for an annexation; a Regulation prohibiting the hunting of grizzly bears; a minister’s variation order in relation to fishing rights; a Cabinet directive to an independent agency specifying classes of applicants to whom licenses may be issued; an order-in-council authorizing the discontinuation of a passenger railway services; establishing tax rates; directions respecting hospital restructuring; and an order-in-council delaying a union’s exercise of a right to strike; (and) a minister’s prescriptions concerning determinations of dumping”.

⁶³ See *Brown & Evans*, *supra*, note 21, at 7:2340.

⁶⁴ Or those who may *become* interested *after* the decision is rendered, for obvious reasons.

rendered, this will not always result in the kind of formal evidentiary “record” that would normally be produced in a court action or before an adjudicative tribunal. Often, there is no requirement that the decision maker issue “reasons”, with a discussion of the evidentiary basis for the decision, facts that were and were not accepted, and so on. While the limited nature of the duty of fairness in these circumstances may preclude any arguments based on a breach of procedural rights, it will nevertheless affect the scope and content of the record, for the purposes of meaningful review of the decision for reasonableness.

In our view, applying strict limitations on the admissibility of evidence on judicial review of these non-adjudicative or legislative decisions carries important consequences. A restrictive view of the record and of admissible evidence may frustrate the courts’ application of *Dunsmuir*, and in particular the determination of whether the outcome is “defensible” in light of the facts and the law.⁶⁵ Moreover, if the information available to a court on judicial review remains as limited as was suggested in cases like *Northumberland* and *Nat Bell Liquor*, not only will this potentially frustrate the court’s task on judicial review,⁶⁶ but may also occasion considerable unfairness to affected parties; many would be

⁶⁵ The distinction between, for instance, the exercise of Ministerial discretion and an adjudicative tribunal was discussed in a recent decision of Madam Justice Adair in *Da’naxda’xw/Awaetlala First Nation v. British Columbia (Minister of Energy, Mines and Natural Gas)*, 2015 BCSC 16, 2015 CarswellBC 20 (B.C. S.C.) at para. 176. That case involved a question of whether the government had made a commitment with respect to a proposed hydro-electric project on lands on which the Da’naxda’xw had asserted title, and whether it could be held to that commitment on administrative law grounds. Adair J. admitted a range of extrinsic evidence, over the objection of the Government, and voiced her agreement with the petitioners that “that this is not a ‘normal’ judicial review case, where there is an application to a tribunal or decision-maker, and a decision (sometimes after a hearing) based on the materials provided (the “record”), which is then the subject of judicial review” (at para. 176). In this context, it should be noted that the evidentiary principles have typically been softened in the context of a judicial review with respect to the Crown’s duty to consult, derived from the aboriginal rights found in the constitution: see e.g. *Tsuu T’ina Nation v. Alberta (Minister of Environment)*, 2008 ABQB 547, 2008 CarswellAlta 1182 (Alta. Q.B.), affirmed 2010 CarswellAlta 804 (Alta. C.A.); *Enge v. Mandeville*, 2013 NWTSC 33, 2013 CarswellNWT 40 (N.W.T. S.C.); and *Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District)*, 2013 BCSC 1068, 2013 CarswellBC 1805, 52 B.C.L.R. (5th) 381 (B.C. S.C.), reversed 2015 CarswellBC 2113 (B.C. C.A.). In our view, the case law in this area is effectively ahead of the curve, and should be replicated more widely, although always in consideration of the specific factual, legislative and legal context of a given administrative proceeding.

⁶⁶ The evolution of substantive judicial review for reasonableness will give rise to allegations, for example, that a decision maker failed to consider relevant factors, considered irrelevant factors, rendered a decision that does not accord or is inconsistent with its statutory mandate or purpose, fails to account for the public interest, or was made based on conclusions unsupported by the evidence or any evidence. It is difficult to see how these claims can be adequately assessed in the absence of reasons, particularly where the content of the record is self-determined.

permitted to argue that a decision falls below the *Dunsmuir* standard, but unable to file the evidence necessary to establish why this is so.

Although courts are now regularly permitted to consider the evidence that was before the decision maker,⁶⁷ even outside the tribunal setting, this only provides solace to the parties where the decision maker actively identified and considered the relevant material and evidence. Administrative decision makers often have broad discretion to limit the participatory rights of parties before them.⁶⁸ Indeed, even if the decision maker does invite all potentially interested parties to provide submissions and evidence it considers relevant to its decision, it is not always clear, absent procedural fairness requirements, that the decision maker will be obliged to consider the information, or to find that the information is relevant to the decision (or, if not relevant, provide reasons for why not).

Moreover, where the decision maker is making a decision of a polycentric nature that may affect a wide range of interests — for instance, promulgating regulations, passing by-laws, or developing rules and guidelines — there will be countless persons or organizations who may ultimately be affected, some of whom might not exist as interested parties at the time the decision is made but who might ultimately seek judicial review of the decision.⁶⁹ In these types of settings, it is important that the court on judicial review have the opportunity to understand the evidence and considerations that ought to, or could, have been taken into account by the decision maker, if it is to determine whether the decision is substantively reasonable and defensible on the facts and the law.

More concerning, in our view, is that the broad discretion over the content of the record in certain non-adjudicative settings could effectively allow the decision maker to immunize its decisions from meaningful scrutiny. This can occur for innocent and defensible reasons, by virtue of the nature of the process in place for the decision, for example, or more culpable reasons, such as through a lack of due diligence or even by artificially and purposefully limiting the range of considerations taken into account in making the decision.⁷⁰ As a result, the

⁶⁷ See the discussion in Part 4(c), below.

⁶⁸ See, e.g., *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, 2014 CarswellNat 4233, 2014 CarswellNat 6533 (F.C.A.).

⁶⁹ Consider, for instance, a new participant who enters a highly regulated market after the impugned decision, policy or bylaw comes into force.

⁷⁰ See, e.g., *United States of America v. Sriskandarajah*, 2012 SCC 70, 2012 CarswellOnt 15585, 2012 CarswellOnt 15586, (*sub nom.* Sriskandarajah v. United States of America) [2012] 3 S.C.R. 609 (S.C.C.) at paras. 28, 30: “Procedural fairness does not require the Minister to obtain and disclose every document that may be directly connected to the process that ultimately led him to decide to extradite. . . The Minister must present the fugitive with adequate disclosure of the case against him or her, and with a reasonable opportunity to state his or her case against surrender (*Kwok*, at paras. 99 and 104), and he must provide sufficient reasons for his decision to surrender (*Lake*, at para. 46; *Kwok*, at para. 83)” (emphasis added). Needless to say, a rule that creates an incentive for administrative decision makers to only consider material supportive of a decision is problematic.

decision maker, deliberately or not, may be able to effectively limit the range of evidentiary considerations that are available to a court on review, even on a more modern view of the record. In these circumstances, applicants, who by virtue of *Dunsmuir* would be permitted to argue that the decision was substantively unreasonable, would not be permitted to tender evidence showing why this was so, unless the decision maker had happened to consider that evidence, thereby making it part of the record.

Similarly, the absence of an obligation to give reasons in such cases may frustrate the task of scrutinizing the justifiability, intelligibility and transparency of a decision, as required by *Dunsmuir*. On this issue, the Supreme Court of Canada has closed the gap to some extent, by requiring reviewing courts to pay “respectful attention” to the reasons that would support the decision, whether or not those have been expressly articulated by the decision maker. As such, when the duty of procedural fairness does not include a duty to give reasons, “or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that *could be* offered for the decision when conducting a reasonableness review”.⁷¹

In order to scrutinize reasons that *could be* offered, at least in a broad sense, courts may require additional evidence or material that may not have been specifically “before” the decision maker when the decision was rendered, but which may support or undermine the ultimate decision rendered. While this extension of *Dunsmuir* may be subject to criticism, in so far as it would permit a decision maker to “bootstrap” its decisions after the fact,⁷² the notion that courts may rely upon reasons that could be offered for a decision arguably opens up inquiries on judicial review that had previously been foreclosed entirely. Non-adjudicative or quasi-legislative administrative decision makers may need to provide the court with extrinsic material in support of their decisions, even where that evidence would not be considered part of the traditional record, at least as historically defined.⁷³ While looking to reasons that could have been offered for

⁷¹ *ATA*, *supra*, note 8, at para. 54.

⁷² See e.g. *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 2011 CarswellNat 4372, 2011 CarswellNat 5330 (F.C.A.) at para. 41 (“After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted”). This is not the place in which to address whether and to what extent a decision maker should be permitted to “bootstrap” his or her own arguments, in this sense. Our point for the purposes of this paper is that so long as the arguments are open on judicial review, courts should be willing to permit — within reason and the bounds of judicial policy, discussed below — the filing of evidence in support of those arguments. See, note 87, *infra*.

⁷³ For instance, decision makers can be reasonably expected to draw upon their policy-based expertise in rendering certain decisions. However, in order to demonstrate the reasonableness to a reviewing court, it may be necessary to file evidence confirming the assumptions the decision maker had in mind.

the decision may allow courts to apply *Dunsmuir* in the absence of written reasons on an issue or a broader view of the record, it will arguably make the use of extrinsic evidence not only helpful, but in some cases *necessary*, to determine whether the decision is defensible in light of the facts and the law.

We stress that these situations, while perhaps not common, are not hypothetical either. Take, for example, a professional regulatory body that has the statutory authority to adopt bylaws, provided they are in the public interest and otherwise fall within the body's statutory mandate.⁷⁴ The professional regulatory body adopts bylaws that have the aim of addressing some stated public harm, and are purportedly in the public interest. The bylaws adversely affect a significant stakeholder, but the stakeholder was not involved in the process leading up to the adoption of the bylaws, and was either not invited to make a submission, or not given a full opportunity to provide any relevant information or evidence to the professional regulatory body prior to the adoption of the bylaw. The stakeholder brings an application for judicial review, and seeks to rely on evidence not only of the harm to its own interests caused by the bylaws, but also to suggest that there is insufficient evidence to support the existence of the harm to the public relied on by professional regulatory body in adopting the bylaws. Under the old exclusionary rule, the stakeholder's evidence would be inadmissible because it did not form part of the record before the decision maker, and did not go to the question of "jurisdiction". However, without such evidence, it will be difficult for a reviewing court to determine whether the adoption of the bylaws for the stated statutory purpose and to address the stated harm was reasonable, in the sense contemplated by *Dunsmuir*.⁷⁵

Similarly take, for example, a government department that adopts a policy aimed at providing relief against an economic downturn impacting a given industry. Under the policy, companies with licenses can apply for relief from the requirement to pay certain administrative fees that are a condition of their licenses.⁷⁶ The policy is *ad hoc*, not adopted through a formal regulation or specifically authorized by statute. There is no explanation by the department as to how the stated criteria will be applied, and no formal application form. Eligible companies are merely invited by letter to apply for relief, and are instructed to provide further information regarding why relief should be granted.

⁷⁴ This example is loosely taken from the case of *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2014 BCSC 1414, 2014 CarswellBC 2233 (B.C. S.C.).

⁷⁵ See, e.g., *Duffield v. Prince Albert (City)*, 2015 SKCA 46, 2015 CarswellSask 227, 36 M.P.L.R. (5th) 1, 457 Sask. R. 271, 632 W.A.C. 271 (Sask. C.A.) where the court, without objection, was provided with an explanation of the legislative process through the use of affidavit evidence.

⁷⁶ This example is loosely taken from the case of *Dane Developments Ltd. v. British Columbia (Assistant Deputy Minister)*, 2015 BCSC 1663, 2015 CarswellBC 2644 (B.C. S.C.). The court refused to consider any of the evidence that did not form part of the record, as traditionally understood.

After an exchange of correspondence, which includes statements by the decision maker that it is his practice to consider any relevant information that may have an effect on the decision and that, having evaluated and considered the information available, the application for relief is denied. The applicant is aware of evidence and information — both its own and from public documents prepared by the decision maker's own department — that questions the reasonableness of the decision to deny relief. A strict application of the old evidentiary rules would prohibit the company from filing evidence to support the allegation that the decision is in fact not based on all the relevant evidence, and is in fact contrary to all the relevant evidence.⁷⁷

Many other types of quasi-legislative or non-adjudicative decisions — or decisions rendered in a “tribunal setting” but where the petitioner is not able or permitted to fully make his or her case — are likely to give rise to similar circumstances. The difficulty is simply that there are now certain substantive arguments available on judicial review, both to applicants and respondents, that were not available at the time that *Northumberland* was decided. These arguments going to the substantive merits of the decision can be made in the context of administrative decisions for which evidence extrinsic to the record is not only helpful, but sometimes necessary, in order for the court to exercise meaningful judicial review. To the extent that these arguments are available, and consistent with a court's role on judicial review, parties should not be hamstrung in making those arguments by evidentiary rules more consistent with a strictly jurisdictional concept of the review function.

(b) Decisions Implicating *Charter* Values

The importance of considering evidence extrinsic to the record is all the more critical, in our view, in cases involving *Charter* values and potentially conflicting *Charter* rights and interests. As emphasized above, determining whether an administrative decision that engages *Charter* rights and values is reasonable under *Doré* may require extensive discussion of the statutory purpose of a given legislative regime, as well as testing assertions regarding the impact of certain public action on the rights and freedoms of affected parties. Specifically, evidence may be necessary, both with respect to establishing the purpose and intention of the legislative or rule-making authority (i.e. legislative facts), and in order to identify the “the severity of the interference” with the *Charter* rights or interests inflicted by the administrative decision that must be balanced against the statutory purpose (i.e. social and adjudicative facts).⁷⁸

Again, these cases, though perhaps not common, are not merely hypothetical. Consider the decision of a Minister of Education to first permit,

⁷⁷ And this would be so even if there was no practical opportunity to provide the evidence before the decision was made, if the government should have had knowledge of the material, and even if it was tendered to support the argument the applicant was entitled to make: that the decision was unreasonable in the sense contemplated by *Dunsmuir*.

⁷⁸ *Doré*, *supra*, note 2, at para. 56.

and then revoke, his consent to establish a faith-based law school, notwithstanding the obligation for all students of the proposed school to sign and abide by a mandatory code of conduct that discriminates against members of the Lesbian, Gay, Bisexual, Trans and Queer (“LGBTQ”) community.⁷⁹ If the Minister denied that a consideration of the *Charter* interests of potential LGBTQ students was a relevant factor in rendering his decision to approve the proposed law school under the applicable legislation, evidence going to the *Charter* interests of both the law school’s membership and LGBTQ applicants would not have formed a substantial, if any part, of the Minister’s record for the purposes of judicial review. Admittedly, this failure to address relevant considerations alone may have been sufficient to quash the decision.⁸⁰ However, if the Minister had asserted that he had at least *considered* the relevant *Charter* interests — but had not provided reasons on the issue or referenced any evidence — a strict application of the old evidentiary rules would not permit a party challenging that decision on judicial review to adduce evidence as to the effect of the decision on the *Charter* rights and interests of LGBTQ students. Moreover, other than any material which the proposed law school had sent to the Minister before the decision was rendered, it would also be precluded from filing expert and other evidence on the judicial review in an effort to demonstrate that the subsequent refusal to accredit the proposed law school imposed an unreasonable restriction on freedom of religion or expression. Nor, indeed, could the Minister seek to supplement the evidentiary basis supporting the decision (to either grant or revoke his consent), if that material had not been “before” the Minister at the time of making the decision.⁸¹ In this case, a strict adherence to the old evidentiary rule would result in the decisions being reviewed — and indeed reviewed for *Charter* compliance — in the absence of comprehensive evidence as to the impact of the decision on all *Charter* interests.⁸²

⁷⁹ This example is loosely taken from *Loke v. British Columbia (Minister of Advanced Education)*, 2015 BCSC 413, 2015 CarswellBC 697 (B.C. S.C.).

⁸⁰ See e.g. *Wall v. Independent Police Review Director*, 2014 ONCA 884, 2014 CarswellOnt 17231 (Ont. C.A.), where the absence of reasons and a sufficiently developed record animated the court’s decision to declare the impugned decision unlawful (at paras. 54-58). See also *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, 2012 CarswellNat 3419, 2012 CarswellNat 5145 (F.C.A.) at paras. 122-124, 136-137.

⁸¹ For instance, the Minister may have considered the discriminatory impact of the school’s code of conduct, but may seek to file further evidence (expert or otherwise) to demonstrate to a court that such a discriminatory impact is likely to occur, and to further explain the details of that impact on the persons affected.

⁸² Campbell J. clearly recognized this point in *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25, 2015 CarswellNS 47 (N.S. S.C.) at para. 26, additional reasons 2015 CarswellNS 289 (N.S. S.C.), the judicial review dealing with the Nova Scotia Law Society’s decision not to accredit TWU’s proposed law school: “Litigation under the *Charter* has resulted in the more robust development of another kind of evidence. Legislative facts or social science evidence is important in providing a context within which to consider issues that relate to public policy. Courts do not consider those kinds of things in a vacuum. It is important to have access to information

To take another example, government and ministerial decisions relating to access to healthcare will often engage s. 7 interests and values under the *Charter*. These decisions, too, will often be non-adjudicative in nature, and the ability of parties to provide comprehensive evidence to the decision maker will be limited. Take the case of a private medical clinic seeking to obtain a license permitting it to bill the provincial healthcare system for the specialized ultrasound services provided to women with high-risk pregnancies, who cannot obtain these same services in a timely fashion in the public healthcare system.⁸³ Or, the case of an individual who challenges a province's decision to deny reimbursement for medical services obtained in another jurisdiction, because the services could not be obtained within the province in a timely manner.⁸⁴ Or, a Minister's decision to deny an exemption from *Criminal Code* prosecution to a safe-injection site, which is said to engage the s. 7 interests of both clinic staff and users alike.⁸⁵ All of these arise in non-adjudicative contexts, where there might be limited opportunities to provide the decision maker with relevant information and evidence, much less the amount of evidence that would be necessary to definitely establish a *Charter* violation or that *Charter* interests are otherwise engaged.⁸⁶

As these examples demonstrate, the types of cases where *Charter* issues are present in administrative decision making are not limited to adjudicative settings. Parties may not be permitted or practically able to provide evidence to the decision maker at first instance demonstrating the impact of a given decision on *Charter* interests, or the decision maker may simply decline to review any information that is provided. In our view, a strict view of the admissibility of evidence in such circumstances would artificially limit the material available on review by preventing the parties from adducing material relevant to whether the decision in question achieved a proportionate balance of statutory objectives against *Charter* interests.

Indeed, applying the old evidentiary rule to situations where a decision maker effectively controls the contents of the record could impose significant harm upon the *Charter* interests of individuals. It risks giving rise to the

but the process can become bogged down by dealing with it in the more formal traditional way. Because of that parties are able to file materials and provide reports from experts that set out some of that information. The court has to consider how much weight to be given to it.”

⁸³ See e.g. *Pacific Centre for Reproductive Medicine v. Medical Services Commission*, 2015 BCSC 53, 2015 CarswellBC 84 (B.C. S.C.) [*PCRM*].

⁸⁴ See, e.g. *Allen v. Alberta*, 2014 ABQB 184, 2014 CarswellAlta 516 (Alta. Q.B.).

⁸⁵ *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, 2011 CarswellBC 2443, 2011 CarswellBC 2444, (*sub nom.* Canada (Attorney General) v. PHS Community Services Society) [2011] 3 S.C.R. 134 (S.C.C.).

⁸⁶ Having full evidentiary record in *Charter* cases has become even more important in recent years, given the deference afforded to judges at first instance. See *Bedford v. Canada (Attorney General)*, 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, (*sub nom.* Canada (Attorney General) v. Bedford) [2013] 3 S.C.R. 1101 (S.C.C.) at paras. 48-56.

troubling state affairs where, so long as the decision maker did not meaningfully *consider* the existence of that harm (and evidence in support of it) before acting, any evidence about the harm would not be part of the “record” before the decision-maker, and could not be considered by a reviewing court in determining whether the decision was consistent with the *Charter*.

In short, the fact that an administrative decision maker may not have considered or sought evidence relevant to *Charter* values in the course of rendering a decision does not mean that the evidence is not legally relevant on judicial review, or that a reviewing court should not have regard to it in determining whether the ultimate decision was defensible in light of the facts and the law and reflects a proportionate balancing of *Charter* values. Moreover, to the extent that the courts now look to the factors that *could* be offered in support of the decision, the administrative decision maker, particularly outside the adjudicative tribunal setting (where the decision maker may be the respondent to the judicial review hearing and called upon to defend its own decision), may also need to provide further non-“record” evidence in support of that decision.⁸⁷ A strict application of old evidentiary rules, in these circumstances, can create “serious injustices and precludes meaningful review” as mandated by *Dunsmuir*,⁸⁸ and may risk effectively immunizing these decisions from scrutiny

⁸⁷ Generally, the ability of tribunals in adversarial proceedings to make substantive arguments on judicial review are limited, for obvious reasons, and their submissions tend to be restricted to issues respecting the standard of review. See the discussion in *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 2011 CarswellBC 3118 (B.C. C.A.) at paras. 30-44. However, where the administrative decision maker is more clearly carrying out a policy objective (e.g. a regulatory body rendering a policy, or a professional body passing a bylaw), or is an appointed or elected political actor instead of an impartial tribunal (e.g. a Ministerial decision), there may be less reason to be concerned about their ability to make substantive arguments, or to “bootstrap” their decision by providing evidence on judicial review in support. On this point, see e.g. *Children’s Lawyer for Ontario v. Goodis*, 2005 CarswellOnt 1419 (Ont. C.A.) at paras. 53-56. In its very recent decision in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 CSC 44, 2015 SCC 44, 2015 CarswellOnt 14396, 2015 CarswellOnt 14395 (S.C.C.), the Supreme Court examined when and under what circumstances “bootstrapping” may be permitted, concluding that though this is generally to be avoided there is no hard and fast rule. With respect to the topic of this paper — when and under what circumstances should material, that is not part of the “record”, be admissible on judicial review — the Court did not comment directly. Indeed, as many of the circumstances we identify do not involve formal reason-giving, so the concept of “bootstrapping” as supplementing reasons on review is not directly applicable. That said, some of the Courts’ examples of new arguments a decision-maker may be permitted to raise on judicial review suggest that additional evidence may be required. For instance, the Court noted that a decision maker may be permitted to describe the “factual and legal realities of the specialized field in which they work” or to “explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review” (see paras. 53, 68). This approach is consistent with what the Saskatchewan Court of Appeal did in *Duffield*, *supra*, note 75. In any event, it would seem that these arguments could only be supported by affidavit evidence, even if that evidence was not strictly “before” the decision maker in the course of rendering the impugned decision.

for *Charter* compliance, or at least frustrate the courts attempt to ensure adherence to constitutional norms.

(c) Signs of Change

Fortunately, there are signs that courts have recognized the implications of the changing scope of judicial review on the admissibility of evidence on judicial review, and are beginning to see the need to modify the rules accordingly, at least in certain contexts.⁸⁹ This has been most notable with respect to admitting and considering the evidence that was in fact put before the decision maker in a tribunal setting, but in our view, should be applied to a broader range of situations.

In many Canadian jurisdictions, the historical restrictions on the content of the record have been expanded by legislative changes, specifically with respect to the evidence that was before the decision maker. This is now generally included as part of the record itself.⁹⁰ However, in those jurisdictions where such legislative reform has not yet taken place, the courts have grappled with the difficulty of meaningfully reviewing a decision for substantive reasonableness, without at least having access to the evidence that was before the decision maker.

Particularly notable in this regard is the decision of Justice Richards (as he then was) in *Hartwig*. In that case, the applicants on judicial review sought to quash various aspects of the report of a Commission of Inquiry and to admit affidavit evidence to support their arguments, in particular a transcript of the evidence before the Commission, including testimony. The Crown opposed, on the basis of the doctrine in *Northumberland* and the cases following it.⁹¹ As Justice Richards explained, the “the content of the record as laid out in *Northumberland* reflects the shape and nature of administrative law jurisprudence in place at the time it was rendered”. He continued:

It is readily apparent therefore that the scope of judicial review has evolved significantly in the 55 years since the *Northumberland* case was

⁸⁸ *Hartwig*, *supra*, note 3, at para. 19.

⁸⁹ As have some scholars. See Kristjanson, *supra*, note 5, at 398 (“As Canadian administrative law evolves, however, it is increasingly difficult to defend the concept that evidence is admissible to demonstrate a complete lack of evidence (historically, a ‘jurisdictional error’), but not otherwise to demonstrate that the decision was unreasonable”).

⁹⁰ See e.g. Ontario, for example, where the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22 requires any tribunal to which it applies to compile a record consisting of, *inter alia*, “the transcript, if any, of the oral evidence given at the hearing” and “all documentary evidence filed with the tribunal”. Similar enactments can be found in many other jurisdictions. See Brown & Evans, *supra*, note 21, at paras. 6:5420 et seq.

⁹¹ See e.g. *Prince Albert Pulp Co. v. C.P.U., Local 1120*, 1986 CarswellSask 265, (*sub nom.* C.P.U., Loc. 1120 v. Prince Albert Pulp Co.) 52 Sask. R. 178 (Sask. C.A.); *Swift Current (City) v. Keith*, 1991 CarswellSask 471, (*sub nom.* Swift Current (City) v. C.U.P.E., Local 183) 93 Sask. R. 308 (Sask. C.A.); *Lüick and CUPE, Local 600, Re*, 1995 CarswellSask 424, 139 Sask. R. 177 (Sask. Q.B.), additional reasons 1996 CarswellSask 25 (Sask. Q.B.).

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.⁹²

After reviewing the historical conception of the “record” on judicial review, and finding that it did not encompass the kind of evidence the applicants sought to tender, Justice Richards nevertheless found that the material should be before the Court on the judicial review application:

[I]t is necessary to revisit and revise traditional notions about the scope of the material properly before a court on a judicial review application.

[T]he 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 finding 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”.

Thus, in all of the circumstances, the best course in this area for now is to simply recognize the right of participants in judicial review proceedings to bring forward the evidence which was before the administrative decision-maker. This may be done by way of an affidavit which identifies how the evidence relates to the issues before the court and which otherwise lays the groundwork for its admission...⁹³

Hartwig was endorsed in *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, where the BC Court of Appeal dealt with whether an informal and unofficial transcript of proceedings before the Human Rights Tribunal was admissible on judicial review. Justice Groberman agreed that 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.⁹⁴

⁹² *Hartwig, supra*, note 3, at para. 19 (emphasis added).

⁹³ *Hartwig, supra*, note 3, at paras. 31-33 (emphasis added).

To this extent, at least, courts have begun to take a more expansive view of what material and evidence is properly before the court for the purposes of judicial review. *Hartwig* and *SELI Canada*, in particular, dealt with attempts include in the “record” the very evidence that had been presented to the tribunal in each case.⁹⁵ While a modification of the approach in these circumstances is welcome, these decisions do not specifically address the scenarios discussed above and where in our view the approach to evidence on judicial review is in particular need of reform — that is, to many decisions rendered *outside* of an adjudicative setting, particularly where *Charter* rights and interests are implicated.⁹⁶

In our view, the identification of the issue and approach to the problem in *Hartwig* and endorsed in *SELI Canada* is sound, and should in certain circumstances extend beyond applications to admit extrinsic evidence more generally. We suggest that, as a starting point, the principle from *Hartwig* — 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 in this paper. When a court on judicial review is faced with either an explicit application to adduce extrinsic evidence, or an implicit argument that it ought to consider extrinsic evidence in determining whether the decision under review is reasonable, the court ought not to be constrained by a rigid and inflexible exclusionary rule with limited and categorical exceptions. Rather, the court ought to have a broader discretion to consider whether — in light of the arguments raised on judicial review, the nature

⁹⁴ *SELI*, *supra*, note 3, paras. 84-5 (emphasis added); *Hartwig*, *supra*. See also *Lobbe and Tippet Richardson Ltd., Re*, 2013 FC 1258, 2013 CarswellNat 4933, 2013 CarswellNat 5774 (F.C.) at paras. 39-46, affirmed 2014 CarswellNat 4680 (F.C.A.). For an example of the proactive management of the issue of additional evidence, see *Sierra Club Canada v. Ontario (Ministry of Natural Resources)*, 2011 ONSC 4086, 2011 CarswellOnt 5889 (Ont. Div. Ct.).

⁹⁵ And indeed, in *Hartwig*, the Court refused to admit evidence that had not been before the Commission.

⁹⁶ Some courts have begun to view affidavit evidence going to show constitutional harms as an “exception” — not unlike allegations involving a breach of procedural fairness — to the general rule with respect to admissible extrinsic evidence on judicial review. See *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316, 2012 CarswellOnt 7116 (Ont. Div. Ct.) at para. 54 (“the nature of the applicants’ submissions fall within to the exception to the general rule. . . [because] (t)he applicants assert that the Decision breached their ss. 7 & 15 Charter rights”). See also *Alghaithy v. University of Ottawa*, 2011 ONSC 5879, 2011 CarswellOnt 10489, [2011] O.J. No. 4471 (Ont. Div. Ct.) at para. 29, additional reasons 2012 CarswellOnt 7358 (Ont. Div. Ct.) (“. . . as with an allegation of a breach of natural justice, affidavit evidence must also be permissible to supplement the record to demonstrate a validly raised allegation of constitutional error”. This has been particularly notable in claims involving aboriginal rights and title, as noted above.

and purpose of the evidence sought to be admitted, and the nature of the processes before the decision maker — the evidence ought to be admitted.

In our view, this approach would provide the reviewing judge with the opportunity to ensure that it has the evidence necessary to properly and adequately fulfill the task set out in cases like *Dunsmuir* and *Doré*: to determine whether the decision is substantively reasonable, defensible in light of the facts and the law, transparent, intelligible, and capable of justification, and comports with any *Charter* rights and values that may be implicated by the decision.⁹⁷ Moreover, it would alleviate the need to create new “exceptions” to the old rule, which so far have proven relatively *ad hoc* and uncertain, and risk becoming as outdated as the exceptions established before.

In short, just as the courts’ approach to the evidence admissible on judicial review was informed by the scope of judicial review that existed at the time the rule was articulated in *Northumberland*, so should the approach to evidence now be adapted to reflect the scope of and approach to judicial review as it exists today. We believe that the general rule articulated in *SELI* and *Hartwig* provide a principled starting point.

(d) Limiting Principles

Notwithstanding our endorsement of the general approach set out in *Hartwig*, we reiterate that there remain valid concerns regarding admitting “extraneous” evidence on judicial review applications, and in particular evidence not originally before the decision maker.⁹⁸ These concerns include the risk of the “new” evidence leading to what are essentially *de novo* hearings, and the concern that a reviewing court may delve into “questions that were not adequately canvassed in evidence at the tribunal or trial court”.⁹⁹ As observed in *Keeprite*, “(i)f extensive affidavits can be filed on applications for judicial review in order to permit parties to challenge findings of fact before such tribunals, there would

⁹⁷ Courts have begun to recognize this in the context of constitutional cases. See e.g. *R. v. Kilpatrick*, 2013 ABCA 168, 2013 CarswellAlta 605 (Alta. C.A.) at paras. 6-7 (noting that “courts in *Charter* challenge cases have a wider discretion to accept extrinsic evidence” and that “an appropriate underlying evidentiary record is necessary to ensure that the legal issues can be properly assessed and dealt with”); *Provident Energy Limited v. Alberta (Utilities Commission)*, 2008 ABCA 362, 2008 CarswellAlta 1617 (Alta. C.A. [In Chambers]) at para. 17 (“This court depends on a complete record to enable it to make fully informed decisions, particularly where contested matters of such importance are at issue. Without that foundation, serious questions of law cannot be fairly adjudicated”); *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 2011 CarswellBC 3130 (B.C. S.C.) (“With the enactment of the *Charter* in 1982, the use of extrinsic evidence transformed from something that was allowed to something that was desirable and, in some cases, practically required”).

⁹⁸ See Kristjanson, *supra*, note 5, at 396 (“The general rule regarding the record is that evidence that was not before the initial decision-maker will not be permitted on judicial review.”)

⁹⁹ See *Gitxsan Treaty Society*, *supra*, note 25, at para. 15.

be significant incentives for parties to seek judicial review since they could then attempt to reframe the evidence that was before the” original decision maker.¹⁰⁰

We agree that these concerns should continue to influence the exercise of a judge’s discretion when faced with the decision whether to admit or consider extrinsic evidence on judicial review. However, we also offer a few suggestions as to factors that might also influence a court’s exercise of its discretion, in light of the above discussion.

For example, one factor that would be relevant to considering the admission of evidence on a judicial review, even where that evidence may be relevant to a ground of review otherwise available to the applicant, is the nature of the decision under review. Where there was an adequate opportunity to put the evidence before the decision maker at first instance, and to have that evidence meaningfully considered and ruled upon, the concerns raised in cases like *Keeprite* will be more compelling.¹⁰¹ This will be particularly the case in the context adjudicative tribunals, where the parties are defined and there are clear procedural rights (and a practical obligation) to adduce evidence and make submissions. An individual litigant has every incentive and obligation to ensure that the decision maker, be it a labour board, professional disciplinary body, workers’ compensation board, or human rights tribunal, has sufficient evidence to make a determination as to his or her rights. In these circumstances, judicial reluctance to permit the parties to have a second kick at the can is perfectly sensible.¹⁰² In our view, limitations on the admissibility of extrinsic evidence in relation to decisions arising out of an adjudicative setting remain compelling and

¹⁰⁰ *142445 Ontario Ltd. v. I.B.E.W., Local 636*, 2009 CarswellOnt 2701, 95 Admin. L.R. (4th) 273, [2009] O.J. No. 2011 (Ont. Div. Ct.) at para. 32. We note that, while the conceptual rationale for limiting the scope of admissible evidence relied on in many of the Canadian cases may no longer obtain, many of the cases endorsing the traditional approach to evidence on judicial review remain defensible at least in terms of their result, as they occurred in an administrative context which will often make the tendering of extrinsic evidence unnecessary. This is discussed further below.

¹⁰¹ Indeed, as noted above, many of the authorities that endorse a restrictive view of the record, such as *Keeprite* and *Association of Universities and Colleges*, involved adjudicative decisions in which the affected parties had an opportunity to provide extensive evidence to the administrative decision maker. This prudential consideration may have coloured the courts’ approach to admissible evidence in these cases.

¹⁰² In such cases, it may be sensible for courts on judicial review should scrutinize any attempts to adduce additional evidence on a standard comparable to that applied to applications to adduce fresh evidence on appeal. See *R. v. Palmer* (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759 (S.C.C.), applied in *R. c. Lévesque*, 2000 SCC 47, 2000 CarswellQue 1994, 2000 CarswellQue 1995, [2000] 2 S.C.R. 487 (S.C.C.) and Kristjanson, *supra*, note 5, at 404. Indeed, some courts have sought to apply the “fresh evidence” test in the context of material filed on judicial review (see e.g. *Northern Lights School Division No. 69 and ATA (Johnson), Re*, 2013 ABQB 220, 2013 CarswellAlta 472 (Alta. Q.B.) at para. 48 and *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, 2002 CarswellOnt 1061, 211 D.L.R. (4th) 741 (Ont. C.A.), leave to appeal refused 2003 CarswellOnt 1067, 2003 CarswellOnt 1068 (S.C.C.)), while others have rejected it (see *Alberta Liquor Store Assn. v. Alberta (Gaming*

necessary, lest the courts' more limited role on judicial review be compromised.¹⁰³

That said, the approach to the admissibility of evidence on judicial review in the context of adjudicative tribunals should not blind us to the fact that it may be unduly restrictive in other situations, and this approach need not be applied as a blanket rule to situations where the admission of extrinsic evidence is more sensible. As explained in *SELI*:

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.¹⁰⁴

While the courts should be alert to the fact that, in certain circumstances, there will be an obligation and reasonable expectation that parties put their best foot forward and provide all relevant evidence to the decision maker, many other types of decisions in other administrative contexts may not provide the same practical opportunity or obligation to put all relevant evidence before the decision maker, as discussed above.

Furthermore, the purpose for which the evidence is sought to be admitted is also relevant. Post-decision, truly “fresh” evidence should continue to be scrutinized, while simply seeking to ensure that the court has all the information that was or could have been available to it at the time of the decision may be less controversial.

(e) Conclusion on the modern approach to evidence admissible on judicial review

In light of the above, we would proposed the following framework for the consideration of extrinsic evidence. First, the courts should begin by asking whether the extrinsic evidence is relevant (or perhaps necessary) to an argument a party is permitted to make on judicial review, based on the grounds of review raised. If it is relevant, the courts could then determine whether other factors should outweigh this consideration. In undertaking the latter inquiry, we believe

& Liquor Commission), 2006 ABQB 904, 2006 CarswellAlta 1690 (Alta. Q.B.) at para. 44).

¹⁰³ Indeed, both *SELI Canada* and *Hartwig*, *supra*, note 3, involved decisions from tribunals, where “reasons” for the decision were provided and there was no suggestion that the parties were not permitted to lead all relevant evidence before the decision maker. The only question was whether the evidence upon which those reasons were based could be put before the Court on judicial review. Despite taking a broader view of the “record” in *Hartwig*, Justice Richards nonetheless refused to admit evidence that had not been put before the Commission of Inquiry, but that reasonably could have been.

¹⁰⁴ *SELI*, *supra*, note 3, at para. 69.

the courts should be guided by the nature and the purpose of the evidence sought to be admitted, whether there was a legal right, a practical opportunity and reasonable expectation to tender the evidence before the decision maker,¹⁰⁵ and the importance of having a full record for the review of decisions (such as those involving allegations that *Charter* rights and interests are implicated by the decision under review).

The approach to the admissibility evidence on judicial review that we suggest — which we will self-interestedly call the “principled approach” — would therefore start with the proposition that evidence sought to be admitted must be directly relevant to a permissible ground of review.¹⁰⁶ Needless to say, what constitutes an arguable ground of review post-*Dunsmuir* continues to be subject to healthy judicial disagreement, and that will in turn bear on the scope of admissible extrinsic evidence. Take, for instance, the case of *Utilities Kingston*, where the Ontario Divisional Court expressly disagreed with *Hartwig*, and excluded affidavit evidence that appended type-written notes of what occurred at an arbitration where no official transcript was available. While Madam Justice Swinton found herself bound by *Keprite*, she went on to say— contrary to the logic underlying *Hartwig* and *SELI* — that “recent developments in the law of judicial review have *not* expanded the court’s role in reviewing findings of fact” and “the courts are confined to ensuring that the findings on which the decision is based are supported by some logically probative evidence on which the decision-maker may lawfully rely”.¹⁰⁷ As we read this portion of her reasons, Swinton J. is suggesting that the material sought to be admitted would not help the applicant, because it did not pertain to a ground upon which the decision could be quashed on review.

Regardless of the differing results in *SELI* and *Hartwig* on the one hand, and *Utilities Kingston* on the other, in our view, both sets of reasons were properly focused on the relevant question. That the inquiry should not begin with whether the evidence is prohibited by the rule enunciated in *Northumberland*, or whether it falls within certain limited exceptions to that approach, such as whether it goes to “jurisdiction”. Rather, the primary inquiry, as these decisions suggest, is whether the material sought to be admitted is relevant or necessary to a substantive argument that party is permitted to make. If so, we believe that a court should exercise practical and principled judgment as to whether and in

¹⁰⁵ Some courts have begun to incorporate these considerations expressly into their reasons. See e.g. *Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, 2014 CarswellBC 901 (B.C. S.C.) at para. 134, affirmed 2015 CarswellBC 2215 (B.C. C.A.) (“extrinsic evidence that goes to characterising an asserted *Charter* right is not admissible where it could and should have been placed before the decision-maker tasked with the responsibility of balancing *Charter* values with statutory objectives” (emphasis added)).

¹⁰⁶ And, needless to say, the approach urged here would not limit the courts in applying other exclusionary rules relating to the admissibility of evidence.

¹⁰⁷ *142445 Ontario Ltd. v. I.B.E.W., Local 636*, 2009 CarswellOnt 2701, 95 Admin. L.R. (4th) 273, [2009] O.J. No. 2011 (Ont. Div. Ct.) at paras. 26-29.

what circumstances that avenue should be foreclosed, for instance, because the party had a reasonable opportunity to present the evidence to the decision maker and to have it meaningfully considered.

The approach we propose accommodates the fact that the arguments available to litigants on judicial review will change with time and the ever-shifting scope of judicial review, and is premised on the notion that the courts' approach to the evidence should develop and evolve in tandem with the permissible scope of review. Whether or not the scope of judicial review as reflected by *Dunsmuir* and *Doré* is set in stone,¹⁰⁸ or will be subject to change over time, we suggest that the courts should not be bedeviled by strict evidentiary rules that are rooted in a concept of jurisdiction that has, for better or worse, long since lost its currency.

5. CONCLUSION

The ambition of this paper is modest: we suggest that the rules governing the admissibility of evidence on judicial review should be informed by, and must serve, the substantive grounds of review available to litigants. An approach to judicial review that permits the applicant to impugn a decision on the basis of "reasonableness", that looks to whether the decision is defensible in light of the law and facts, and that requires a consideration of the impact of the decision on *Charter* rights and interests, will in some cases necessitate a more far-reaching assessment of the evidence or information before the decision maker, and may require material that was not before the decision maker but that ought to have been considered. Though certainly not a complete re-weighing of the evidence, judicial review for substantive reasonableness may now involve more robust scrutiny of the decision and the reasons for it than would have a simple review for error on the "face of the record" or jurisdictional error. In many cases, a court will not be able to adequately undertake its task without the opportunity to consider evidence relating to the substantive "reasonableness" of the decision, whether or not that evidence makes up part of the limited and (sometimes) self-determined record before the decision maker.

While some courts have recognized the need to adapt the rules governing evidence on judicial review in light of the fundamental changes to the scope of judicial review, the effort has been slow-going. There remains a general reluctance to go beyond the traditional limited view of the record, notwithstanding the fact that the historical basis for limiting the evidence on

¹⁰⁸ Indeed, we neither endorse nor criticize the courts' evolving role on judicial review, nor do we take a position on whether, for instance, administrative decision makers should be permitted to effectively bolster the reasonableness of their decisions with extrinsic material showing reasons that "could be" offered in support of a decision. Rather, we merely suggest that, in light of the more expansive approach to judicial review for substantive reasonableness espoused in cases like *Dunsmuir* and *Doré*, the conceptual link between the permissible scope of review, and the ability to tender evidence in support of available arguments, should be maintained.

judicial review has been undermined by the evolution of the scope of available arguments on judicial review.

That being said, we agree that there remains legitimate concerns about the impact that a more flexible approach to the admissibility of evidence might have on the scope of judicial review and the courts' role. Absent explicit statutory language to the contrary, judicial review does not give rise to a trial *de novo* on the merits, and a more flexible approach to the admissibility of evidence on judicial review should not alter the very nature of judicial review. In our view, where parties have an adequate opportunity to file evidence or information before the decision maker and to have that evidence considered, they should not then be able to supplement the record on judicial review with new evidence produced post-hearing, absent truly exceptional circumstances. These concerns remain as present now as they have always been, particularly in the context of adjudicative tribunal decisions, and in our view should continue to inform a court's approach to the exercise of its discretion to consider or admit the evidence.

At the same time, where natural justice before the decision maker is limited or not afforded at all, or where it would be unreasonable or otherwise inconsistent with the structure of the particular decision making process or the capacity of the parties, to expect all those possibly affected by the decision to file extensive evidence prior to it being made, there may be no principled reason to refuse a petitioner the opportunity to adduce evidence that will be relevant to whether the decision maker has met the standard of "reasonableness".

As we have tried to demonstrate, the concerns raised by a strict application of the restrictive rules governing the scope of the record are amplified where the decision maker effectively has the right to determine the content of its own record, a prospect particularly troubling where it is alleged that *Charter* rights and values have been inappropriately ignored. In our view, an approach that begins with the premise that parties should be permitted to put before the court any evidence bearing on the arguments they are permitted to make on judicial review, but which allows for the exercise of the court's discretion to continue to disallow such evidence in appropriate cases, would better achieve meaningful judicial review.