New Evidence on Judicial Review or on Appeal
Prepared For: Legal Education Society of Alberta
Evidence Law Refresher

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For Presentation In:
Calgary – November 24, 2014
Edmonton – December 3, 2014
NEW EVIDENCE ON JUDICIAL REVIEW OR ON APPEAL

INTRODUCTION

This paper deals with the question of when new evidence beyond what is contained in the certified record of proceedings may be permitted in a judicial review proceeding and with the question of when new evidence beyond what is contained the Appeal Record will be considered by the Court of Appeal. The relevant rules and legal principles will be discussed along with some of the leading cases. Each section will conclude with some suggestions of practical points to consider when the question of new evidence arises in either a judicial review or an appeal.

NEW EVIDENCE ON JUDICIAL REVIEW

Relevant Rules

Rule 3.15 – Originating application for judicial review

This Rule sets out some of the basic procedural requirements for an originating application for judicial review including the nature of the remedies that can be sought and the time limit for filing and serving the originating application for judicial review. Rule 3.15(5) requires that “An affidavit or other evidence to support an originating application for judicial review must be filed and served on every other party one month before the date scheduled for the hearing of the application.” However, despite this reference to filing an affidavit or other evidence, Rule 3.22 places clear limits on what the Court may consider in the way of evidence when hearing an originating application for judicial review.

Rule 3.22 – Evidence on Judicial Review

3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:

(a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;

(b) if questioning was permitted under rule 3.21 [Limit on questioning], a transcript of that questioning;

(c) anything permitted by any other rule or by an enactment;
(d) any other evidence permitted by the Court.

Important Points to Note regarding Rule 3.22

- The only evidence that does not require specific permission of the Court before it can be considered in a judicial review is the certified copy of the record of the proceedings.

- Any other form of evidence requires either specific regulatory or statutory permission (Rule 3.22(c)) or the permission of the Court.

- Permission of the Court in respect to other evidence either by way of questioning or affidavits should not be assumed.

General Rule Regarding New Evidence

The starting point in respect to a judicial review is that the judicial review is not an appeal of the decision but instead a determination of whether the decision or action of the person or body whose decision is being reviewed meets the appropriate standard of review: reasonableness or correctness. The person or body’s decision or action is reviewed based on the record of the decision and the evidence that was before the person or body.

As a result, the judicial review is conducted based on the certified copy of the record of the proceedings before the tribunal and new evidence in the form of affidavits or other evidence is only admissible in very limited situations.

The limited circumstances in which supplementary or new evidence may be allowed include the following:

a. to show bias or a reasonable apprehension of bias, if the facts in support of the allegations do not appear in the record;

b. to demonstrate a breach of natural justice that is not apparent from the record;

c. to address issues like standing;

d. where the tribunal makes no, or an inadequate, record of its proceedings;