(a) Introduction

There are few, if any, issues that have arisen in the context of administrative law in Canada in recent years that have generated the amount of discussion and analysis as the Supreme Court of Canada’s recent changes to the standard of review in judicial review proceedings. This audience is by now very familiar with those cases, and the effect of those cases on the standard of review. The purpose of this paper is to provide the Saskatchewan perspective with respect to the effect that those changes have had on the practice of administrative law in the area of labour and employment law in the Province of Saskatchewan.

This paper will examine the response of Saskatchewan Courts to the changes in the standard of review, from the perspective of judicial review applications in the context of labour law, including judicial review applications of decisions of the Saskatchewan Labour Relations Board, and judicial review applications of arbitrator awards. This paper will also discuss two other “hot topics” in the Province of Saskatchewan: that being what materials properly constitute the record that should be before the reviewing Judge, and the issue of statutory appeals.
(a) *Dunsmuir*¹ and *Khosa*²: Has the Supreme Court made it easier to practice administrative and labour law in Saskatchewan?

It has been our experience that the practice of judicial review applications in the context of labour law in Saskatchewan has been made easier by the Supreme Court of Canada’s decisions in Dunsmuir and Khosa. From our reading of the decision, it appears that it was one of the goals of the Supreme Court to simplify the issue of which standard of review applies to a case, which is why it decided to collapse the two previously separate standards of reasonableness simpliciter and patent unreasonableness into one single standard of reasonableness.

As we all know, now the standard of review is correctness for questions of law and jurisdiction, and reasonableness for everything else. In the context of the reasonableness standard, pursuant to the majority’s decision in Dunsmuir, the court considers whether the process by which the decision was made was reasonable, or whether the decision itself is reasonable. In Dunsmuir the Court said that if a decision falls within the realm of reasonable possible outcomes of the case, it should be upheld. In our view, this direction was meant to allow lawyers to spend less time arguing about which standard applies to their judicial review applications, and more time arguing the merits of their applications.

It has been our experience, at least in the context of applications for judicial review of decisions of arbitrators and the Labour Relations Board, that it is now much easier to come to a conclusion with respect to the applicable standard of review, and get down to the business of arguing the merits of the case. We do not now spend as much time arguing about which standard

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¹ Dunsmuir v. New Brunswick 2008 SCC 9 (“Dunsmuir”)
² Khosa v. Canada (Minister of Citizenship and Immigration) 2009 SCC 12 (“Khosa”)
applies. It is easier now to focus on the facts of the case, and used the skills we have as lawyers to explain why a decision or process was not reasonable or correct when we consider the facts and the law.

We now turn to a brief discussion on some of the main cases coming out of our Saskatchewan courts in which Dunsmuir and Khosa have been discussed and applied.

The Court of Appeal, shortly after the Dunsmuir decision was released, released its decisions in two cases that applied the new standard of review. In United Brotherhood of Carpenters and Joiners, Local 1985 v. Graham Construction and Engineering Ltd.\(^3\) the Court of Appeal assessed a decision of the Saskatchewan Labour Relations Board. It is important to note here that generally speaking the Courts in Saskatchewan recognize the expertise of the Labour Relations Board and for that reason are prepared to grant a high level of deference to the Board in most cases.

The main issue in the Graham Construction case was abandonment of bargaining rights. The Board concluded that the Unions had abandoned their bargaining rights with respect to the employer, and the Unions applied to the Queen’s Bench to have the Board’s decision quashed. In it’s decision, which pre-dated Dunsmuir, the Court upheld the Board’s decision. The Court held that the appropriate standard of review with respect to the Board’s decision was patent unreasonableness, because the Board was a specialized tribunal interpreting its own governing legislation and using its own expertise to decide the issue of abandonment. In addition, The Trade Union Act contains a full privative clause.

\(^3\) 2008 SKCA 67 (hereinafter Graham Construction)
On appeal, which was post-Dunsmuir, the Court of Appeal concluded that this standard of review applicable to the Board’s decision was reasonableness. The issue of abandonment was within the Boards expertise, and therefore the appropriate standard of review was reasonableness. In addition, because of the Board’s high level of expertise in labour relations issues it is entitled to a significant amount of deference when determining issues in that area.

However, the Court of Appeal overturned the Board’s decision without looking at the evidence. It appears this was done on the basis that the Court did not understand how the Board could reach the conclusion it did on the facts found in the case.

In the case of CUPE Local 882 v. Art Hauser Centre Board Inc. the Court of Appeal examined a judicial review application of an arbitrator’s award which had centered primarily upon the interpretation of the collective agreement in force between the parties. The employer applied for judicial review of the award, and the Queen’s Bench granted the application. The Union appealed the Queen’s Bench decision, and the Court of Appeal allowed the appeal and restored award.

The Court of Appeal said that the application of the reasonableness standard of review requires the reviewing judge to determine whether the decision under review falls within the range of acceptable outcomes. The Board’s decision presented one of the acceptable interpretations of the clause from the collective agreement that was at issue in the case. The Queen’s Bench judge had substituted her own interpretation of the collective agreement for that of the Board’s, without according the Board’s interpretation sufficient

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4 2008 SKCA 121, the Saskatchewan Court of Appeal
deference, and in doing so had incorrectly applied the reasonableness standard. Although the reviewing judge’s interpretation of the collective agreement also fell into the range of reasonable possible outcomes, that factor was irrelevant for the purposes of resolving the issues before the Court. The judge had not taken into account the Board’s interpretation and reliance on a specific body of jurisprudence pertaining to the issue before it.

There is at least one case from our Queen’s Bench outside of the realm of labour law that is worth mentioning here. In Campbell v. Workers’ Compensation Board⁵ the court heard an application for judicial review of a decision of the Workers’ Compensation Board as to whether the applicant’s action was barred by the provisions of the Workers Compensation Act, 1979. Counsel for the applicant argued that an issue pertaining to the Board’s interpretation of it’s own governing legislation was a true jurisdictional question attracting the correctness standard. The Court disagreed, and applied Dunsmuir and Khosa, particularly the directions given in those decisions that courts should not “brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.” The Court accordingly held that the Board’s interpretation and application of the Act required deference, and the standard of reasonableness applied.

We can see that in the Province of Saskatchewan, at least in the context of judicial review of decisions of the Labour Relations Board and arbitrators, the Court will continue to apply the standard of review of reasonableness with some considerable amount of deference to those two administrative bodies, considering the amount of expertise they are presumed to have in their fields.

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⁵ 2009 SKQB 275
(b) The Record: What materials are properly before a reviewing court?

This issue is not legislated in the Province of Saskatchewan as it is in many other provinces. Until recently, the courts and practitioners in Saskatchewan have relied on the old Northumberland rules to guide them as to what properly constitutes the record in judicial review proceedings. However, the matter has recently been clarified in two Court of Appeal decisions, and one Court of Queen’s Bench decision.

In Hartwig v. Saskatchewan (Commissioner of Inquiry)\(^6\) the Court of Appeal examined the issue of what materials were properly before the reviewing court on an application for judicial review. Speaking for the Court, Mr. Justice Richards carefully reviewed the history and case law on the issue, and concluded that all evidence and material relevant to the issues before the reviewing court ought to be before the reviewing court.

In that case, various parties to the Neil Stonechild inquiry sought to quash various aspects of the findings made by the Commission of Inquiry, and brought an application for judicial review to the Court of Appeal pursuant to The Court of Appeal Act.\(^7\) Mr. Justice Richards noted that other provinces have dealt with the issue by legislation, and went on to state at para. 22 that:

\[22\text{ No such provisions exist in Saskatchewan. Judicial review applications proceed within the framework of Part 52 of the Rules of Court. Rule 669 is a particular relevance here as it spells out the requirements concerning the “return” which a tribunal is obligated to make if an application is launched. In relevant part it reads as follows:}\]

\[\_\_\underline{2007 \text{SKCA} 74}\]

\[\_\_\underline{S.S. 2000, ch. C-42.1}\]
669(1) where an application is made for an order by way of certiorari or to quash proceedings, a notice to the following effect, adapted as may be necessary and addressed to the court, tribunal or other authority shall be endorsed in or on the notice of motion:

You are required by the Rules of Court forthwith to return to the Local Registrar of this Court at the Court House (addressing) Saskatchewan, the conviction, Order, Decision (or as the case may be) and the reasons therefore, together with the process commencing the proceeding, and the warrant, if any, issued thereon.

(2) All things required by subrule (1) to be returned to the Local Registrar shall be deemed to be part of the record.

23 I note, however, that there is nothing in rule 669 which would be inconsistent with a ruling to the affect that, in appropriate circumstances, parties to judicial review applications are entitled to put before the reviewing Court the evidence considered by the tribunal when it made the decision in issue. The fact that the decision of the tribunal, its reasons and the process commencing the proceeding are deemed “part of” the record by Rule 669 does not in itself exclude other materials from consideration of a Court. In deed, Rule 671 contemplates orders requiring information beyond the return to be brought forward.”

Therefore, the Court of Appeal concluded that all relevant evidence should be before a reviewing court, and it should be brought before the reviewing court by way of affidavit. Mr. Justice Richards stated the following at paragraph 33:

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. That was the general approach taken by Hartwig.
This matter was most recently reviewed by the Court of Appeal in the August 2009 decision in Saskatchewan Credit Union v. UFCW Local 1400. The interesting issue in that case was that the employer, in the context of its judicial review application, filed with the Court affidavits and documentation describing the bargaining and negotiation process relating to the collective agreement interpretation issue before the Board, as well as affidavits which included the dissenting opinion of the Board. The Union appealed to the Court of Appeal, partly because it disagreed with the acceptance by the Queen’s Bench judge of the affidavits and the dissenting opinion of the Board. The Court of Appeal reviewed its decision in the Hartwig, supra, case and held that the principles stated by Mr. Justice Richards in that case also applied to the dissenting opinion of an arbitration board if that was one of the relevant issues before the reviewing Court. The Court said uncontroverted facts set out in the dissenting opinion could be considered under the reasonableness test.

Another interesting case out of Saskatchewan is the Queen’s Bench decision in Mosaic Potash Colonsay ULC v. United Steel Workers of America Local 7656. In that case, the Court was dealing with a judicial review application of an arbitration board’s award. An issue before the Court was whether the parties could, by affidavit, file with the Court materials other than the arbitration award itself. The Court held that because it is not common for transcripts to be made in the context of arbitration hearings, the only way to get that evidence and material before the reviewing court is by way of affidavit. However, the Court cautioned that affidavits on a judicial review application are to be confined to such facts as witnesses are able of his or

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8 2009 SKCA 87
9 2008 SKQB 238
her own knowledge to state, and they cannot contain hearsay or argumentative matters.

(c) Statutory Appeals: What standard of review applies to the appeal?

This is one of the current “hot issues” in the Saskatchewan in the context of administrative law. The issue is currently being examined by the Saskatchewan Law Reform Commission, as in Saskatchewan, like many other provinces, there are numerous statutes that contain appeal provisions with respect to the administrative decisions that are made thereunder. The problem in Saskatchewan is that there is a lack of consistent principles and procedures to be applied to the statutory appeals, raising considerable difficulties for legal practitioners, the administrative decision-makers themselves, and the members of the public affected by those decisions.

One of the main issues is the standard of review to be applied. For example, when a statute gives a person a right of a appeal on a question of law, on a question of law or jurisdiction or on a question of fact, which standard applies?

Statutory appeals differ depending on the statute, and largely, as has been considered by the Law Reform Commission, also differ with respect to what action or decision of the statutory decision-maker can be appealed, to what level of court, what type of appeal hearing an appellant will be entitled to, and what standard of review will apply to the decision. The Law Reform Commission has prepared a consultation paper on this subject, and it is available on the Law Reform Commission’s website at sklr.sasktelwebhosting.com.
In Hellquest v. Owens\textsuperscript{10}, the Saskatchewan Court of Appeal examined an appeal under The Saskatchewan Human Rights Code. The Code provides that a party has a right of appeal with respect to questions of law. The Court of Appeal indicated that the standard of review in that context is correctness, as the Board’s decisions are made under the umbrella of a privative clause. The Court indicated that boards of inquiry under a statutory regime like the Human Rights Code do not have any special expertise with respect to legal issues at play in human rights problems, at least relative to the judiciary, which also lends itself to the correctness standard of review.

A similar issue arose in the context of an appeal from a decision of the Saskatchewan Human Rights Tribunal in Whatcott v. Saskatchewan Human Rights Tribunal\textsuperscript{11}. In that case, the Court indicated that an appeal from a decision of the Tribunal that involved an interpretation of the Human Rights Code is a question of law, and the appropriate standard of review is one of correctness.

In Potash Corporation of Saskatchewan v. Oppenlander\textsuperscript{12} the court heard an appeal from a decision of an adjudicator under the Occupational Health and Safety Act, 1993, which provides a statutory appeal from decisions of that nature. The court considered Khosa, supra, and Dunsmuir, supra, in determining the standard of review even though it was a statutory appeal rather than a judicial review application.

We can see from the decisions out of the courts in Saskatchewan, as well as the Supreme Court of Canada’s decision in Q v. College of Physicians and

\textsuperscript{10} 2006 SKCA 41
\textsuperscript{11} 2007 SKQB 450
\textsuperscript{12} 2009 SKQB 112
Surgeons of British Columbia\textsuperscript{13}, that the courts prefer to apply the developing law with respect to the standard of review and the context of judicial review to statutory appeals, as there will rarely, if ever, be direction in the governing statute with respect to the standard of review applicable to the statutory appeal.

We can see that there is some movement in the Province of Saskatchewan to have the legislature apply some consistent principles and procedures, such as grounds for appeal, procedure, level of court, and the applicable standard of review, to statutory appeals. It will be interesting to follow this issue as it moves forward in the province.

\textsuperscript{13} 2003 SCC 19