Draft Outline of Introduction to Standard of Review Panel

Roundtable on *Dunsmuir*
University of Toronto Faculty of Law
June 4, 2008

Implication of *Dunsmuir* for Standard of Review

Ten Discussion Points

1. Does the reduction in the number of standards of review from three to two necessarily make the identification of the appropriate standard of review any easier? Does this in part depend on whether unreasonableness review involves a contextual sliding scale (as suggested by Binnie in his characterization of the majority's position)?

2. Does the majority's identification of a series of situations in which the standard will generally be obvious and not requiring much analysis simplify the conduct of standard of review analysis?

3. What about precedents? The Court seems to indicate that if precedent has already established the standard of review authoritatively, there is no need to revisit it in subsequent cases. Does that reach back to pre-*Dunsmuir* decisions? If so, what about those cases where the selected standard was patent unreasonableness? Do they get located at the least intrusive end of the new unreasonableness spectrum?

4. Where there are no precedents, does the new standard of review analysis differ from the old pragmatic and functional approach in anything other than terminology? Does the judgment clarify the meaning or content of any of the relevant criteria such as expertise?

5. What about Binnie's concern that the majority has not thought enough about contexts other than an adjudicative setting? Is that a fair criticism? If so, is there still work to do in other than adjudicative settings *e.g.* broad ministerial discretion?

6. Whither situations involving a statutory right of appeal to the courts?

7. Is the jury still out on constitutional questions and, in particular, review of discretionary powers implicating *Charter* rights? Contrast *Multani* with *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, applying an unreasonableness standard with nary a mention of *Multani*.

8. What are the badges of the resurrected form of jurisdictional errors and issues of *vires*?

9. Who has the better of the argument about questions of common or civil (general) law and statutory interpretation? The majority seem to suggest that there should be

unreasonableness review unless the question is both outside the expertise of the decision-maker **and** of central importance to the legal system as a whole. Binnie does not agree particularly with the added requirement of importance to the legal system as a whole and Deschamps would be even more interventionist on questions of general law or statutory interpretation.

10. What impact, if any does *Dunsmuir* have on situations (such as under the British Columbia *Administrative Tribunals Act*) where patent unreasonableness is a legislated standard? Also, what about the *Federal Court Act* "codification" of the grounds of review? Stay tuned for the judgment in *Khosa v. Canada (Minister of Citizenship & Immigration),* appeal heard March 20, 2008.

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