Faculty of Law, University of Toronto
Roundtable on *Dunsmuir*

On June 4, 2008, a Roundtable was held at the Faculty of Law, University of Toronto on the *Dunsmuir* v. *New Brunswick* decision from the Supreme Court of Canada (handed down in March of 2008 and available at http://scc.lexum.umontreal.ca/en/2008/2008scc9/2008scc9.html). The aim of the Roundtable was to explore the implications of this for the development of Administrative Law, and in particular the Court's wide-ranging discussion of the standard of judicial review of administrative action, deference, and the applicability of procedural fairness to public office holders.

The background material for the Roundtable, including the *Dunsmuir* case, the facta filed at the Supreme Court, and some early commentaries are available to download at: http://www.law.utoronto.ca/conferences/dunsmuir.html.

Below, we have prepared a summary of the themes, ideas and arguments raised during the Roundtable in the hopes that it will serve as a catalyst for further discussion and debate.

What is the Perspective from which the *Dunsmuir* decision should be seen?

- One way to look at the case is to ask what it reveals about the philosophical stance of the Supreme Court with regard to judicial review? Has the Court reconceptualized its view of its constitutional role? *Dunsmuir* assumes that there is a 'contest' between the rule of law and Parliamentary Supremacy, an assumption that raises serious questions

- An alternative approach is to look at the type of rhetoric used in the case. What does the Supreme Court say it is doing in *Dunsmuir*, and what does it say about the law of judicial review? Three aspects of this were discussed.
    - The Court stated that it did not intend to expose more executive action to judicial review or increase intensity.
    - What it *did* intend to do was make the law of judicial review simpler and easier to understand, and also to make clear that precedent plays an important role in setting the standard of review.
    - The Court thus saw itself as changing the *approach* to standard of review, not as changing the scope or intensity of review.

- One can also ask what difficulties and problems are raised by the new tests. One example that was discussed was the ambiguity within the case on the issue of whether reasonableness is one standard or a sliding scale (this issue was addressed further in general discussion)

- Finally, one can look at what the Supreme Court actually did.

- The Court reached the conclusion that the decision was unreasonable. Its analysis of reasonableness was sparse and thin. It was suggested that in fact the Court simply thought the decision by the adjudicator was incorrect.
- A participant argued that this is the latest in a line of Supreme Court cases that purport to apply reasonableness but in fact apply correctness, and that this could possibly indicate a move by the Supreme Court to more widespread *de facto* correctness review (this issue was addressed further in general discussion).

Is Reasonableness a single Standard of Review or a sliding scale?

- It was suggested that the confusion inherent in *Dunsmuir* on whether there was a single reasonableness or a sliding scale could be seen in the OCA decision in *Mills* (http://www.ontariocourts.on.ca/decisions/2008/june/2008ONCA0436.htm). In that decision, Rouleau J.A. appeals to the rhetoric of *Dunsmuir*, stating that the case represents a new approach, but not a new standard for judicial review. Rouleau emphasizes that *Ryan* (SCC 2003) remains good law and therefore that the standard of reasonableness does not include a "sliding scale" but is, rather, a single standard to be applied contextually. However, the actual application by the judge seems to illustrate that the standard will very, depending on the context. Does this add clarity or illustrate confusion as to the nature of the tests in *Dunsmuir*?

- Interpreting this issue another way, one participant thought that, while the majority in *Dunsmuir* was very sparse about what constitutes unreasonableness, this may be wise. There is only one standard of reasonableness, but how it is applied will be contextual. Emphasis is placed on choice of procedures – if there is no choice of procedures under the statute, there is no room for deference. An analogy was drawn to American jurisprudence – post *Chevron* – where, if there is no ambiguity in the statute, the standard should be correctness.

- Does formalism or a more categorical approach really lead to more deference? One participant worried that the removal of the standard of patent unreasonableness would be interpreted as a rhetorical signal to be less deferential, even if the Court protested that this was not its intent.

Does *Dunsmuir* reflect the trend toward Balancing vs Categorical approaches to standard of review?

- It was suggested that one can approach standard of review from either a categorical or a balancing perspective. The categorical approach places situations in a fixed 'box A' or 'box B' depending on a variety of factors, whereas the balancing approach weighs the factors and then picks a spot anywhere on a scale. *Dunsmuir* can be seen as a move back towards a categorical approach – a reaction against an endless series of balancing exercises.

- The pragmatic and functional methodology resulting in three standards of review (patent unreasonableness, reasonableness *simpliciter* and correctness) represented a categorical approach. With *Dunsmuir*, by collapsing patent unreasonableness and reasonableness *simpliciter* and relaxing the methodology employed to reach a finding on the standard of review the Court has attempted to put a more coherent face on the categorical project One participant wondered whether, rather than a retrenching of formalism, the Court should adopt an alternative standard of review analysis which looks much more like the procedural fairness analysis (with the balancing of five factors to determine the degree of fairness applicable to a given administrative context). Revamping the standard of review analysis along these lines was suggested in the recent article, L. Sossin & C. Flood, "Contextual Snakes and Ladders: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) University of Toronto Law Journal 581-606.

- Another participant suggested, however, that if one is truly performing a balancing analysis, it is very difficult not to actually subject a decision to quite intense scrutiny.

- It was argued that in the battle between Gonthier and Wilson JJ in *National Corngrowers* (SCC 1990), Gonthier J. had the better of the argument that sometimes it will be necessary to take a detailed look at the legal framework even under a patent unreasonableness standard. Possibly there are no other alternatives regardless of the standard being used.

What is the Link between substantive and procedural judicial review?

- One participant noted that in the area of procedural fairness, balancing has not attracted the depth of criticism that it has in the area of substantive review, and suggest that this may be because the cases that pass the threshold for the application of procedural fairness are remarkably few.

- Another participant noted that one of differences between procedural fairness and substance that in the procedural fairness analysis, it is often difficult to see any link between the level of fairness deemed to be needed and the actual procedures to follow. This is not a huge problem in the procedural fairness area because a lot of work is done by statutory procedures and/or analogy with them. There is no such resource for substantive review. This being the case, once a standard has been determined, what does one actually do with it?

- A participant noted that the key distinction between the procedural fairness analysis and the standard of review analysis is the effect of the decision at issue on the party challenging it. This is considered crucial to the determination of procedural fairness but not as relevant to the standard of review analysis. To those who follow the standard of review, however, it seems obvious that courts are

often influenced by the significance of the decision for the parties. Why should such considerations not be made explicit?

- In response, it was asked how the impact on the individual would affect the standard of review. Do you say the decision has to be *more* reasonable, or say that it has to be subject to *more* scrutiny?

- One participant suggested that in *Dunsmuir*, as in *Baker* (SCC 1999) there is an almost inseparable relationship between the procedural and substantive elements.

Post-*Dunsmuir*, is the Slide towards Correctness Review Inevitable?

- As mentioned above, some participants thought that *Dunsmuir* was a step along the path to more widespread correctness review. A participant asked if it is it really possible to determine ex ante what a proper level of deference for statutory interpretation is when we don't really know what we think 'good' statutory interpretation is? We just tend to look at the way the courts do it. It was suggested that this could explain a slide towards correctness review.

- On a similar note, another participant opined that *Dunsmuir* and *Multani* (SCC 2006) illustrate that the SCC has been ducking some big issues post-*Baker*. It does not seem to make sense to look at the nature of the decision being made. Statutory interpretation is a form of discretion – if we accept this there is no difference between questions of law and discretion. This would require a new way of looking at judicial review, and is something that Binnie J. seems to have been grappling with in *Dunsmuir*, while the majority "ducks it."

- One participant contended that the actual work of substantive judicial review will involve an analysis of the issues that inevitably looks like correctness. The nature of the area is such that it is virtually impossible to get a consistent regime – one will always be looking at individual circumstances.

- Another participant observed that the perceived spread of 'hard look' review resembled a shift toward the American administrative law approach.

How Should *Dunsmuir*'s Methodology be Characterized?

- Some participants suggested that *Dunsmuir*'s methodology was a throwback to Gonthier J.'s approach in *National Corngrowers*. It was also argued that *Dunsmuir*'s methodology revealed a lack of self-consciousness on the part of the judges as to how the court is assessing reasonableness.

- *Dunsmuir* would seem to be leading to a more transparent form of decision making from judges. The first question the judge is really asking is "should I intervene?" – then the judge should look at the restraints that the system places on intervention. *Dunsmuir* may signal a real advance with respect to the transparency of judicial reasoning in JRs.

What is *Dunsmuir's* place in the development of the Standard of Review since *CUPE*?

- One participant remarked upon the desire of the courts to say something new while being held by the ghost of the past. This has been seen in the past in decisions such as *CUPE* (SCC 1979). In the case of *Dunsmuir*, this desire can be seen in the Court's realigning of the standard of review while simultaneously recommending that precedent be used to assist in finding standards of review. This is an odd sort of backwards grasp of the past given that past precedent is often not aligned as the Court desires.

- One of the questions asked was whether anything had really changed, or whether patent unreasonableness would continue to be *de facto* applied. One participant noted that the Supreme Court's emphasis on precedent could (and already had) allowed courts to continue to apply standards of review developed under the old law. Indeed, another participant challenged the group to think of a single case which would have led to a different result if the *Dunsmuir* approach had been adopted.

- One participant noted that *Dunsmuir* makes the obvious argument that a number of standard of review decisions are easy. Paragraph [54] of *Dunsmuir* says that, presumptively, the standard of review for an agency interpreting its own statute is reasonableness. This is a significant shift. It is only a presumption, but still significant.

- One participant questioned the Court's assumption that things were too complicated previously. The old approach had a number of advantages, particularly for generalist judges. One of the advantages of the previous 2-step approach is that the first step focuses a judge, who may not have an admin law background, on the values and purposes behind deference.

- A number of participants expressed the view that taking away the standard of patent unreasonableness lost an important rhetorical reminder that told people that some things shouldn't be interfered with unless really unreasonable.
    - One participant compared this to the effective loss of section 33 of the *Charter* – both losses point towards expanding judicial power at the expense of the other branches of government.

- A participant suggested that we will never solve all problems through the law, so they question is whether the problems we have under *Dunsmuir* are more tractable than those under the previous approach.

- A participant pointed out that the Supreme Court's post-*Dunsmuir* jurisprudence, especially the *Lake* decision (SCC, May, 2008) appears to adopt a spectrum approach [see paras 22 and 37]. Another participant noted that a reasonableness standard was applied in *Lake* notwithstanding that constitutional issues appeared to be at stake, which no doubt will lead to additional confusion.

Is there a tension between pragmatism and rationality in *Dunsmuir*?

- One participant suggested that *Dunsmuir* is a response to the court's overreach with the pragmatic and functional approach. It was suggested that the court had identified as a problem the tension between flexible generalized guidance and a more structured framework for review. The court responds in *Dunsmuir* by withdrawing from the general guidance at the first step of the standard while also withdrawing from the formalism of the 2nd stage.
    - The aim is of the Court is to bring clarity and guidance. *Dunsmuir* is actually more pragmatic than pragmatic & functional approach in its 1st step – it uses more easily applied tests. But the core action of removing of patent unreasonableness is less about pragmatism and more about a desire for rationality.

- It was also suggested that logic and rationality have value only as they help us in concrete problems. The pragmatic argument is that we should be orientated towards utility rather than rationality. Thus rationality should be seen as a means to achieve utility, rather than an end in itself.
    - The motivation for *Dunsmuir* arose from concern about internal contradictions and lack of clarity/rationality in distinction between reasonableness and patent unreasonableness. It was argued that there are limits to the extent we can and should achieve perfect rationality.

- One participant compared the pre- and post-*Dunsmuir* situations, observing that three standards to some extent cuts off the reasoning process. It has utility in clear categorisation and brevity of reasoning, but it is inexact – if one wants 'exact' levels of deference, the *Dunsmuir* approach may be better.

- On a related note, a participant asked whether there was a way to make sure that the loss of a patent unreasonableness standard isn't a retreat from pragmatism. Is it perhaps a better way to work things out over a period of time through the process of cases rather than a metaphysical dictates from "on high" from the Supreme Court? Does *Dunsmuir* reduce the number of problems we face compared to the previous approach?

Deference as Respect?

- At paragraph 48 of the majority judgment, Bastarache and LeBel JJ invoke the phrase "deference as respect", and refer to an article by David Dyzenhaus from which it is drawn ("The Politics of Deference: Judicial Review and Democracy",

in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997)

- A participant argued that the Supreme Court is using the phrase without actually understanding the logic behind it, which requires understanding Dyzenhaus' theory of administrative law.

- The Supreme Court is in fact following the old Diceyan model of 'deference as submission' under the name of deference as respect.
    - Their version of deference is animated by the idea that there are certain questions that don't lend themselves to a single right answer. This involves the positivist assumption that somewhere there exists an external standard of reasonableness that measures the range of reasonable legal answers.

- To truly embrace into deference as respect, a Dworkinian approach to law needs to be taken.
    - Law must be seen as an interpretive activity.
    - Distinctions between form and substance, normative and descriptive statements must be rejected. This means there are no external standards of reasonableness – assessments of reasonableness are in themselves interpretive acts.
    - The question is can we interpret the reasons for a decision in a light that holds the legal system and its values in the best light?
    - The benefit of this approach is that it is democratic, avoids both judicial activism *and* judicial quietism.

- Using this idea of deference, standard of review becomes much less important. The only question is "does this decision deserve our respect?"

- There was some discussion of the meaning of "the reasons offered or which could be offered in support of a decision" It was suggested that the presumption to offer 'good' reasons for a tribunal's decision (rather than the reasons they actually had for the decision) was disrespectful.
    - In response, it was pointed out that the Dyzenhaus article had been written before *Baker*, and thus assumed a situation where there was no duty to give reasons. In the pre-*Baker* context, it is conceivable that the court would have had to construct a set of reasons.

The 'Project' of Deference

- One participant argued that there are three questions at issue in the 'project' of deference:
    - why to defer,
    - whether to defer, and
    - how to defer.

- The jurisprudence shows how, but doesn't really examine the why or the whether. How do you get judges to buy into the questions of why they should defer?

Is the Duty of Fairness a type of Fiduciary Obligation

- It was argued that power being exercised by public authorities is always exercised over people who do not have the ability to exercise it themselves but will always be subject to it. The relationship between the governors and the governed is such that it can be seen as fiduciary in nature. This is already accepted in aboriginal law – in this context it is seen as a fundamental part of how authority works. Administrative law can similarly be seen as solicitude to those over whom executive power is exercised.

- The fundamental problem with duty of fairness is that it is an unwritten common law principle, so what happens if another unwritten common law principle comes along that conflicts with them or comes to supplant them?
    - This happened in *Dunsmuir*. The Supreme Court saw the interaction between the New Brunswick government and the public servants in their employ as purely contractual. The Court saw no ongoing relationship leading to an obligation of fairness. Despite this finding, one participant argued that, independent of the contract, there is a strong case that the administrative authority still has the ability to exercise delegated power over the employees, and thus there are the indicia of a fiduciary duty.

- Fiduciary duty of fairness flows out of the idea that public power cannot be exercised arbitrarily and therefore public employees (who were all at issue in *Nicholson, Knight,* and *Dunsmuir*) cannot be dismissed arbitrarily.

- Fiduciary theory explains why important interests to which no duty would otherwise apply can trigger public law duties in situations where no common law or statutory right would otherwise attach.

- A fiduciary duty is indicated by the existence of a particular contextual fact situation:
    - The existence of administrative power, conferred on or assumed by an institution and exercised for a particular purpose;
    - The vulnerability of those over whom power is being exercised; and
    - The existence of a substantial or important interest that is at stake.

- It was suggested that the Court in *Dunsmuir* deliberately didn't use section 20 of the Civil Service Act because it is a legislative override of *Knight*. Using such an override would have left the general authority of *Knight* in place.

- Another participant argued that using a fiduciary model in the employment context is problematic. If it is a fiduciary duty, where is the duty to act in the best

interest of the beneficiary? Where is the duty of candour or the duty of loyalty? Doesn't it also risk undermining the idea of what a fiduciary duty actually constitutes?

- Response: Dawson J in *Harris* (FC 2001) agrees with that statement. But the participant arguing for the fiduciary duty did not. The duty of loyalty and other duties applies to specific cases where the relationship is with a discreet and identified individual. There is authority, however, (UK pensions etc) that such duties *can* apply to the public at large.

- In a similar vein, someone raised the question of who the fiduciary duty is owed to? Presumably the public at large. This being the case, could onerous procedural protections make public authorities reluctant to dismiss people who it would be in the public interest to be dismissed?

What will be the effect of *Dunsmuir* on Procedural Fairness to Public Servants

- Many participants generally see Dunsmuir as "disastrous" for non-unionized, public sector employees, and to reflect a palpable anti-employee animus.

- One participant asked how significant is it that duty of fairness is removed from public employment given that procedural guarantees are often embedded in collective agreements? In discussion another participant suggested that, directly, it is very important for non-unionised public officials who lose their employment protection. It was also argued that the decision is important symbolically for everyone else as fair procedures help us distinguish between legitimate and illegitimate exercise of power.

- In response to a question asking whether the fiduciary model made sense to apply to public employees in highly political situations, for example a deputy Minister, a participant pointed out that the scale of fairness in *Knight* would allow for a relatively thin concept of fairness in these highly political situations. It was then observed that high level political employment hypotheticals of this sort only really make sense in a factual vacuum. When considered more closely, it is hard to justify not offering at least some reasons for dismissal.

- It was also noted that the court in *Dunsmuir* applied a private sector model instead of looking at the argument that the situation of public employees more closely resembled a collectively organised situation.

- A participant asked whether it might be a good idea to enact general procedural protections for public and private sector employees, rather than stretch the duty of fairness to apply to (only public) employment situations. This is what we do for human rights obligations.
  - Another participant responded by noting that while this may be a desirable goal, expanding procedural fairness requires no statutory intervention.

In a short session summing up the day's discussions, participants seemed to agree that the majority decision in *Dunsmuir* is poorly reasoned. One participant worried about the Court's decision to pronounce almost legislatively on the state of judicial review, thus departing from the spirit of case-based judicial reasoning.