STANDARD OF REVIEW REFORM: MAYBE ANOTHER TIME?

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Joseph Wilson probably doesn't care much about the standard of review of administrative decisions. Yet many of the words in the recent decision about his circumstances, *Wilson v. Atomic Energy of Canada Ltd.*[1] were focused on that issue.

According to a labour adjudicator Mr. Wilson was unjustly dismissed.[2] An application judge interpreted the Canada Labour Code differently and held that the labour adjudicator's decision was unreasonable. The Federal Court of Appeal also disagreed with the labour adjudicator, but reviewed the issue on the standard of correctness.[3]

The majority of the Supreme Court of Canada restored the labour adjudicator's decision. A majority of the justices held that the labour adjudicator's decision should have been reviewed on a standard of reasonableness and held that the labour adjudicator's decision was reasonable.[4]

Much of the remainder of the decision focused on administrative law standard of review.

Since the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*,[5] Canada has two possible standards of review for administrative decision-making: reasonableness and correctness. Colloquially, correctness is a binary consideration of whether the underlying decision is right or wrong. The reviewing court will undertake its own analysis of the question being reviewed. Reasonableness, on the other hand, involves a consideration of whether the underlying decision was reasonable, with deference being afforded to the decision-maker regarding their administrative decision.

In the last several years, decisions have commonly been reviewed on the standard of reasonableness. Correctness was applied, but relatively infrequently. Then the standard of correctness appeared to strike back: review on a standard of correctness began to appear more often in appellate decisions.

There can be no dispute that over the past several years, people have expressed concern about how standard of review analysis was being performed.[6] Many of those concerns related to consistency of when reasonableness or correctness would govern.

In *Wilson*, one of the issues before the court was on what basis the decision of the labour adjudicator was to be

reviewed. One justice, Justice Rosalie Abella, tried to draw a bright line on the issue. Several of her recent reasons have pushed for application of a reasonableness standard. Abella J.'s reasons in *Wilson* were consistent with that approach. She stated bluntly "[t]he most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness".[7] Even if that were not agreed to, Abella J. stated that, in the alternative, correctness should only be applied in four specific circumstances.[8]

The largest number of justices (four of the nine) agreed that the standard of review to be applied in Wilson was reasonableness. They chose, however, to reject Abella J.'s proposal to impose one standard of review. In their one paragraph decision, they stated that they were not "prepared to endorse any particular proposal to redraw our current standard of review framework at this time".[9]

Another justice, Justice Cromwell, expressly disagreed with "overhaul[ing]" or "re-thinking" of the approach in *Dunsmuir*. Cromwell J. did say that the approach "can and will be refined so that the applicable standard of review may be identified more easily and consistently".[10] The reader is left to wonder when, and in what way.

Lastly, perhaps demonstrative of the concerns underlying Abella J.'s reasons, three of the nine justices dissented from the majority's decision. These justices felt that a correctness standard was applicable.[11] They felt that a standard of correctness should be applied where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers and where the statute could only bear one meaning.[12] In effect, the dissent suggested that the standard of correctness should be applied to a specific category of cases, rather than narrowed or eliminated altogether.

The issue is this. The reasons in *Wilson* demonstrate the ambiguity in current standard of review analysis. The Supreme Court itself disagreed on whether correctness or reasonableness should be applied to the issue in *Wilson*. It disagreed on whether the application of correctness should be narrowed or broadened. Prior to the Supreme Court considering the case, the Court of Appeal applied a standard of correctness. The lower court applied a standard of reasonableness.

It would seem that circumstances could not have been more appropriate for a majority of the Supreme Court of Canada to provide additional clarity on the approach to standard of review. Instead, litigants are left with the Supreme Court's suggestion that standard of review may be refined or redrawn in the future. In the meantime, litigants should continue to ensure they have adequately addressed standard of review at the appellate or review levels.

by Adam Chisholm

[1] 2016 SCC 29 [*Wilson*].

[2] *Wilson, ibid*. at para. 13.

[3] *Wilson, ibid*. at para. 14.

[4] *Wilson, ibid*. at paras. 15-17.

[5] 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*].

[6] *Wilson, supra* at para. 27.

[7] *Wilson, supra* at para. 28.

[8] *Wilson, supra* at para. 38. Abella J. referred to four circumstances where correctness may be applied in *Dunsmuir*. *Dunsmuir* mentions the following four specific examples of when a standard of correctness may be applied: Constitutional questions; true questions of jurisdiction; issues of general law that are of central importance to the legal system and outside the adjudicator's specialized area of expertise; and questions regarding jurisdictional lines between two or more competing specialized tribunals.

[9] *Wilson*, *supra* at para. 70.

[10] *Wilson, supra* at para. 72.

[11] *Wilson, supra* at paras. 74-149.

[12] *Wilson, supra* at para. 88-89.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.