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SCC says "not yet" to further admin law reform

Yesterday's decision from the *Supreme Court of Canada in Wilson v. AECL* will no doubt generate (and has already generated: e.g. here, here) significant commentary.

This makes sense, given the decision's potential impact on federally-regulated industries. The Court's majority restored the decision of an arbitrator under the *Canada Labour Code* declaring that a non-unionized employee's invocation of the CLC's unjust dismissal arbitration provisions ousted the employer's common law power to dismiss an employee without cause (and with notice). The decision is likely to lead to some changes in employer-employee relationships in federally regulated industries. (Though it is hard to know how permanent or widespread they will be given that the appointment of an arbitration pursuant to section 242(1) is subject to ministerial discretion.)

Aside from the result, the decision also reflects the current Supreme Court's attitude towards administrative law. Two aspects of the decision stand out.

First, the current Court has little appetite for further "reform" of administrative law. In an attempt to push the SCC's jurisprudence even further in this direction, Justice Abella tried valiantly to suggest that perhaps it was time to do away with the correctness standard of review. The responses of those concurring judges in the majority ranged from "We appreciate Justice Abella's efforts to stimulate a discussion on how to clarify or simplify … standard of review [but] … we are not prepared to endorse any particular proposal to redraw our current standard of review framework at this time" to "our standard of review jurisprudence does not need yet another overhaul".

Second, the Court also apparently has little appetite for "rationalization" of administrative law (or at least little appetite to engage in that debate). Courts (and lawyers) regularly lament the continuing practice of lawyers focusing on standard of review arguments instead of those on the merits. Why a particular decision is "unreasonable" as opposed to simply "incorrect" is not always straightforward to understand or articulate.

Indeed, the decisions of at least two judges in the majority

(Justice Abella and Justice Cromwell) represented wholesale rejections of the attempt by Justice Stratas of the Federal Court of Appeal to make some sense of this cumbersome categorization regime. Drawing on a nugget buried deep in paragraph 47 of Dunsmuir, Justice Stratas has argued in a number of decisions (and elsewhere) that lawyers should focus on what, in a given case, would have been a range of reasonable outcomes open to a given tribunal given the nature of the decision (and the attendant "margin of appreciation").

Both Justice Abella ("to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity") and Justice Cromwell ("developing new and apparently unlimited numbers of gradations of reasonableness review") soundly rejected this approach. However, the careful silence of the remainder of the Court on this issue at least leaves open the hope that the Court may, in the future, be receptive to advocates' pleas to finally, truly, simplify our convoluted administrative law regime.