

## Standards of Review of Federal Administrative Tribunals

by Marie-Hélène Blais et. al  
Markham, Butterworths, 2003. Pp. 304.

THIS BOOK IS WRITTEN BY NINE FORMER LAW CLERKS to the Justices of the Federal Court of Appeal. It is their extensive exposure to standards of review issues, and a realization that a gap existed in the literature, that inspired them to write the book.<sup>1</sup> The book is a successful attempt to identify and explain the standards of review applicable to a wide range of decision-makers, including boards, commissions, agencies and, sometimes, governmental ministers and their delegates in the federal context.<sup>2</sup> To this end, the authors have set for themselves a big task. First, they provide an understanding of the manner in which courts have applied the pragmatic and functional analysis to quasi-judicial bodies, they then attempt to supplement this understanding with the application of the pragmatic and functional analysis to various tribunals and in the process provide a discussion of rationales for or against a deferential stance toward a tribunal's decision on a given matter.

The book is divided into two parts. In chapter 1, the authors introduce the framework for review of administrative tribunals. They set the stage by examining the administrative context with a brief discussion between defending judicial deference and justifying judicial intervention. The authors also discuss the historical development of the law regarding curial review starting from the courts' interventionist policy in cases like *Metropolitan Life Insurance Co. v. I.U.O.E.*, *Local 796*,<sup>3</sup> *Bell v. Ontario (Human Rights Commission)*<sup>4</sup> and *Blanco v. Rental Commission*,<sup>5</sup> to a deferential stance in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,<sup>6</sup> and the eventual return to classification in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*<sup>7</sup> and *Union des employés de service, Local 298 v. Bibeault*,<sup>8</sup> to finally marking the modern approach of a pragmatic and functional analysis in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,<sup>9</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>10</sup> and *Chieu v. Canada (Minister of Citizenship and Immigration)*.<sup>11</sup>

The first chapter also contains an analysis of the spectrum of standards from correctness, reasonableness *simpliciter*, to patent unreasonableness. The authors do this by discussing many leading Supreme Court decisions such as *Pezim*

1. Marie-Hélène Blais et al., *Standards of Review of Federal Administrative Tribunals* (Markham: Butterworths, 2003) at vi-vii.
2. *Ibid.* at v.
3. [1970] S.C.R. 425, 11 D.L.R. (3d) 336.
4. [1971] S.C.R. 756, 18 D.L.R. (3d) 1.
5. [1980] 2 S.C.R. 827, 35 N.R. 585.
6. [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417.
7. [1984] 2 S.C.R. 412, 14 D.L.R. (4th) 487.
8. [1988] 2 S.C.R. 1048, 95 N.R. 161.
9. [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193.
10. [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.
11. [2002] 1 S.C.R. 84, 208 D.L.R. (4th) 107.

*v. British Columbia (Superintendent of Brokers)*,<sup>12</sup> and *Canada (Director of Investigation and Research) v. Southam Inc.*,<sup>13</sup> to name a few. The chapter also contains a brief section dealing with the development of a fourth standard of review by the Federal Court of Appeal not yet recognized by the Supreme Court of Canada, where the court suggested that a fourth standard of review falls between reasonableness *simpliciter* and patent unreasonableness.<sup>14</sup>

The first chapter of the book is a very solid introduction to the modern approach of standards of review in Canada. The authors succeeded in conveying to the reader the framework for review of administrative tribunals and in a concise and clear fashion. It is a contribution to the literary work by itself and a handy reference to any administrative law practitioner.

The second part of the book is composed of chapters two to eighteen, whereby the authors systematically and consistently apply the framework examined in chapter one to seventeen tribunals.<sup>15</sup> In a disciplined methodology, they succinctly highlight the major Supreme Court of Canada and Federal Court decisions as well as the major statutes affecting each tribunal to determine the applicable standard of review towards a tribunal's decision on a given matter.

For instance, each chapter dealing with a tribunal is divided into two sections, the first of which is a helpful and short introduction to the tribunal in question, including its enabling legislation, powers and mandate. The second section applies the pragmatic and functional analysis to determine the standard of review. This section examines the four corner stones of the analysis: i) statutory access to review, ii) purpose of the tribunal and relevant legislation, iii) expertise of the tribunal and iv) the nature of the decision under review—be it jurisdictional, questions of law, fact, mixed law and fact, discretionary or dealing with procedural fairness.

This part of the book provides an in-depth analysis to a variety of federal tribunals with emphasis on standards of review and a successful attempt to provide the reader with the necessary tools to argue in favour of a deferential or interventionist stance in future cases. It is this part of the book that adds an invaluable resource to the literature in administrative law and will be very useful to practitioners of administrative law. However, it is this part of the book that may require the authors to expedite their efforts to publish a second edition as the application of the pragmatic and functional analysis to some tribunal decisions may not have settled yet.

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12. [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385.

13. [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1.

14. *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Association* (1997), 3 T.T.R. (2d) 263 (C.A.). The court stated that this standard is reserved for an expert tribunal on an issue within its field of expertise and requires more deference than that given where a statutory right of appeal exists and less deference than that given to tribunals protected by a true privative clause.

15. These tribunals are: Canada Industrial Relations Board, Canadian Human Rights Commission & Canadian Human Rights Tribunal, Canadian International Trade Tribunal, Canadian Radio-television and Telecommunications Commission, Canadian Transportation Agency, Commissioner of Patents, Competition Tribunal, Copyright Board, Decision-makers under the Unjust Dismissal Provisions of the Canada Labour Code, Employment Insurance Tribunals, Immigration & Refugee Board, National Energy Board, Pension Appeals Board, Privacy Commissioner of Canada & Information Commissioner of Canada, Public Service Staff Relations Board and Adjudicators, Registrar of Trade-marks and the Tax Court of Canada.

A welcome feature of the book includes a section for further readings after each chapter dealing with a specific tribunal. This may be helpful for the lawyer who finds herself or himself wanting more detailed and concentrated information relating to a specific tribunal. It also includes a detailed table of cases, and an appendix including the addresses, phone, fax numbers, e-mail and websites of federal tribunals.

Although the book contains an index that includes reference to statutes, keywords and tribunals, it is missing a table of statutes similar to the table of cases included at the beginning of the book. Another suggestion for a second edition would be for the authors to use the "short form for subsequent references" rule in citing cases. While the book cites approximately 350 cases, it would make for an easier reading if the authors referred to the cases by either one of the party names or a distinctive part thereof. As some leading cases are referred to in many chapters of the book, and to recognize that each chapter is distinctive by itself, the "short form" rule should be followed on a chapter-by-chapter basis. I would also recommend that the second edition contains a summary table outlining the applicable standards of review for each tribunal studied depending on the nature of the matter under review.

In general, the book is a very useful tool to the Administrative law practitioner, who will find an up-to-date legal analysis of the standards of review in general, or specifically as it applies to a particular federal tribunal.

In the words of the Honourable Mr. Justice Evans, who wrote the foreword to the book, the authors' approach "is likely to be particularly valuable to the lawyer with a federal administrative law case who is not an administrative law specialist."<sup>16</sup> He also concludes that the book "will earn the authors the gratitude of all who practice federal administrative law, whether regularly or sporadically."<sup>17</sup> I concur.

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16. *Supra* note 2 at iii.

17. *Ibid.* at iv.

\* The views or opinions expressed are those of the author alone and do not represent or reflect those of the Department.