

## PREFACE

As the title suggests, this book identifies and explains the standards of review applicable to federal administrative tribunals in Canada. The term “tribunals”, as it is used here, encompasses a wide array of decision-makers, including boards, commissions, agencies and, sometimes, governmental ministers and their delegates, although notably only in the federal context. All of these decision-makers share a common characteristic: their authority results from statutory power conferred upon them by Parliament. Having identified a need to address a particular matter, Parliament entrusts these tribunals to implement and administer social or regulatory programs and other initiatives. The role of the judiciary in this scheme, simply stated, is to supervise the delegation and exercise of statutory authority in accordance with the will of Parliament and with the law. A host of related considerations may, however, indicate that more or less deference to the administrative decision-maker is warranted.

Courts have struggled with this dilemma for many years. Previously, the judiciary took a formalistic approach to categorize the type of decision made. Realizing that such a tactic did little to advance the underlying interests served by judicial deference or intervention, courts began to adopt a principled view of the rationale for delegating decision-making responsibility to administrative tribunals. The culmination of the contextual approach occurred with the advent of a pragmatic or functional analysis, which is now the touchstone manner of determining the allocation between the administration and the judiciary of decision-making responsibility.

The price of a contextual approach has been, arguably, the sacrifice of the ability to generalize or predict the applicable standard in a given case. Of course, there are those who would point out that the modern functionalist approach is no less unpredictable than the formalistic views of the past. Much of the literature about the “standard of review” has, therefore, attempted to rationalize the theory of curial deference. This has led to a lack of emphasis on the practical aspects of the now widely accepted standards of review analysis. Although the content and role of a pragmatic and functional approach has been well documented, there is a conspicuous absence of material dealing with its application to specific decision-makers in particular circumstances.

Admittedly, the nature of a contextualized approach to a standards of review analysis renders it difficult to describe in a meaningful way the general characteristics of certain tribunals that might influence a more or less deferential posture by a reviewing court. Nevertheless, that is what this book undertakes to achieve. Our aim is twofold. First, we seek to provide our readers with an understanding of the manner in which courts in the past have applied the elements of a pragmatic and functional analysis to particular tribunals. Second, we attempt to supplement this understanding with the tools needed to advocate for or against a deferential stance toward a tribunal’s decision on a given matter.

Thus, this book is divided into two parts. The first part, Chapter 1, provides a framework for the analysis of curial review. Here, we explain the fundamental tension that underlies review of administrative decision-making, trace the evolution of the modern approach, describe the considerations that comprise a pragmatic and functional analysis and, finally, define the spectrum of applicable standards. The second part, Chapters 2 to 18, is made up of separate chapters dealing specifically with various federal administrative tribunals. In each chapter, the reader will find an introduction to the structure and mandate of a particular tribunal. More importantly, the bulk of each chapter contains a description of the standards of review previously applied by reviewing courts, broken down according to the factors relevant to a pragmatic and functional analysis, along with a discussion of rationales upon which one might base an argument in favour of a deferential or interventionist stance in the future.

Perhaps no one was more aware of the need for this resource than law clerks to the Justices of the Federal Court of Appeal, who confront this issue routinely. In fact, it was our extensive exposure to standards of review issues that led us to undertake this project, the unique origins of which bear mentioning, along with the people who contributed to it.

Realizing that a gap existed in the literature, Warren Hoole circulated the idea of filling the void by creating our own resource. Other clerks, particularly Jeremy deBeer and Megan Telford, developed this idea into a sample chapter and proposal, and went in search of a potential publisher. In a short while, thanks to the indispensable assistance of the Honourable Mr. Justice A.M. Linden, LexisNexis Canada Inc. (Butterworths) agreed to publish our work, and we wish here to acknowledge their confidence in us.

After several months of research, drafting and editing, we created this book. Chapter 1 was written by Jeremy deBeer, Michael Drake, Megan Telford and Guy Régimbald, all of whom tried to provide just the right degree of depth for those who will use this resource. Each of the nine authors brought their own particular experiences and interests to the other chapters of the book, which constitutes a remarkable illustration of teamwork and cooperation. All of the authors drafted at least one of the chapters, and most drafted multiple chapters. Yet given the roles that each of us played, we thought it best to present the result as the group endeavour that it was, rather than as a compilation of individual efforts.

Special mention should nevertheless be made of the work of Josée Boudreau and Warren Hoole in reviewing the substance of each chapter to ensure accuracy and consistency, and of May Leung and Marie-Hélène Blais in checking the style and format of the text and footnotes. Thanks also to Neil McGraw for his technological prowess, and to Jeremy deBeer and Megan Telford for their initiative and coordinating roles throughout this undertaking.

The authors would especially like to note their appreciation for the contributions of the Honourable Mr. Justice J.M. Evans, whose review of Chapter 1 of this book was invaluable to us. With his universally recognized expertise in the field, we could not have asked for a better person to provide feedback and to compose the foreword to our book. If, however, Chapter 1 contains any inaccuracies or omissions, it is only because we did not pay close enough

attention to his advice. Finally, we must acknowledge each of the Justices of the Federal Court of Appeal, whose tutelage, guidance and patience provided us with the opportunity to incorporate our experience into this text.

We hope that you find our work useful, and look forward to updating this resource as new developments continue to fill in the landscape of judicial review.