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Use footnotes rather than endnotes.

ADMINISTRATIVE LAW 2005: RECENT DEVELOPMENTS

I. Introduction

The purpose of this paper is to provide an overview of some of the significant developments in administrative law over the past year or so, with particular reference to the decisions of the Supreme Court of Canada, a few decisions of lower courts, and some legislative developments. ...

II. Standards of Review

Although nothing earth-shaking conceptually has happened in the last year, the evolution and application of standards-of-review analysis continues to be central to much of administrative law. It is not yet certain how it will develop, whether it can be simplified, and whether administrative law will retain national coherence in the face of different legislative actions.

A. Background: The Development of Standards-of-Review Analysis[1]

From time immemorial, the courts insisted that a statutory delegate had to correctly determine matters relating to its jurisdiction, although they would frequently defer to the delegate on ...

B. Unresolved Issues in the Standards of Review Analysis

One can identify the following issues which still need to be resolved in the standards of review analysis:

1. Is the Pragmatic and Functional Approach the Overarching Analytical Framework for All Types of Substantive Judicial Review?

In *Chamberlain v. Surrey School Board*, 2002 SCC 86—a case which involved an elected body making policy, rather than an adjudicative decision—Justice LeBel made the following comment (at para. 190):

> Interesting as it may be, a discussion on the applicable standard of review seems to me to be a digression from the real issue presented by this appeal. *The pragmatic and functional approach has proven a useful tool in reviewing adjudicative or quasi-judicial decisions made by administrative tribunals. There are, however, limits to the usefulness of applying this framework to its full extent in a different context.* [emphasis added]

2. The Applicable Standard May Change Over Time

In addition, the court's appreciation about which standard of review is appropriate may change over time. The fact that the Supreme Court of Canada has identified the applicable standard of review for a particular matter does not mean that it might not reach a different result when it performs the detailed pragmatic and functional analysis in a subsequent case involving precisely the same matter ...

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1 For a more detailed discussion of the development of the concept of standards of review, see Jones & de Villars, *Principles of Administrative Law*, 4th ed. (Carswell: Toronto, 2004), Chapter 12.

3. The Relationship Between the Second, Third and Fourth Pushpanathan Factors, and Weighing Competing Factors

After discussing privative provisions (the first *Pushpanathan* factor), Justice Bastarache in *Pushpanathan* then identified three other factors that would be relevant to determine the appropriate standard of review, as well as the relationship among them:

(1) The relative expertise of the statutory delegate compared to the court with respect to the question at issue.

(2) The purpose of the legislation as a whole and the specific statutory provision in particular.

(3) The nature of the problem—whether a question of law or question of general or precedential value; or a question of fact or mixed fact and law.

C. A Legislated Solution: British Columbia's Administrative Tribunals Act

Given that the whole point of the pragmatic and functional approach is to determine the intention of the legislature about the role of the courts in reviewing particular actions by particular statutory delegates, it would not be surprising for legislators to enact legislation to address this issue.

To date, the only jurisdiction to do this is B.C. Its Administrative Justice Project was already underway prior to Justice LeBel's *cri de coeur*, and its *Administrative Tribunals Act*, S.B.C. 2004, c. 45, was passed in May 2004.[2] These are its provisions dealing with standards of review:

> **Standard of review if tribunal's enabling Act has privative clause**
>
> 58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

III. The Power of Statutory Delegates to Make Constitutional Decisions

The Supreme Court of Canada's decisions in *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 and *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 clarify the circumstances in which ...

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2 Not all of the provisions of the *ATA* are in force.

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Italicize statutes, case names, and non-English words.

Statute excerpts should be preceded by full name and citation.

In your submission, clearly number and indent statutory sections and subsections.

Place case citations directly in the text rather than in footnotes. Do not use parallel citations.