

Tribunals by Tweets: Independence in the 21st Century

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A. Overview: Tribunals by Tweets

“In my experience, governments are as concerned to respect the independence of tribunals as are the Chairs themselves.

Ministers and senior officials understand that any effort, real or apparent, to subordinate the tribunal to the department will rebound badly on the government.”¹

This remark was made by James R. Mitchell to the Annual Conference of the Canadian Council of Administrative Tribunals in June, 2005. Jim Mitchell knows government and knows Ottawa: he has served with the Department of Foreign Affairs and Privy Council Office, as Assistant Secretary of the Treasury Board, and Assistant Secretary to the Cabinet (Machinery of Government). To what extent, though, does his observation hold true today?

Tribunal independence in the sense I am using it today involves the relationship between tribunals and the executive, particularly structural mechanisms designed to protect tribunals and their members from improper governmental interference in their decisions. Canadian tribunals lack constitutional guarantees of independence, although it is generally accepted that public trust and confidence in the administrative process require some element of independence.

The Canadian tribunal community in the last fifteen years has worked hard to establish objective elements of structural independence, coupled with an increasing acceptance of accountability. The goal has been to create enough independence – despite the lack of

¹ James R. Mitchell, “The Relationship between Tribunals and the Executive: A Government Perspective”, Canadian Council of Administrative Tribunals, Conference, Ottawa, June 20, 2005

guarantees – to deliver administrative justice fairly and efficiently. This is what Ron Ellis calls the “hope and a prayer” theory of independence. Most of the key issues relating to tribunal independence are not based on reported cases, and rarely come before a court. Rather, the structural issues which have been identified generally include processes and criteria for recruitment, appointment, reappointment, tenure, the role of the Chair in relation to the Minister/executive, appropriate funding and remuneration, and respect for adjudicative independence. Canadian organizations such as the CIAJ, SOAR, CCAT and BCCAT have done tremendous work in these areas, supported by the Administrative and Public Law/Lawyer sections of general organizations such as the OBA and the CBA.

While the Ontario government has made significant ground with the *Adjudicative Tribunals Accountability, Governance and Appointments Act*,² (“ATAGAA”), the Act is limited in its application to a thirty-seven adjudicative tribunals. However, the principles set out in the statute are a significant achievement in areas such as competitive appointments, performance-based reappointments, and the role of the Chair. As importantly, ATAGAA explicitly links the notions of independence and accountability, which is the predominant normative framework today in analysing these issues. Section 1 of the Act provides: “The purpose of this Act is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making.” We can expect many of the principles set out in ATAGAA to inform approaches to tribunal independence in the future. The ATAGAA model represents a relatively mature tribunal community, within a framework of government respect for adjudicative independence consistent with Jim Mitchell’s remarks.

So how does the concept of tribunals by tweets fit into the narrative? A look at the actual tweets of the Minister in the days surrounding the controversy over the CRTC’s ruling on Internet pricing is instructive. Journalist Rosemary Barton asked the Minister by Twitter if it was true that the Minister would overturn the CRTC decision if the CRTC “does not back down”, and the Minister replied in a tweet: “True. CRTC must go back to drawing board.” The tweet was posted prior to the CRTC Chair’s announcement that he would review and delay the decision on internet pricing. This is how the decision was announced, taken from the Minister’s Twitter account (easily available on the internet):

True. CRTC must go back to drawing board RT @RosieBarton is it true you will overturn internet decision if crtc does not back down? [Wednesday, February 02, 2011 10:27:40 PM](#) via Twitterrific

I remain very concerned by the #UBB decision of the CRTC & look forward to my review being completed ASAP. [Wednesday, February 02, 2011 6:21:58 PM](#) via Twitterrific

² S.O. 2009, c. 33, Schedule 5, proclaimed in force April, 2010

I'm looking forward to the CRTC chairman's appearance before the House Industry Cttee tomorrow to explain his support for #UBB decision. [Wednesday, February 02, 2011 6:20:47 PM](#) via Twitterrific

Recorded interview with Radio NL Kamloops BC on #UBB! [Wednesday, February 02, 2011 1:51:22 PM](#) via Twitterrific

I am sad...RT @NMEmagazine: The White Stripes split up - <http://bit.ly/e1GCj5>” [Wednesday, February 02, 2011 1:27:56 PM](#) via Twitterrific

I honour Groundhog Day by playing "I Got You Babe" on my iPod. Thx Bill & Andie for that classic. [Wednesday, February 02, 2011 6:37:47 AM](#) via Twitterrific

While the government has always had the power to refer a CRTC decision to Cabinet, intervening by tweet three days after the decision, rather than the months during which a review or appeal could be launched, is unprecedented. When coupled with the *Public Mobile* decision summarized below, the cautious optimism we have about the maturing of tribunals as another “pillar” of the justice system is tempered.

Professor Phil Bryden expressed a similar concern when he stated:³

As long as tribunals are seen simply as vehicles by which government policy is pursued, the temptation to have recourse to tactics that would not be acceptable if used against judges is ever present. Reinforcing the idea that independence is a justice system imperative regardless of whether the independent adjudicator is a judge or a member of an administrative tribunal seems to me to be the most effective means of protecting that essential value.

Another aspect of concern for tribunal members is reflected in this partial "list of the fallen," which includes both tribunal members and senior bureaucrats fired/not reappointed during periods of controversy. In recent years, the list includes:

Pat Stogran: Nov., 2010, appointment of Canada's first Veterans Ombudsman not renewed.

Munir Sheikh: July, 2010, head of StatsCan resigns in protest after census controversy.

³ Prof. Phil Bryden, “New Developments in Tribunal Reform: Lessons from British Columbia,” The Future of Administrative Justice Symposium, Faculty of Law, University of Toronto, January 18, 2008, pp. 21-22

Peter Tinsley: Dec., 2009, contract of chair of the Military Police Complaints Commission not renewed in the midst of Afghan detainee transfer hearings.

Paul Kennedy: Dec., 2009, head of Royal Canadian Mounted Police Public Complaints Commission not renewed.

Sheridan Scott: Dec., 2008, head of Competition Bureau leaves after term not renewed.

Marty Cheliak: Aug., 2008, head of the RCMP's Canadian Firearms Program let go.

Linda Keen: Jan. 2008, President of the Canadian Nuclear Safety Commission let go.

Given the rather dispiriting era of tribunals by tweets, what can we do to protect tribunal independence? How do we reinforce the concept that independence of tribunals and members is critical – for tribunal users, for the business community, for any member of the public affected by administrative decision-making – and ultimately, for the government as well?

Statutory protection for tribunal members is an increasingly important element in protecting tribunal member independence, given the development of Canadian jurisprudence. To ensure an administrative tribunal is independent, impartial and expert, three guiding principles should inform the process for appointing tribunal members: (1) the process should be merit based; (2) the process should be open and transparent; and (3) the influence of partisanship should be minimized.

In Ontario, ATAGAA is a first step. Section 14 of ATAGAA addresses appointments of members to Ontario adjudicative tribunals and requires:

- the selection process to be competitive and merit based;
- the criteria applied in assessing candidates to include: experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal, aptitude for impartial adjudication, aptitude for applying the alternative adjudicative practices and procedures that may be set out in the tribunal's rules;
- the rejection of candidates who do not possess the required qualifications.
- the responsible minister to publish the recruitment process to select tribunal members, including: the steps to be taken in the recruitment process; and the skills, knowledge, experience, other attributes and specific qualifications required of the person to be appointed; and

- that no appointment to a tribunal be made unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications, recommends the person be appointed.

Subsection 14(4) of AGATAA provides that no person should be reappointed unless the chair, after being consulted on the member's performance, recommends that the person be reappointed.

In B.C., the *Administrative Tribunals Act*⁴ provides that tribunal Chairs are to be appointed "after a merit based process" for a term of up to five years, with a reappointment term of up to five years. Members are to be appointed "after a merit based process and consultation with the Chair. The B.C. Guidelines⁵ state that tribunal members should be reappointed if their performance has been satisfactory and there are no contrary factors against their reappointment.⁶ The Guidelines assume that as the Chair provides performance evaluations for tribunal members, the Chair will be involved in the reappointments process. In terms of satisfactory performance, the B.C. Guidelines suggest that a member has performed satisfactorily if the member has:

- contributed to the achievement of the tribunal's goals and service plans;
- conducted themselves with decorum in carrying out the tribunals' work;
- rendered timely decisions;
- had good attendance; and
- conducted other activities in support of the tribunal's work.⁷

In terms of factors that might militate against the reappointment of a member, the B.C. Guidelines suggest that the Chair needs to weigh the member's expertise gained through experience in working for the tribunal against the fresh perspective a new member could bring to the work of the tribunal.⁸ In determining whether to reappoint an existing member or whether or not to consider an existing member as part of recruitment process that considers other qualified candidates, the Chair may consider factors such as "the timing of a reappointment, the availability of other qualified individuals interested in and willing to accept a tribunal appointment, the expertise of the incumbent, the ongoing workload of the tribunal and the costs and commitment required to carry out a formal recruitment process or to train a new appointee."⁹

⁴ Administrative Tribunals Act, S.B.C. 2004, c. 45: see sections 2-3

⁵ Board Resourcing and Development Office, *Appointment Guidelines: Governing Boards and other Public Sector Organizations* (August 2001, revised May 2007), online: http://www.lcs.gov.bc.ca/brdo/appoint/AppointmentGuidelines_PublicAgencies.pdf at p. 3 ("B.C. Guidelines").

⁶ B.C. Guidelines at p. 22.

⁷ *Ibid.* at p. 23.

⁸ *Ibid.*

⁹ *Ibid.*

In the U.K., reappointments are based on a performance evaluation of the tribunal member and the number of years the member has held the position. Members may serve only a cumulative total of ten years in the same position.¹⁰ Section 5.21 of the Code of Practice states that members are eligible for reappointment if they meet the following criteria:

- they are considered to meet the current requirements of the public body;
- their performance has been judged as at least satisfactory against the current performance assessment requirements;
- their term of office has not expired;
- the appointing authority is content to reappoint; and
- they are agreeable to being reappointed.¹¹

The criteria apply to a first reappointment only. A second reappointment may only be made after the member is considered as part of an open and competitive process and subject to the same requirements as the initial appointment process.¹²

We are seeing the evolution of statutory protections in a number of provinces. Progress has been slow at the federal level. The *Federal Accountability Act*,¹³ enacted in 2006, sought to provide more transparency to the federal appointments process and provided for the establishment of a Public Appointments Commission (“PAC”) to reduce patronage and partisanship in federal appointments.¹⁴ The Commission was established by Order in Council in 2006 before the *Federal Accountability Act* came into force but has been non-functioning since the initial Commission Members resigned and a parliamentary committee refused to ratify the appointment of its chair.¹⁵

Shortly after the creation of the PAC, the government established the Public Appointments Commission Secretariat (the “Secretariat”). The Secretariat currently has two staff members, a Deputy Executive Director and an administrative assistant on contract.¹⁶ The mandate of the Secretariat is to “provide advice and support with respect to the development of the Public Appointments Commission and once the Commission is

¹⁰ Public Appointments Commissioner, “Code of Practice” online: <<http://www.publicappointmentscommissioner.org/admin/assets/spaw2/uploads/files/Code%20of%20Practice%202009.pdf>> at pp. 51-52.

¹¹ Ibid. at p. 54.

¹² Manitoba Law Reform, *supra* at p. 66.

¹³ S.C. 2006, c. 9.

¹⁴ Manitoba Law Reform, *supra* at p. 51.

¹⁵ Canwest News Service, “Frustrated PM abruptly cancels Public Appointments Commission” (May 17, 2006), online: <http://www.canada.com/topics/news/politics/story.html?id=ef7d26ff-a4a8-435c-a1f8-a06ab1101a30&k=57662/nblank_>.

¹⁶ Public Appointments Commission Secretariat, Departmental Performance Report 2009-2010 at p. 2, online: <<http://www.tbs-sct.gc.ca/dpr-rmr/2009-2010/inst/PCM/pcm-eng.pdf>> (“PCAS Performance Report”).

established to assist it with the development and implementation of a Code of Practice, with its audits and with the preparation of its annual report to the Prime Minister and to Parliament.”¹⁷ No Code of Practice has yet been published.

A more robust response, and very unlikely in the present climate, is the recognition of tribunals as a separate element of the justice system. This is the type of approach pursued in Quebec, with the ATQ, and the evolution we have witnessed in the UK.

Finally? Perhaps we should all sign up for Twitter accounts....

I set out below a summary of recent cases in the areas of both independence and impartiality.

B. Tribunal Independence Case Update

1. Public Mobile

Public Mobile Inc., 2011 FC 130 (F.C.)* (FCA Appeal has been argued)

Public Mobile applied for judicial review of a decision issued by the Governor in Council. That decision overturned a ruling made by the Canadian Radio-television and Telecommunications Commission (CRTC) that Globalive Wireless was ineligible “to operate as a telecommunications common carrier in Canada” (para. 1), because it was not Canadian-controlled (para. 5). Hughes J. held that the Governor in Council’s decision was subject to judicial review (para. 62), and that Public Mobile had standing to bring the application (paras. 66-83).

Hughes J. found that the Governor in Council did not disagree with the CRTC’s factual findings, but did draw “different [legal] conclusions from those findings”; as such, it was appropriate to review those findings on a correctness standard (para. 104). In applying this standard, Hughes J. determined that the Governor in Council, in its decision, had invented a policy objective “previously unknown” in the *Telecommunications Act* (para. 107), namely, one that encouraged “foreign investment” (para. 117). Hughes, J. held that “There is no doubt that the Governor in Council is bound by the Act and that the Courts may, by way of judicial review, determine whether the Governor in Council has acted within or outside the provisions of the Act” (para. 108). The Court went on to analyse the issue as one of the exercise of discretion within the boundaries of the Act and the intention of Parliament. The Act was clear that “the promotion of Canadian control...is

¹⁷ Public Appointments Commission Secretariat, Statement of Plans and Priorities 2008-2009, Online: <<http://www.tbs-sct.gc.ca/rpp/2008-2009/inst/pco/pco10-eng.asp#1>>.

to be the essential criterion upon which the matter is to be determined. It is for Parliament not the Governor in Council to rewrite the *Act*” (para. 117).

Hughes, J. noted that *Inuit Tapirisat* had clearly affirmed that the Governor in Council was subject to judicial review on jurisdictional grounds, stating that:

[109] The Supreme Court of Canada in dealing with a decision of the Governor in Council in reviewing a decision of the CRTC in *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 stated the same principles. Estey J for the Court wrote at page 748:

Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity.

[110] He wrote further at page 752:

However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

Hughes, J. held as well that: “The principle that a statutory decision-maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous occasions.” (para. 113) He held that the Governor in Council had “misdirected itself in law”:

[117] In the first of the above “Whereas” clauses, the Governor in Council misdirected itself in law by interpreting the Canadian ownership and control requirements of the Telecommunications Act, to use its words, “in a way that ensures access to foreign capital, technology and experience is encouraged”. While the Governor in Council is correct in saying in the

same clause that “the Act does not impose limits on foreign investment” it must be kept in mind that the Act does not refer anywhere to “foreign investment” or to “foreign capital, technology and experience”. What the Act does say is that telecommunications has an essential role in the maintenance of Canada’s identity and sovereignty and provides a policy objective which requires Canadian ownership and control to be promoted. There is no policy objective in the Act that encourages foreign investment. The Act provides tests as to Canadian ownership and control including in subsection 16(3)(c) that a corporation not be otherwise controlled by a non-Canadian. The intent of the Act is clear that a situation such as this is to be determined in a manner so as to ensure that there is Canadian control. Where there is a concern that foreign investment and other factors may put Canadian control at risk then it is the promotion of Canadian control that is to be the essential criterion upon which the matter is to be determined. It is for Parliament not the Governor in Council to rewrite the Act.

Moreover, the Governor in Council had erroneously sought to “limit...its Decision to Globalive only” (para. 107), which constituted an “improper consideration”:

[118] In the second of the above “Whereas” clauses, the Governor in Council acted outside the legal parameters of the Act in stating that its Decision impacts only on Globalive. The Governor in Council cannot restrict its interpretation to one individual and not to others who may find themselves in a similar circumstance.

Consequently, the Governor in Council’s decision was quashed (para. 119), although the judgment was stayed for 45 days (para. 121). The decision is now under appeal.

2. Saskatchewan Federation of Labour

Saskatchewan Federation of Labour v. Saskatchewan (Attorney General, Department of Advanced Education, Employment and Labour), [2010] S.J. No. 124, 317 D.L.R. (4th) 127 (Sask. C.A.): The Saskatchewan Federation of Labour and two unions sought judicial review of an order-in-council “effectively terminating the appointments of the chairperson and vice-chairpersons of the Labour Relations Board and appointing a new chairperson” upon the coming to power of a new provincial government (para. 1). The labour groups alleged that 1) the Lieutenant Governor in Council was not empowered to make the order-in-council under Saskatchewan’s *Interpretation Act*, and 2) the order-in-council attempted to “influenc[e] the decisions of the Board and subvert...its independence and impartiality” (para. 27).

Cameron J.A., for the court, held that the chairperson and vice-chairpersons did not serve “at pleasure” (para. 30), since *The Trade Union Act* appointed these decision-makers for fixed terms (paras. 31, 39). *The Trade Union Act* thus expressed an intention to oust the presumption, set out in s. 19 of the *Interpretation Act*, that all public officers served “at pleasure” (para. 33). As such, the Lieutenant Governor in Council could not have made the order-in-council under s. 19 of the *Interpretation Act*. This conclusion was supported by the “quasi-judicial” status of the Labour Relations Board, as noted by Cameron J.A. in two particularly helpful statements:

The Board is bound by the common law principle of natural justice and all this implies about its independence and impartiality, including independence from government.... [I]ndependence in this context is a function in significant part of security of tenure. To speak of security of tenure as a hallmark of quasi-judicial independence is to speak of something other than serving “during pleasure only”. (para. 41)

[T]he primary mandate of the Board under The Trade Union Act is quasi-judicial, implying a meaningful degree of independence in the Board and therefore a meaningful measure of security of tenure. More specifically, the Act requires that the members of the Board be appointed to hold office for fixed terms of office, suggesting something in the way of security of tenure. It also requires that they take oaths of fidelity and impartiality. In addition, and this is particularly significant, the Act confers upon the Board exclusive jurisdiction to decide interests of vital importance to organized employees and employers, major interests that in many respects have historically generated, and still generate, deep-seated tensions, tensions potentially productive of serious social and economic disruption. Finally, the parties that regularly appear before the Board include, by way of telling example, the Government of Saskatchewan as employer. (para. 45)

All the same, the Lieutenant Governor in Council was entitled to make the order on the basis of s. 20 of the *Interpretation Act*, which permitted the replacement of public officers following an election, and which purposefully did not carve out an exception for Board decision-makers (paras. 57-58).

Moreover, in exercising its powers under s. 20, the Lieutenant Governor in Council acted with a proper purpose. The Lieutenant Governor in Council aimed to dispense with the existing chairperson and vice-chairpersons, and to hire new decision-makers that would “give effect to the legislative policies choices embodied in the proposed legislative changes” (para. 72). Such a purpose was specifically envisioned under s. 20:

While the appellants contended otherwise, based on the remarks of the Premier in particular, we are of the view his point on the whole was that the new government was concerned to ensure that the Board interpreted and applied the anticipated statutory changes in keeping with legislative intent. This is not inconsistent with section 20, as is evident from the purpose of the section.

It might be noted that the Legislature chose to enact this law almost thirty years ago, expressly rejecting the idea members of the Labour Relations Board should be excluded from the scope of the law. And the Legislature has not since altered or repealed the law despite intervening changes of government. As much as the appellants contended against the actions of the present government, the Legislature allowed for this very thing in the limited circumstances in which section 20 applies, namely after a general election resulting in a change of government. (paras. 73-74)

3. Saskatchewan Federation of Labour #2

Saskatchewan Federation of Labour v. Saskatchewan Government and General Employee's Union, [2010] S.J. No. 614 (Sask. Q.B.): This case concerned the same order-in-council discussed in the above decision; however, this time, the unions sought to have the order-in-council and s. 20 of the *Interpretation Act* quashed “on the basis that they are ‘inconsistent with the Constitutional principles of adjudicative independence’” (para. 8). Since the Court of Appeal had determined that the Lieutenant Governor in Council was empowered to make the order-in-council under s. 20 of the *Interpretation Act*, the order-in-council could be voided only on the basis that s. 20 itself fell afoul of the unwritten constitutional principles of judicial independence (para. 15). Consequently, Ball J. was required to determine whether these principles could apply to the Saskatchewan Labour Relations Board.

Ball J.’s analysis centred on *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] S.C.R. 781, and the determination set out therein “that administrative tribunals created for the primary purpose of implementing government policy do not attract constitutional guarantees of judicial independence, written or unwritten, because they do not fulfil the constitutional role of courts” (para. 28). For the purposes of this decision alone, Ball J. held that it was not impossible for a tribunal to “attract some unwritten constitutional guarantees of independence”:

Whether they do or do not will depend upon the extent to which they perform judicial functions and, in particular, whether they are obliged to

enforce the provisions and protect the values set forth in the *Charter*. It will also depend upon whether, and to what extent, they require constitutional (as distinct from common law or statutory) guarantees to carry out their functions in a manner that will maintain public confidence in the administration of justice. (para. 41)

In applying these principles to the Board, Ball J. engaged in an extensive examination of the Board's structure and operation. He noted, in particular, that the "manner in which SLRB carries out its duties and responsibilities is very much dependent upon how its members exercise their discretion and implement what they perceive to be the policy goals of the statute" (para. 55). And indeed, it was largely on this basis that Ball J. concluded that the Board was not sufficiently judicial to "attract unwritten constitutional guarantees of judicial independence": "The SLRB is given a wide discretion as to how [the goals and objectives set out in the *Trade Union Act*] should best be achieved. It remains a textbook example of a statutory tribunal which, to parse the language of the Supreme Court of Canada in *Ocean Port Hotel*, spans the constitutional divide between the executive and judicial branches of government" (para. 75). Moreover, despite the inapplicability of the constitutional guarantees, Ball J. found that the Board was already subject to adequate guarantees of impartiality and independence. In this regard, he drew largely upon the Court of Appeal's earlier judgment on the order-in-council, asserting that the Board was subject to the "rules of natural justice" and to the review of the courts (para. 78). In addition, the fixed-term appointments of the Board's decision-makers ensured, in part, that the Board was independent (para. 83).

4. CBC v. Nova Scotia (Attorney General)

Canadian Broadcasting Corp. v. Nova Scotia (Attorney General), [2010] N.S.J. No. 418, 8 Admin. L.R. (5th) 290 (N.S. S.C.): The CBC sought an order requiring the provincial court to "'index its records of search warrants', but the only named respondent [was] the Attorney General" (para. 2). This request required consideration of the nature of judicial independence. Moir J. noted that "some aspects of court administration are exclusively in the control of the judiciary, with the government having a constitutional obligation to fund those aspects" (para. 22). Such administration must occur in accordance with the "constitutional requirements" for judicial institutional independence (para. 38). That the CBC alleged that the provincial court was failing to ensure "sufficient access to its search warrant records" triggered the "open courts principle". This principle is "an obligation of the courts" (para. 40). As such, it was an error for the provincial court not to have been named as a respondent in the judicial review application, since the court "controls access to [its] records" (para. 43). Moir J. thus directed that the court or its chief justice be named as a respondent. However, because not all aspects of these records were controlled by the courts, it was not yet appropriate to remove the Attorney General as a party (para. 45). Notably, naming the court or its chief justice as a respondent was permissible on the basis of the definition of "decision-making authority" as set out in the *Nova Scotia Rules of Civil Procedure* (paras. 13-17).

5. Masters' Association of Ontario v. Ontario

Masters' Assn. of Ontario v. Ontario, [2010] O.J. No. 3318, 322 D.L.R. (4th) 76 (Ont. S.C.J.): The Masters' Association sought declarations that case management masters, appointed under s. 86.1(1) of the *Courts of Justice Act*, "were entitled to the same salary and terms of office provided to" traditional masters, appointed under s. 87(8) of the *Act*, and that several orders-in-council and provisions of the *Act* ran afoul of "the constitutional principle of judicial independence" (para. 3). Platana J. held that the responsibilities of the case management masters had "significantly expanded" (para. 112), with "all masters...performing virtually the same work" (para. 113). Consequently, the distinction in post-retirement reappointments between the case management masters and the traditional masters could not stand: the "at pleasure" reappointments for the former were contrary to the security of tenure required for both kinds of masters, given their intense functional similarity (para. 116).

Moreover, the case management masters were not provided with sufficient financial security, insofar as the comparator selected in determining their salaries was not one "independent from the sole discretion of the Executive Branch", and having "a process...through which judicial officers can challenge the appropriateness of that comparator in the future" (para. 120).

Masters' Association of Ontario v. Ontario, 2011 ONCA 243 (CanLII)

The Court of Appeal dismissed the appeal by the Crown to set aside the remuneration-elements of the initial decision, with a minor variation. The CA held that Order-in-Council 458/2003, the order that sets out the process for setting the remuneration of Case Management Masters, was unconstitutional and therefore, invalid, although the Act itself was valid. The CA also dismissed the Masters' Association's cross-appeal

6. Prothonotaries Decision

Aalto v. Canada (Attorney General), [2010] F.C.J. No. 949, 8 Admin. L.R. (5th) 128 (F.C.A.): The Federal Court prothonotaries sought judicial review of the Minister of Justice's decision not to "implement all the recommendations made by the Special Advisor on Prothonotaries' Compensation..., except a recommendation that their vacation entitlement be extended to six weeks" (para. 1). It was not disputed that the prothonotaries performed "integral" judicial services, and that they "enjoy[ed] the constitutional guarantee of independence" (paras. 6-7).

The court held that the government's response to the recommendations met the "rationality" test set out in *Bodner v. Alberta*, [2005] 2 S.C.R. 286 (paras. 8-9). The government acted as it did, because of "the deteriorating state of the global economic situation and its impact on the finances of the Government of Canada" (para. 11). Moreover, since the government's actions in relation to the prothonotaries were part of broader wage restraint measures, the government could rely on the presumption that such measures were rational (paras. 11, 13). In addition, adequate evidence of economic deterioration was tendered by the government to justify its actions (paras. 15-16). Lastly, although the government did not respond to the advisor's recommendations quickly or particularly thoroughly (paras. 20-21, 25), its conduct was still acceptable given the economic circumstances, and the absence of a constitutional duty "to provide detailed costing information to demonstrate that the state of the economy prevents it from accepting [the advisor's] recommendations" (para. 23). However, the court did note that it expected the government to "revisit the issues promptly and thoroughly when economic conditions improve" (para. 26).