Institutional Bias: The Applicability of the Nemo Judex Rule to Two-Tier Decisions

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1. Introduction

The tremendous increase in the state's intervention in all aspects of human activity over the past fifty years has been accomplished by the delegation by Parliament of a very wide range of discretionary powers. Frequently, Parliament has provided an appeal from the decisions taken by its delegates. As the extensive jurisprudence on the efficacy of privative clauses indicates, Parliament has not always seen fit to permit such an appeal to the courts, but has preferred to leave the final decision with another level of the administration. Such administrative appeals may or may not be a better vehicle than an appeal to the courts for determining whether the initial decision is either correct or fair. Nevertheless, serious problems may arise where there is overlapping between the membership of the original decision-making body and the body hearing the appeal therefrom — a phenomenon which might be called "institutional bias". Does the maxim *nemo judex in sua causa debet esse*[1] apply in such circumstances?

The attempt to invoke the *nemo judex* rule to prevent institutional bias must be seen in light of the remarkable upsurge in the number of recent cases[2] dealing with this second principle of natural justice. There appear to be four principal reasons for this increased litigation.[3]

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[1] No man should be a judge in his own cause. This second principle of natural justice is otherwise known as the bias rule or the *nemo judex* rule.

[2] At least eight cases involving the *nemo judex* rule have come before the Supreme Court of Canada in the last decade: *Ghirardosi* v. *Minister of Highways (B.C.)* [1966] S.C.R. 367, (1966) 56 D.L.R. (2d) 469, 55 W.W.R. 750; *King* v. *University of Saskatchewan, infra,* note 9; *Blanchette* v. *C.I.S. Ltd* (1973) 36 D.L.R. (3d) 561; *Law Society of Upper Canada* v. *French, infra,* note 12; *P.P.G. Industries* v. *A.G. of Canada* (1976) 65 D.L.R. (3d) 354; *Ringrose* v. *College of Physician and Surgeons of Alberta, infra,* note 4; *The Committee for Justice and Liberty* v. *The National Energy Board* (1976) 68 D.L.R. (3d) 716; *Morgentaler* v. *The Queen* (1974, not reported on this point).

[3] For a discussion of another aspect of the *nemo judex* rule see Jones, *The National Energy Board Case and the Concept of Attitudinal Bias* (1977) 23 McGill L.J. 459.

First, prior to the recent decision of the Supreme Court of Canada in *Committee for Justice and Liberty Foundation* v. *National Energy Board*,[4] considerable confusion existed about the correct test for bias. In that case, however, the majority of the Supreme Court of Canada clearly held that the *nemo judex* rule is broken whenever there is a reasonable apprehension of bias, and that there is no further requirement that there also be a real likelihood of bias.[5] The effect of this decision is to widen the applicability of the *nemo judex* rule.

Secondly, it has not yet been finally determined in Canada whether the rules of natural justice apply only to the exercise of a judicial or quasi-judicial function. On the one hand, the concept of a judicial or quasi-judicial function is notoriously difficult to define with any precision. This makes it exceedingly difficult for counsel to advise clients *before* litigation whether the rules of natural justice even arguably apply, let alone whether they have been breached in the circumstances. On the other hand, Canadian courts have not yet satisfactorily dealt with the now numerous English cases[6] which apply the rules of natural justice wherever the decision-maker has a general "duty to be fair", regardless of the characterization of the function as quasi-judicial. No doubt, this latter lacuna can be directly attributed to the infelicitous wording of section 28 of the *Federal Court Act*[7] with which many of the recent cases have been concerned.

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[4] *Supra*, note 2. Note that in this case the appellants had specifically disclaimed any allegation that Mr Crowe in fact was biased. Therefore there could have been no real likelihood of his bias. Nevertheless, the Supreme Court of Canada held that his previous participation in the Study Group would raise a reasonable apprehension that he would be biased, and prohibited him from sitting on the Board in the particular hearings there in issue. The reasonable apprehension test was subsequently accepted to be correct by de Grandpré J. writing for the majority of the Court in *Ringrose* v. *College of Physicians and Surgeons of Alberta* [1976] 4 W.W.R. 712 (S.C.C.), even though he had dissented on this point in the *National Energy Board* case. See also de Smith's comments on the proper test in *Judicial Control of Administrative Action* 3d ed. (1973), 230-32.

[5] For a discussion of the differences between the reasonable apprehension and real likelihood tests for bias, see *Metropolitan Properties Co.* v. *Lannon* [1969] 1 Q.B. 577, 599 *per* Lord Denning M.R., 606 *per* Edmund Davies L.J.

[6] See, *e.g.*, *In re H.K. (An Infant)* [1967] 2 Q.B. 617, 630 (C.A.); *Regina* v. *Gaming Board for Great Britain* [1970] 2 Q.B. 417 (C.A.); *Re Pergamon Press Ltd* [1971] Ch.388 (C.A.); *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534, 547 (H.L.); *Bates* v. *Lord Hailsham of St Marylebone* [1972] 1 W.L.R. 1373, 1378 (Ch.D.); *Regina* v. *Liverpool Corp.* [1972] 2 Q.B. 299, 307-308, 310 (C.A.).

[7] R.S.C. 1970, c.10. S.28(1) states:

"Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review

Thirdly, the principles of natural justice are procedural rules which are implied by common law. Their application and their content yield to contrary Parliamentary provision, either express or necessarily implied. Considerable argument, therefore, can arise in construing the statutes under which Parliament or the provincial legislatures have granted very numerous and often enormous discretionary powers to various delegates. Regrettably, very little Canadian legislation specifies in detail the procedure by which the delegates are to exercise their discretionary powers, possibly because the legislation itself is almost invariably drafted by that part of the administration which subsequently will exercise the delegated powers. In many cases, therefore, the courts are faced with unnecessary and difficult questions of statutory interpretation in order to determine whether the principles of natural justice do or do not apply to the exercise of a particular delegate's powers.

Finally, the rules of natural justice may apply to an extremely varied multitude of factual circumstances. It is often exceedingly difficult to predict before litigation exactly what does constitute a fair hearing in particular circumstances.

The purpose of this article is to examine the applicability of the *nemo judex* rule to one particularly vexing fact pattern, the two-tier decision. In the paradigm case, a committee which is entitled to exercise a particular power (*e.g.*, to discipline a member of a profession) appoints a subcommittee either (i) to investigate the facts but make no judgment thereon, or (ii) tentatively to decide the matter subject to a final hearing (or an appeal) before the parent committee. The question then becomes, is the *nemo judex* rule breached if members of the subcommittee also participate in the parent committee's deliberations. A similar fact pattern raises the same issue. Is the *nemo judex* rule breached where there is an appeal to a person or body which is reasonably apprehended to be unlikely

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and set aside a decision or order, *other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis*, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." (Emphasis added.)

to deviate from the previous decision taken elsewhere in the decision-making institution, even if *no* actual overlap of personnel occurs between the two different decisions? Both of these fact patterns might generically be labelled "institutional bias".[8]

Attempts to obtain judicial review of decisions entailing institutional bias have been rare until relatively recently; and, furthermore, the courts have not clearly come to grips with the issues raised by such allegations. For example, in 1969 the Supreme Court of Canada in *King* v. *The University of Saskatchewan*,[9] rejected an attempt to invoke the concept of institutional bias to strike down a particular decision. There, the appellant argued that he had not been given a fair hearing by a committee of the University Senate (which declined to grant him a law degree) because a number of the members of that committee had also been members of at least two previous bodies which had considered his petition.[10] Although Spence J. accepted that the *nemo judex* rule was applicable to the Senate committee's deliberations, he held that it had not in fact been breached because:

> It was inevitable that there would be duplication as one proceeded from one body to another ... of persons carrying out their ordinary duties as members of the faculty of the University .... I am of the opinion that, in such matters as were the concern of the various university bodies here, duplication was proper and was to be expected, and I am not ready to agree that such duplication would result in any bias or constitute a breach of natural justice.[11]

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[8] See de Smith, *supra*, note 4, 227-29 for a discussion of the problems raised by the phenomenon of institutional bias, which may also be called departmental bias. Dickson J. in *Ringrose*, *supra*, note 4, 720, actually used the phrase "institutional bias or participation by association" to refer to the second type of bias.

[9] [1969] S.C.R. 678, (1969) 6 D.L.R. (3d) 120; aff'g (1969) 1 D.L.R. (3d) 721, 67 W.W.R. 126 (Sask.C.A.).

[10] King's "appeal" was first heard by a special committee of faculty council (composed of Messrs Spinks, Booth, Haslam, Tracey, Mann, Langley and Pepper) which recommended that he be granted his degree. The executive committee of faculty council (including both Dean Lang and Professor Pepper from the College of Law, as well as all of the other members of the special committee except Professor Tracey) then rejected the special committee's recommendation. Finally, the plaintiff appealed to the Chancellor of the University, Chief Justice Culliton, who treated it as an appeal to the University Senate and set up a five-member Senate committee to dispose of the matter. The members of the Senate committee included the President of the University as well as two deans (Begg and Currie) who had all been members of the executive committee.

[11] *Supra*, note 9, 690-91.

Thus, Spence J., without referring to any test for determining whether the *nemo judex* rule had been breached, simply rejected the appeal. One must conclude, therefore, that the facts in this case did not disclose any reasonable apprehension of bias.

Two more recent cases involving allegations of institutional bias have posed considerably more conceptual difficulties for the Supreme Court of Canada. In both *The Law Society of Upper Canada* v. *French*[12] and *Ringrose* v. *College of Physicians and Surgeons of Alberta*,[13] the majority of the Court dismissed attacks on the validity of particular decisions where institutional bias was alleged, despite very strongly worded dissenting opinions. This division in judicial opinion indicates a serious difference in the methods adopted by the various judges in dealing with both the concept of institutional bias and the *nemo judex* rule itself. This difference may be highlighted by reference to the following four points.

First, in the particular fact pattern coming before the court, is there a reasonable apprehension that the second decision-maker is biased? Secondly, if so, has the *nemo judex* rule been ousted by statute (either expressly, or by necessary implication) from applying to the particular facts in question? Thirdly, if not, does the *nemo judex* rule apply if, but only if, the subcommittee is making a binding decision affecting rights (and not merely investigating facts to be reported to the parent body) from which a strict appeal lies to the parent body (which, therefore, would not be making the first decision in the matter)? And, finally, does the applicability of the *nemo judex* rule depend upon characterizing the function of either the parent body or the subcommittee as being judicial or quasi-judicial?

Let us turn, therefore, to an examination of the judgments in these two cases.

2. The Law Society of Upper Canada v. French

In *The Law Society of Upper Canada* v. *French*, the respondent had been found guilty of professional misconduct by the Discipline Committee of the Law Society. Its report, and a recommendation that Mr French be suspended for three months, was sent to Convocation for final decision. All members of the Discipline Committee were Benchers and therefore also members of Convocation. Two

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[12] [1975] 2 S.C.R. 767, (1975) 49 D.L.R. (3d) 1.

[13] *Supra*, note 4.

of them[14] asserted their right to participate in Convocation's disposition of the Discipline Committee's report. At this point, French successfully applied to the High Court for an order quashing Convocation's proceedings.[15] This was subsequently affirmed by the Court of Appeal.[16] The Law Society took a further appeal to the Supreme Court of Canada, on two principal grounds: first, that the *Law Society Act*[17] impliedly permitted the two Benchers to participate in Convocation's decision;[18] and, secondly, that Convocation was not really hearing an *appeal* at all, but merely receiving a report from one of its committees, and that the *nemo judex* rule therefore had no application to prevent members of the Discipline Committee from sitting in Convocation on the same matter.

(a) *Statutory construction: Has the rule been ousted?*

Spence J., writing for the majority which allowed the Law Society's appeal, looked at the *Law Society Act* in its entirety and agreed that the Legislature had impliedly intended to oust the application of the *nemo judex* rule from the particular kind of disciplinary proceedings which had been taken against French.[19] He

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[14] Messrs Strauss and Harris. Mr Maloney (now Ombudsman for Ontario) of his own volition did not sit in Convocation on this matter. Mr Chappel had been defeated at an intervening election for Benchers, and therefore had ceased to act as a member of the Discipline Committee and was not entitled to sit in Convocation.

[15] (1972) 25 D.L.R. (3d) 692, [1972] 2 O.R. 766 (Osler J.).

[16] (1974) 41 D.L.R. (3d) 22*n*, 1 O.R. (2d) 513*n*.

[17] S.O. 1970, c.19; now R.S.O. 1970, c.238.

[18] Spence J. rejected the Law Society's submission that the present proceedings were not subject to the *nemo judex* rule because at common law judges could sit in appeal from their own decisions. He pointed out that the *Supreme Court of Judicature Act, 1873* of England (36-37 Vict. c.66) and *The Judicature Act* of Ontario (R.S.O. 1970, c.228) now prohibit such judicial overlapping, *supra,* note 12, 782; and specifically held that such overlapping could contain the seeds of bias. Therefore the *nemo judex* rule could arguably be presumed to apply to the present proceedings *unless ousted by statute* — which he held to be the case here. It is interesting to note that Spence J. specifically treated his earlier decision in *King* v. *University of Saskatchewan, supra,* note 9, as "applying only to its particular circumstances", *supra,* note 12, 783.

[19] French was charged with professional misconduct under s.34 of the Act, which provided: "If a member is found guilty of professional misconduct or of conduct unbecoming a barrister and solicitor after the due investigation by a committee of Convocation, Convocation may by order cancel his membership in the Society by disbarring him as a barrister and striking his name off the roll of solicitors or may by order suspend his rights and privileges as a member for a period to be named or may by order reprimand him or may

reached this remarkable conclusion by comparing the wording of the section dealing with professional misconduct with that of other provisions dealing with other disciplinary offences which specifically prohibited members of the Discipline Committee from subsequently sitting in Convocation on the same matter.[20] Spence J. concluded that this was a proper place to apply the maxim *expressio unius est exclusio alterius*,[21] and that therefore this particular example of institutional bias had been statutorily put beyond the reach of the *nemo judex* rule,[21a] whether or not a reasonable person would apprehend that the two Benchers would have been biased.

Chief Justice Laskin, writing for the three dissenting members of the Court, found this to be "a curious, if not inverted view of *expressio unius, exclusio alterius*".[22] The Chiel Justice noted that the specific statutory prohibitions of overlapping membership between the Discipline Committee and Convocation dealt with far less serious offences than charges of professional misconduct. The Chief Justice pointed out that a charge of professional misconduct is so grave

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by order make such other disposition as it considers proper in the circumstances." One might note that s.33(12) clearly infers that a person found guilty of professional misconduct under s.34 by the Discipline Committee has a right of *appeal*: "The decision taken after a hearing shall be in writing and shall contain or be accompanied by the reasons for the decisions in which are set out the findings of fact and the conclusions of law, if any, based thereon, and a copy of the decision and the reasons therefor, together with a notice to the person whose conduct is being investigated of his right of appeal, shall be served upon him within thirty days after the date of the decision." Although the Act does not specify to whom this *appeal* lies, the Lieutenant-Governor-in-Council, acting under the powers granted to him in s.55 of the Act, made Regulation 556, R.R.O. 1970, 719 which assumes that the "appeal" lies to Convocation, although it refers to the Discipline Committee's *report*, not to its *decision* (see s.13(7) of that regulation). The *vires* of this regulation was not considered by either the majority or the minority in the Supreme Court of Canada — somewhat remarkable in light of Spencer J.'s insistence that there was no strict appeal because the Discipline Committee was merely investigating and did not decide anything. Osler J., *supra*, note 15, specifically held the regulation to be *intra vires*.

[20] Spence J., *supra*, note 12, 781-82, referred to s.39 of the Act, which permitted the Discipline Committee itself to impose the lightest penalty — the reprimand — on a recalcitrant member, and which also provided that an appeal from such a decision lay to Convocation. S.39(4) further provided that: "No bencher who sat on the committee of Convocation when the order appealed from [*i.e.*, the reprimand] was made shall take any part in the hearing of the appeal in Convocation."

[21] Expression of one thing is the exclusion of another.

[21a] *Supra*, note 12, 785-86.

[22] *Ibid.*, 773.

that the *nemo judex* rule would clearly have been implied by the courts at common law if the statute had been silent. Faced with the absence of such a statutory prohibition against overlapping membership, Chief Justice Laskin considered this to be "a *casus omissus* which cries for judicial intervention in accordance with accepted principles of administrative law".[23]

With respect, Chief Justice Laskin's approach is preferable. Clearly, Parliament ought to give closer attention to the details of legislation so as to specify, as far as possible, when it does intend to permit or prohibit overlapping membership in multi-tiered decisions (or in any other case where bias might be apprehended). But Parliament, it seems, lacks the energy, the will and the time to consider such important procedural details. Although the courts may no longer be prepared to strike down a statutory provision which expressly ousts the *nemo judex* rule, as Coke did,[24] there is still no reason for them to scrutinize legislation as minutely as Spence J. did in order to eke out the legislators' "intention" to permit bias.[24a] After all, the policy underlying the *nemo judex* rule is to maintain the public's confidence in the integrity and impartiality in the administration of the affairs of state. The courts have achieved this policy by applying both principles of natural justice to a myriad of decisions where Parliament has made no specific provision whatever for the procedure by which, or the persons by whom, those decisions were to be made. Of course, Parliament may always oust the application of either rule of natural justice, provided it uses clear words to do so. But why should the courts not adopt as robust a method of statutory construction to presume that the *nemo judex* rule does

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[23] *Ibid.*

[24] See *Dr Bonham's Case* (1610) 8 Co. Rep. 113b, 118 77 E.R. 638, 652 where Coke said: "[W]here an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul [*sic*] it, and adjudge such Act to be void."

[24a] De Grandpré J. in the *Ringrose* case, *supra*, note 4, 718, stated, as a general proposition, that the *nemo judex* rule is ousted whenever the statutory scheme provides for multi-step proceedings where overlapping membership could occur but does not specifically prohibit it. De Grandpré J. said: "[N]o reasonable apprehension of bias is to be entertained when the statute itself prescribes overlapping of functions. Such is exactly the situation under the Medical Profession Act. ... Thus, the same council, the members of which are by law entitled to take part in all of its decisions, is by statute authorized at the same time to ... appoint a discipline committee staffed by at least three of its midst. *Thus, it is clear that the legislator has created the conditions forcing upon the members of the council overlapping functions.*" (Emphasis added.)

apply as they have when avoiding the effect of privative clauses?[25] Let Parliament state its intentions clearly.

(b) *Is a strict "appeal" necessary for the rule to apply?*

Spence J. then went on to hold that the *nemo judex* rule did not apply to prevent the two Benchers from sitting in Convocation because it was not, strictly speaking, hearing an *appeal*[26] from a decision of the Discipline Committee. He said that the Committee decided nothing; it was only an investigator and reporter, not a prosecutor.[27] Therefore the *nemo judex* rule did not apply to prevent the two members of the Committee from also sitting in Convocation.

It is important to examine Spence J.'s insistence that there was no appeal from the Discipline Committee's report to Convocation. One may agree that only Convocation had the power to impose a

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[25] See, *e.g., Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 (H.L.); *Metropolitan Life* v. *International Union of Operating Engineers, Local 796* [1970] S.C.R. 425. Arguing for a less hostile judicial approach to privative clauses, see Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952) 30 Can.Bar Rev. 986.

[26] But what constitutes an "appeal"? Must there be a "decision" at the first stage, so that there can be no "appeal" from a mere investigation of facts? If, on the other hand, the first body does form an opinion (*e.g.*, about guilt), or make recommendations as to what action is required, is this enough to constitute an "appeal"? Or must the first body not only have reached some sort of decision, but also be in a position to implement that decision itself, before one can say that an "appeal" exists from it to another body? Spence J. did not specify which meaning he ascribed to the word "appeal", but it was clearly relevant to his decision that only Convocation had the power to impose any actual penalty on French and therefore there could be no "appeal" to it from the Discipline Committee (whatever it investigated or decided). Chief Justice Laskin, on the other hand, clearly concentrated on the fact that the Discipline Committee had done more than merely investigate the facts, but had gone on to find French guilty and recommended to Convocation that he be suspended. Laskin C.J.C. said, *supra,* note 12, 786, that he did "not think that the issue herein falls to be decided according to whether the proceedings in Convocation are or amount to an appeal or are or amount to a review under a two-stage scheme of inquiry into allegations of professional misconduct. No doubt, characterization of the proceedings as an appeal may lend weight to the contention of the appellant solicitor, but the principle underlying his position rises above any such formalistic approach. The principle is immanent in the ancient maxim *nemo judex in causa sua,* expressed by Coke in *Dr. Bonham's Case* . . . ."

[27] As Spence J. noted, *supra,* note 12, 788, if anyone was the prosecutor, it was the Secretary of the Law Society, Kenneth Jarvis. *Quaere* whether Mr Jarvis sat with either the Discipline Committee or Convocation when they considered the case against French. If so, would this have breached the *nemo judex* rule?

penalty on French for professional misconduct. As well, it is true that the Committee made no final or binding determination, from which an appeal might (or might not) have been taken to Convocation. But, as Chief Justice Laskin pointed out in his dissenting judgment, it does not therefore follow that the Committee made no determination at all. Indeed, the Committee did decide that French had been guilty of professional misconduct, and recommended to Convocation that he be suspended. One may question, therefore, whether the existence of a strict appeal is a necessary requirement for the *nemo judex* rule to apply to prevent overlapping membership of committees in circumstances like that in *French*, or whether the existence of such a strict appeal is merely a sufficient condition for the application of the *nemo judex* rule. In other words, are there other circumstances besides the existence of a strict appeal, in which there may be a reasonable apprehension of bias?

The answer to this question is clearly yes, and the fallacy in Spence J.'s reasoning can easily be demonstrated by reference to the *National Energy Board* case,[28] where he himself agreed that the *nemo judex* rule applied to prevent Crowe from hearing the application to build the pipeline. The basis for Crowe's disqualification was his previous involvement with the Study Group which planned the pipeline. The Study Group certainly was not an adjudicative body and certainly did not "appeal" (in any sense of the word) to the National Energy Board when it applied for a permit to build its proposed pipeline. Nevertheless, Crowe's involvement with the Study Group raised a reasonable apprehension that he would be biased in favour of building the Arctic Gas pipeline, and he was therefore disqualified as a member of the National Energy Board when it subsequently had to decide which pipeline should be built. The Supreme Court of Canada simply asked the blunt question "is there a reasonable apprehension of bias on these facts?" If the same question had been asked in *French* at the very outset, the result would surely have been different. For the mere involvement of the committee members in the disciplinary proceedings ought to have raised a reasonable apprehension that they would be biased against French in Convocation. Why, therefore, was it necessary to go further and to insist that the *nemo judex* rule applied if, but only if, the Discipline Committee's hearings were "adjudicative", from which an appeal could be taken to Convocation? Yet, this was clearly the *ratio decidendi* adopted by Spence J. in allowing the Law Society's appeal. Instead of challenging this reasoning, by his emphasis on the

[28] *Supra*, note 2.

adjudicative nature of the Discipline Committee's finding of guilt, Chief Justice Laskin merely distinguished the authorities relied upon by Spence J.

But why is it relevant to know whether the Discipline Committee, the first stage of the two-tier process, made any "determination" at all? Spence J.'s reasoning clearly requires the first stage to be "determinative" (and not merely investigative), for otherwise there could be no strict appeal to Convocation. And a strict appeal is necessary, in Spence J.'s opinion, for the application of the *nemo judex* rule to Convocation's proceedings. Although Chief Justice Laskin specifically held that the existence of a strict appeal was not necessary in order for the *nemo judex* rule to apply,[29] the basis of his judgment rests squarely on his view that the Discipline Committee had, in fact, found French guilty. In effect, the Chief Justice simply disagrees with the facts as found by the majority. But how would Chief Justice Laskin have disposed of the case if he, too, had characterized the Discipline Committee's decision as being "merely investigative"?

The clue to Spence J.'s reasoning might be thought to lie in the proposition that the rules of natural justice do not apply to proceedings which are only investigative. This was the result of the Supreme Court of Canada's decision in *Guay* v. *Lafleur*,[30] where the Court held that the plaintiff taxpayer was not entitled to legal counsel during a statutory inquiry into his financial affairs. All members of the Court agreed that the inspector was not there acting in a judicial or quasi-judicial capacity because he was only inquiring into facts and had no power to affect the plaintiff's rights. And even if at a subsequent time the plaintiff were assessed higher taxes as a result of the inquiry, all of the normal appeal procedures under the *Income Tax Act*[30a] would then be open to him. *Guay* v. *Lafleur* therefore may be said to stand for the proposition that the rules of natural justice do not apply to a merely investigative procedure.

But does the rationale behind *Guay* v. *Lafleur* necessarily apply to determine the outcome of a case involving institutional bias? Aside from the fact that *Guay* v. *Lafleur* concerned the applicability of the *audi alteram partem* rule and not the *nemo judex* rule, it is important to note whose decision was being attacked in *Guay* v. *Lafleur*. The Supreme Court of Canada held that the *audi alteram*

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[29] See *supra*, note 26.

[30] [1965] S.C.R. 12, (1965) 47 D.L.R. (2d) 226.

[30a] R.S.C. 1952, c.148, s.231(15) as amended by S.C. 1970-71-72, c.63.

partem rule was not applicable to the *inspector's* inquiry. It said nothing about the applicability of the rules of natural justice to any subsequent step in the proceedings. If the Minister of National Revenue did assess the plaintiff in light of the report and the matter went to the Tax Review Board, could it render its judgment without permitting the plaintiff to be heard, or without the advice of counsel? Surely not. And the reason for this would be the quasi-judicial nature of these *subsequent* proceedings before the Tax Review Board, which necessarily[31] required the application of the rules of natural justice. And no one would suggest that the Tax Review Board would be exempted from the rules of natural justice simply because the preceding stage in the tax-collecting process was "merely investigative".

Why, therefore, did it matter at all in *French* whether the Discipline Committee had made a "determination"? Why was the characterization of the Discipline Committee's function even relevant to the applicability of the *nemo judex* rule[32] to the proceedings before Convocation? Surely, at least as long as *Convocation's* proceedings could properly be characterized as being judicial or quasi-judicial,[33] there could be no doubt that both rules of natural justice applied to them. And the only relevant question then is: "Has the *nemo judex*

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[31] This assumes that the principles of natural justice apply to the exercise of all quasi-judicial functions. It can, of course, be forcefully argued that the principles of natural justice are of considerably wider application, and do not depend upon the existence of a judicial or quasi-judicial function. This wider concept of the principles of natural justice explains the genesis of the English cases on the "general duty to be fair" referred to *supra*, note 6. See also Lord Reid's eloquent analysis of the relationship of the principles of natural justice and the existence of a judicial or quasi-judicial function in his judgment in *Ridge* v. *Baldwin* [1964] A.C. 40 (H.L.).

[32] This point was clearly recognized by Paré J. (though not by any of the judges in the Court of Appeal or in the Supreme Court of Canada) in *Saulnier* v. *The Quebec Police Commission* at first instance (unreported, but referred to in Pigeon J.'s judgment in the Supreme Court of Canada which is reported at (1976) 57 D.L.R. (3d) 545, 547-48) when he said: " 'Here, there arises an irreconcilable conflict between the spirit of the Act and the rules of elementary justice. The tribunal before which applicant could appeal the decision of the investigator is none other than the one which decided his case at first instance, through a Commission of Inquiry.' " See Jones, (1975) 53 Can.Bar Rev. 802.

[33] And none of the judges doubted that Convocation was exercising a judicial or quasi-judicial function. *Cf.* de Grandpré J.'s judgment in the *National Energy Board* case, *supra*, note 2, where he would have held that the Board did not exercise a quasi-judicial function. On this aspect of the case, see Jones, *supra*, note 3, 464-68.

rule been breached; is there a reasonable apprehension of bias?" And the answer to this question would surely have been yes, whatever the characterization of the first stage in the proceedings.

3. Ringrose v. College of Physicians and Surgeons of Alberta

The above approach was precisely the one adopted by Dickson J. in his dissenting judgment in *Ringrose* v. *College of Physicians and Surgeons of Alberta*.[34] There, the plaintiff was charged with conduct unbecoming a physician and surgeon. His medical privileges were immediately suspended[35] by the Executive Committee of the Council (or general governing body) of the College, pending the outcome of a formal hearing into his conduct by the Discipline Committee. This latter committee subsequently found him guilty and recommended to the Council (which had the final decision-making power) that he be suspended for one year.[36] Dr Ringrose sought to prevent this report from reaching the Council by applying for an order of *certiorari* to quash the Discipline Committee's report because one of its members (Dr McCutcheon) was also a member of the Executive Committee which had earlier temporarily suspended the plaintiff's licence. In fact it turned out that Dr McCutcheon had not taken part in the first proceedings at all, but only became aware of the charges against the plaintiff when the case later came before the Discipline Committee. The *Ringrose* case, therefore, does not concern the first type of institutional bias noted above (where the same person actually participates in more than one stage of a multi-step proceeding), but rather the second type in which there is a reasonable apprehension that the final decision-maker is unlikely to deviate from the previous decision taken elsewhere within the decision-making institution, even if no overlap of personnel occurs. Ringrose's application for *certiorari* was dismissed by the Trial Division of the Supreme Court of Alberta, and this was confirmed both by the Appellate Division[37] and the Supreme Court of Canada.[38]

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[34] *Supra*, note 4.

[35] The suspension was itself almost immediately quashed by the Trial Division *per* Lieberman J. (unreported, but referred to in de Grandpré J.'s judgment, *supra*, note 4, 713).

[36] The final decision rested with the Council, of which Dr McCutcheon was also a member (as, presumably, were all of the members of both the Executive and the Discipline Committees). The Discipline Committee also recommended that Dr Ringrose be required to pay the costs of its investigation.

[37] [1975] 4 W.W.R. 43, (1975) 52 D.L.R. (3d) 584 *per* Prowse J.A.

[38] *Supra*, note 4.

In speaking for the majority of the Supreme Court of Canada, de Grandpré J. presented reasons which closely resembled those of the majority in *French*. After first considering whether two affidavits were admissible for the purpose of determining whether there was a reasonable apprehension of bias,[39] de Grandpré J. held that the *nemo judex* rule could only be invoked where the allegedly biased person was sitting in direct appeal from the committee of which he was normally a member.[40] This was clearly not the case here because

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[39] First de Grandpré J. pointed out that the College had not argued that Dr Ringrose had waived his right to object to Dr McCutcheon's presence on the Discipline Committee by waiting to bring the present proceedings until after the Committee had sat. Therefore Dr Ringrose's affidavit concerning his ignorance of Dr McCutcheon's functions in the College could only have been made for the purpose of sustaining the allegation of bias. After expressing surprise that a member of a professional body did not know the names of its officers, de Grandpré J., *supra*, note 4, 715, said that "the allegation is irrelevant because we are not to look at the situation through the eyes of a person who takes no step to inform himself of the true facts; on the contrary, it is to the reasonable person, well-informed, that we must look *and that reasonable person has the duty to obtain knowledge of the facts.*" (Emphasis added.) This statement is strikingly similar to de Grandpré J.'s approach in his dissenting judgment in the *National Energy Board* case, *supra*, note 2, which has been criticized by this author for ignoring the policy behind the *nemo judex* rule, *supra*, note 3, 470-71.

Secondly, de Grandpré J. considered the admissibility of the affidavit made by the Registrar of the College. Although in principle no evidence is admissible to determine whether there was or was not actual bias (because such evidence is simply irrelevant to the question whether there is a reasonable apprehension of bias), de Grandpré J., *supra*, note 4, 716, admitted the College's affidavit for the reasons given by Prowse J.A. in the Appellate Division, *supra*, note 37, 48. There Prowse J.A. said: "In my view these cases [*Szilard* v. *Szasz* [1955] S.C.R. 3 and *Ghirardosi* v. *Minister of Highways for B.C.*, *supra*, note 2] merely support the conclusion that when circumstances exist from which a reasonable apprehension of bias arises *evidence is not admissible for the purpose of establishing that a person the law presumes to be biased was not in fact biased.* They do not purport to deal with the question of the admissibility of evidence for the purpose of having the relevant circumstances before the court so that it may consider whether in those circumstances a reasonable apprehension of bias arises." (Emphasis added.)

Although de Grandpré J. referred to Chief Justice Laskin's decision in *P.P.G. Industries* v. *A.G. of Canada*, *supra*, note 2, he did not appear to notice that the Chief Justice there did quite definitely consider evidence — contrary to principle — which showed that Buchanan had not in fact participated in the Anti-Dumping Tribunal's decision, although he had signed one copy of it. Ought one to conclude, therefore, that the first part of Prowse J.A.'s summary of the law has been overruled by the Supreme Court of Canada in *P.P.G.*?

[40] De Grandpré J.'s ruling is contrary to Lord Widgery's *dictum* in *Hannam* v. *Bradford City Council* [1970] 2 All. E.R. 690, 698, [1970] 1 W.L.R. 937, 946

the Executive Committee's decision temporarily to suspend Ringrose was

> nothing more than a statement of the common weal on the one hand and the private interest of the medical practitioner on the other ... [which have] ... been weighed and ... the temporary conclusion has been reached that, until the facts are properly investigated, it is preferable to suspend.[41]

The Discipline Committee was not hearing an appeal of any kind from the provisional decision of the Executive Committee to suspend Dr Ringrose. Therefore, de Grandpré J. held that the *nemo judex* rule did not apply to the Discipline Committee's proceedings.

Dickson J., writing for the minority, strongly dissented from this technical approach. He simply assumed that the principles of natural justice did apply to the Discipline Committee's proceedings. He then asked whether on the facts there was a reasonable apprehension that the Discipline Committee would have been biased against the plaintiff. The answer to this question, he said, in such a case depended upon a whole host of factors:

> *All of the surrounding circumstances must be investigated.* What is the function of each of the committees? Does the first body merely find facts, or does it make a preliminary adjudication? What is the effect of one body's decision on the second's decision making? Is one of the committees sitting in appeal, expressly or in effect, from the decision of the other committee? Is the member in the second committee defending, perhaps unconsciously, a decision of the first committee which he helped to make? Did the first committee initiate the proceedings or lay charges with the result that a member of that committee, who later sits on the other committee to hear evidence, is both accuser and judge? What is the size of the respective committees? What was the degree of participation in each committee by the member whose presence on both committees is impugned? These and other questions must be asked and answered.[42]

In complete contrast to the approach adopted by the majority in both *French* and *Ringrose,* Mr Justice Dickson posed these questions for the sole purpose of determining whether there was a reasonable apprehension of bias. If these questions had been answered in the affirmative, Dickson J. would have held the impugned decision to have been void, without further inquiry. Although the majority also

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(C.A.), which reads: "[W]hen one is used to working with other people in a group or on a committee, there must be a built-in tendency to support the decision of that committee, although one tries to fight against it, and this is so although the chairman [*i.e.,* the person whose impartiality is attacked] was not sitting on the occasion when the decision complained about was reached." Thus, the *Hannam* case clearly did deal with the second type of institutional bias noted in the "introduction" to this article. See text, *supra,* p.607.

[41] *Supra,* note 4, 717.

[42] *Ibid.* 720 (emphasis added).

asked these questions, they did so for the purpose of first determining whether the principles of natural justice applied at all. Only then would they have asked whether there was a reasonable apprehension of bias.

Although Dickson J.'s approach would not always yield a different solution,[43] it possesses a number of distinct advantages. First, Dickson J. clearly concentrated on the impression created by the particular fact situation in which the *nemo judex* rule is alleged to have been breached, thus bearing in mind the public policy behind the very existence of the rule: justice should be seen to be done impartially. This has the double advantage of being both a generic approach capable of being applied to all situations in which bias is alleged, as well as recognizing that

> [w]hat may be termed institutional bias or participation by association should ... not be rejected out of hand as a possible ground for apprehension of bias.[44]

Dickson J. thus acknowledged that both types of institutional bias distinguished earlier in this article[44a] may, in certain circumstances, constitute a breach of the *nemo judex* rule. Secondly, this approach avoided the magical requirement that there be a strict appeal before the *nemo judex* rule can apply to the second stage of a two-tier decision. Thirdly, this approach riveted the court's attention squarely on the apprehension of bias at a particular stage in the proceedings, and completely avoided confusing the issue by referring to the merely investigative or administrative nature of preceding steps in the decision-making process. Finally, such a forthright judicial appraisal of whether or not the particular facts do generate a reasonable apprehension of bias would encourage the courts to take a far more robust approach to the construction of poorly drafted statutory provisions which may (or may not) inferentially permit institutional bias. As Dickson J. himself said:

> On occasion, ... the governing statute may permit overlapping of functions in a two-stage procedure but such an enabling provision must not be over-extended. The provision in the Medical Profession Act, ... permitting a degree of overlapping between the council and discipline committee, does not justify overlapping between the discipline committee and the executive committee. I think that, to avoid criticism, reliance should be placed upon such an overlapping provision as infrequently as the practicalities of the situation permit, since there rests upon the governing bodies of the professions in the exercise of their statutory disciplinary powers the duty

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[43] Indeed, in this case, Dickson J. agreed that there was no reasonable apprehension of bias.

[44] *Supra*, note 4, 720.

[44a] See text, *supra*, p.607.

> to be scrupulously fair to those of their members whose conduct is under investigation and whose reputations and livelihood may be at stake.... [T]he investigation of the alleged breach, and the steps taken to determine culpability, must be such that justice is manifestly seen to be done, impartially and, indeed, quasi-judicially.[45]

4. Conclusion

As de Grandpré J. said in a slightly different context:

> Confidence in our institutions is at a low ebb. This statement is not very original but unfortunately is unchallengeable. Many factors have brought about this crisis and unconscionable conduct by public officials is only part of the story. Still, if we are to regain some of the lost ground, we have to start somewhere. To reaffirm the requirements of highest public morality in elected officials is a major step in that direction.
>
> To speak of civil liberties is very hollow indeed if these liberties are not founded on the rock of absolutely unimpeachable conduct on the part of those who have been entrusted with the administration of the public domain.[46]

Not only must the conduct of public administrators in fact be absolutely unimpeachable, it must also appear to be fair. Decision-makers who participate in more than one level of a multi-tier decision frequently do appear to be biased, and therefore appear to be somewhat less than fair. The courts do nothing to alleviate such a lingering suspicion of unfairness by invoking very technical grounds (such as the lack of a strict appeal or the merely investigative nature of earlier steps) for holding that the *nemo judex* rule virtually never applies to cases of institutional bias. The appearance of justice is a major element in the public's confidence in society's institutions. Maximizing the appearance of justice requires a far more intrepid approach to the *nemo judex* rule than demonstrated by the majority in either *French* or *Ringrose*. Justice cannot appear to be done where there is a reasonable apprehension of bias. And the very existence of such an apprehension of bias ought to be the starting point for judicial review — whether of institutional bias, or of any other circumstance where the *nemo judex* rule has allegedly been breached. The appearance of procedural fairness may not insure substantive justice, but greater care over procedural details would go a long way to raising the public's confidence in those who exercise authority over us all.

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[45] *Supra*, note 4, 720.

[46] In *Hawrelak* v. *City of Edmonton* (1975) 54 D.L.R. (3d) 45, 68 (S.C.C.), a case dealing with conflict of interest.