The National Energy Board Case and The Concept of Attitudinal Bias

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The Supreme Court of Canada in its somewhat unexpected decision in *Committee for Justice and Liberty* v. *The National Energy Board*[1] has given prominence to a relatively little-used maxim of administrative law, *nemo judex in sua causa debet esse*,[2] otherwise known as the second principle of natural justice. Unlike the first principle of natural justice, the *audi alteram partem* rule,[3] the *nemo judex* rule has not been the object of close judicial scrutiny and has not been developed by a large body of jurisprudence. Consequently its boundaries and limits have not been explored with the rigour which has characterized consideration of the *audi alteram partem* rule. The policy, however, underlying both rules is the same: justice must not only be done, but must manifestly be seen to be done.[4] It is my submission, then, that the limits placed upon the reach of the *nemo judex* rule, given its avowed purpose, are artificial ones, and (as has already happened with the *audi alteram partem* rule), these limits must be critically re-examined.

The *National Energy Board* case provides one of the relatively rare instances where the *nemo judex* rule has been successfully invoked[5] to control the procedure by which governmental decisions are

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[1] (1976) 68 D.L.R. (3d) 716 (S.C.C.); rev. (1976) 65 D.L.R. (3d) 660 (Fed.C.A.) *sub nomine Re Canadian Arctic Gas Pipeline Ltd.*

[2] No man should be a judge in his own cause.

[3] Hear the other side.

[4] See *The King* v. *Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256, 259 *per* Hewart L.C.J.

[5] 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* (1969) 6 D.L.R. (3d) 120, 68 W.W.R. 745; *Blanchette* v. *C.I.S. Ltd* (1973) 36 D.L.R. (3d) 561; *Law Society of Upper Canada* v. *French* [1975] 2 S.C.R. 767, (1975) 49 D.L.R. (3d) 1; *P.P.G. Industries Canada Ltd* v. *A.G. of Canada* (1976) 65 D.L.R. (3d) 354; *Ringrose* v. *College of Physicians and Surgeons of Alberta* [1976] 4 W.W.R. 712; *The Committee for Justice and Liberty* v. *The National Energy Board* (1976) 68 D.L.R. (3d) 716;

taken. The Court held that Mr Marshall Crowe's previous involvement with one of the promoters of a northern pipeline, even in a capacity representing the Government of Canada, was sufficient to disqualify him from subsequently acting as Chairman of the National Energy Board's hearings of applications by a number of competitors (including that promoter) for permission to build a pipeline to transport natural gas from the Arctic to southern markets. Chief Justice Laskin's judgment for the majority[6] of the Court clearly articulates the policy underlying this second principle of natural justice: that justice must not only be done, but must manifestly and undoubtedly be seen to be done. Given this rationale, the Chief Justice held that a breach of the rule occurs whenever there is a reasonable apprehension of bias, and that it is unnecessary to show any likelihood of bias.

In addition, the fact that both de Grandpré J. (writing for the three dissenting members[7] of the Court) and Thurlow J. (writing for all five members[8] of a specially constituted panel of the Federal Court of Appeal) disagreed with Chief Justice Laskin's reasoning clearly indicates a certain amount of judicial division both as to the kinds of functions to which the *nemo judex* rule applies as well as to what actually constitutes bias. This in turn raises the question whether a decision-maker can be disqualified — not because of his previous words or actions as they relate directly to the facts of the case before him — but rather because he might be perceived to be "attitudinally biased", that is, predisposed by reason of previously expressed views on a subject to decide consciously or unconsciously, that matter in a certain way. The limits of the *nemo judex* rule have usually been drawn here. The maxim has been applied where issues of fact in a *particular* case may have been prejudged, but not where an opinion on general issues of law or policy has been expressed.[8a] Does the public policy underlying the

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Morgentaler v. *The Queen* (1974, not reported on this point).

Of these cases, the invocation of the *nemo judex* rule was only successful in *The National Energy Board* case, *Ghirardosi* and *Blanchette* (however, in the latter case the application of the *nemo judex* rule was only a secondary issue, and only referred to by Pigeon J. at pp.578-79). In all of the other cases cited above, the impugned decision was upheld.

[6] The majority was composed of Laskin C.J.C., Ritchie, Spence, Pigeon and Dickson JJ.

[7] The dissenting minority was composed of de Grandpré, Martland and Judson JJ.

[8] The Court of Appeal was composed of Thurlow, Pratte, Urie, Ryan JJ. and Kerr D.J.; judgment was rendered on 12 December 1975.

[8a] See text, *infra*, p.477.

existence of the rule dictate its extension to allow questions of "attitudinal bias" (hitherto excluded from its operation) to be taken into consideration?

1) The Facts

In June 1972, a consortium was formed to study the feasibility of building a pipeline to transport natural gas from the Arctic to southern markets, to choose the most economical route, and then to file applications for the requisite governmental permissions to build the project. In November 1972, this consortium was transmuted into corporate form under the name of Canadian Arctic Gas Pipeline Limited ("Arctic Gas"). In that same month, the Canada Development Corporation, whose shares were wholly owned by the Government of Canada, became a shareholder in the new corporation, and contributed some $1.2 million to the project. Mr Marshall Crowe was President of the Canada Development Corporation from the date of its entry into the project until October 1973, when he was appointed Chairman of the National Energy Board. During this period, he attended various meetings and took part in numerous decisions made by several of the committees of the consortium.

In 1975, Arctic Gas and a number of competitors made applications to the Board for permission to construct pipelines to move natural gas from the Arctic to southern markets. In April 1975, the Board (which at that time had eight members) assigned Crowe and two others to constitute the panel to hear these competing applications, which were subsequently directed to be heard together at public hearings commencing in October 1975.

In the meantime, counsel for Arctic Gas approached the Board's counsel and raised the question whether Crowe should participate in the hearings, since a third party might reasonably apprehend that Crowe was biased in favour of his client. Crowe therefore prepared a statement which was sent to all of the applicants and intervenors shortly before the hearings, setting out his involvement with the Arctic Gas project. When this was read at the opening of the hearings, five of the intervenors objected to Crowe's participation. The National Energy Board therefore decided to state a case to the Federal Court of Appeal under subsection 28(4) of the *Federal Court Act*[9] in the following terms:

> Would the Board err in rejecting the objections and in holding that Mr Crowe was not disqualified from being a member of the panel on the grounds of reasonable apprehension or reasonable likelihood of bias?[9a]

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[9] R.S.C. 1970 (2d Supp.), c.10.

[9a] *Re Canadian Artic Gas Pipeline Ltd, supra,* note 1, 661.

2) The Federal Court of Appeal

After first considering its own jurisdiction to decide the question put to it[10] the five members of the Court of Appeal[11] unanimously held that the Board would not err in permitting Crowe to participate in the hearings. In giving reasons for the Court's decision, Thurlow J. surveyed the wide range of factual circumstances in which bias may be alleged, and noted that there was no suggestion here that Crowe was actually biased[12] or had a pecuniary interest in the outcome of the hearings. He then considered[13] the two submissions made by the intervenors: first, that a third party could reasonably apprehend that Crowe's previous involvement with Arctic Gas would incline him to favour its application; or, secondly, that Crowe was in favour of building *a* pipeline.

Thurlow J. only dealt with the second submission by recognizing that bias might be established in "predetermination cases, cases where there has been some expression of views indicating ... prejudgment". But he said that

> [e]ven in such cases *it becomes necessary to consider whether* there is reason to apprehend that *the person* whose duty it is to decide *will not listen to the evidence and decide fairly on it.*[14]

After noting that Crowe's participation in the consortium "might give rise in a very sensitive or scrupulous conscience to the uneasy suspicion that he might be unconsciously biased...",[15] the learned judge rejected such a subjective test for bias. Rather, he said, the *nemo judex* rule was cast in terms of:

> [W]hat would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude [?] Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?[16]

Applying this test, the Court of Appeal held that reasonable and right-minded persons had no cause to apprehend bias in Crowe. Therefore, the decisions of the National Energy Board over which Crowe was scheduled to preside would be valid.

The Court of Appeal buttressed this conclusion by referring to the fact that Crowe's participation in the consortium was of a

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[10] (1976) 65 D.L.R. (3d) 660, 662-63 (Fed.C.A.).

[11] *Supra*, note 8.

[12] *Supra*, note 10, 667.

[13] *Ibid.*, 666. See point 3 on that page, dealing with the submission made by the Committee for Justice and Liberty Foundation.

[14] *Ibid.*, 667 (emphasis added).

[15] *Ibid.*

[16] *Ibid.*

representative nature only.[17] While he was President of the Canada Development Corporation, he had no financial interest either in it or in the consortium; he "was essentially a person acting in the interest of the Government of Canada...".[18] He therefore had nothing to gain or lose from any decision which might be reached by the Board. Accordingly, Thurlow J. held that there was no

> ... reason for apprehension that he would be likely to be unable or unwilling to disabuse his mind of preconceptions he may have in the face of new material [coming before the Board] pointing to a different view of matters considered in the course of his participation in activities of the study group, or that he would be unconsciously influenced by decisions which he had supported as a participant in the study group.[19]

Furthermore, the Court of Appeal noted that a two-year period had elapsed between Crowe's tenure as President of the Canada Development Corporation and Arctic Gas' application to the Board, and it held that the issues now to be decided by the Board were "widely different from those to which the study group devoted its attention".[20] Thus

> there appear [ed] to be no valid reason for apprehension that Mr. Crowe ... cannot approach these new issues with the equanimity and impartiality to be expected of one in his position.[21]

This reinforced the Court's rejection of the allegations of bias. In summary, the *ratio decidendi* of the Court of Appeal's judgment centered on Crowe's ability to keep an open mind, and not on what a by-stander would reasonably perceive.

3) The Supreme Court of Canada

The Supreme Court of Canada reversed[22] the Court of Appeal by a five-to-three decision. The analyses adopted by the majority and minority in the Supreme Court were diametrically opposed. On the one hand, Chief Justice Laskin, writing for the majority, concentrated almost exclusively on whether the particular facts disclosed a reasonable apprehension of bias. Although he fleetingly referred to the possibility that predetermination or preconception could amount to bias, his judgment was not based on any extension

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[17] *Ibid.*, 668.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*, 669.
[22] *Supra*, note 1. Note that the Supreme Court did not award costs to the appellants.

of the *nemo judex* rule to cover what might be called "attitudinal bias". On the other hand, de Grandpré J.'s dissenting judgment not only denied the quasi-judicial nature of the National Energy Board, and therefore even the applicability of the *nemo judex* rule to its proceedings, but also was particularly hostile to the possibility that personal attitudes or previous experiences might amount to a disqualifying bias.

Because of the sharply differing perspectives adopted by the majority and minority of the Supreme Court, their judgments can usefully be compared on the following points. First, does the National Energy Board exercise a quasi-judicial function when, under section 44 of its Act,[22a] it hears applications for a certificate of convenience for the construction of a pipeline? If not, does the *nemo judex* rule nevertheless apply, in some form or another, to the proceedings in question? Secondly, were the issues to be decided by the Board essentially the same as those in which Crowe had participated when he represented the Canada Development Corporation in the consortium? Is such overlap a necessary condition for the application of the *nemo judex* rule? Thirdly, did the Court of Appeal apply the correct test for bias? Does one look to the open-mindedness of the decision-maker, or rather to the perception that third parties would have of his impartiality in light of all the knowledge available to them? Fourthly, was Crowe's representative capacity in the consortium relevant to oust the application of the *nemo judex* rule? Finally, may "attitudinal bias" in some circumstances disqualify a decision-maker?

a) *Was the Board Exercising a Quasi-Judicial Function?*

Chief Justice Laskin specifically recognized[23] that the National Energy Board possessed certain expertise acquired through its previous hearings, its own studies, and advice given to it by the Governor-in-Council under the various provisions of its Act. Some of these functions were investigative or only advisory in nature. Nevertheless, he held that the Board was required to act in a quasi-judicial manner when it considered an application to build a pipeline under section 44 of the Act. Therefore, the principles of natural justice applied, and the Chief Justice proceeded to determine whether, on the facts, the *nemo judex* rule would be breached

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[22a] *National Energy Board Act*, R.S.C. 1970, c.N-6.

[23] *Supra*, note 1, 727.

if Mr Crowe continued to act as Chairman of the panel hearing the applications.

Somewhat surprisingly, de Grandpré J. held[24] that "[t]he Board is not a court nor is it a quasi-judicial body". He pointed out that

> [t]he question of bias in a member of a Court of Justice cannot be examined in the same light as that ... of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and that of its technical advisers.
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> The basic principle is of course the same, namely, that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal.[25]

The learned judge referred[26] to cases where the members of certain adjudicative agencies are appointed as representatives of the parties, and noted that such a relationship does not necessarily breach the *nemo judex* rule. While this composition is not true of the National Energy Board, he nevertheless observed that

> [i]n hearing the objections of interested parties and in performing its statutory functions, the Board has the duty to establish a balance between the administration of policies they are duty bound to apply and the protection of the various interests spelled out in s.44 of the *Act*. The decision to be made by the Board transcends the interest of the parties and involves the public interest at large. In reaching its decision, the Board draws upon its experience, upon the experience of its own experts, upon the experience of all agencies of the Government of Canada and, obviously, is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. It is not possible to apply to such a body the rules of bias governing the conduct of a Court of law.[27]

With respect, it is submitted that de Grandpré J.'s reasoning is not persuasive. One can easily accept (as Chief Justice Laskin did[28]) the need for the Board to rely upon its own expertise. One may further accept that the decision to permit a pipeline to be built necessarily raises broader questions of public policy. Yet neither of these premises inexorably means that the Board is not exercis-

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[24] *Ibid.*, 741.

[25] *Ibid.*, 736. Note that the phrase "natural justice" in administrative law generally is used to refer to procedural justice. It does not refer to the justness of any particular outcome of a dispute. Nor should it be confused with the concept of inalienable rights, which *natural lawyers* once thought existed, and which were supposed not to be affected by contradictory positive law enacted by earthly legislatures.

[26] *Ibid.*, 737, referring to the decision of the Nova Scotia Court of Appeal in *Tomko* v. *N.S. Labour Relations Board* (1975) 9 N.S.R. (2d) 277, 298 *per* MacKeigan C.J.; aff'd (1977) 69 D.L.R. (3d) 250 (S.C.C.).

[27] *Supra*, note 1, 741.

[28] *Ibid.*, 727.

ing a judicial or quasi-judicial function. Nor does it mean that the Board may ignore the principles of natural justice. On the contrary, it would be difficult to contemplate not applying the *audi alteram partem* rule to the Board's proceedings. Surely de Grandpré J. would agree that all of the parties (and the intervenors[29]) had a right to be present during the Board's hearing, to make representations, and to reply to the representations made by other parties, as well as to comment upon the public policy considerations raised by the Board. While such a "hearing" does not necessarily have to mirror in all respects a trial in a court of law, no one[30] would suggest that the *audi alteram partem* rule (whatever its content in the circumstances) does not apply at all. Why, therefore, should the *nemo judex* rule not also apply to the Board's proceedings?

Of course one might argue that the content of the *nemo judex* rule, that is, what constitutes bias, may vary according to the circumstances. (Certainly the requirements of the *audi alteram partem* rule[31] vary from case to case.) Indeed, de Grandpré J. when he discussed what he conceived the test[32] for bias to be, seemed to suggest that such flexibility does apply to the *nemo judex* rule:

> This [the test adopted by the Court of Appeal] is the proper approach which, of course, must be adjusted to the facts of the case.[33]

But this approach would clearly accept the applicability of the *nemo judex* rule. It would, of course, also require a clearly articulated method for determining what amounts to bias in various circumstances, and this was not a task upon which de Grandpré J. embarked. On the contrary, he simply held that the *nemo judex* rule did not apply at all to the proceedings in question because

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[29] The intervenors (including the Committee for Justice and Liberty Foundation, which was one of the appellants to the Supreme Court) were given standing in the pipeline hearings by the Board. Note that (unlike in the *P.P.G. Industries Canada Ltd* v. *A.G. of Canada, supra,* note 3,) no question arose in this case as to the intervenors' standing to seek judicial review of the Board's decision to permit Crowe to hear Arctic Gas application.

[30] And particularly not the gas and pipeline companies, who certainly would not lightly contemplate the prospect of their not being able to cross-examine witnesses in proceedings before the Board. On another aspect of the content of the *audi alteram partem* rule to the Board's proceedings, see *Re A.G. of Manitoba and National Energy Board* (1975) 48 D.L.R. (3d) 73 (F.C.T.D.).

[31] See, *e.g., Wiseman* v. *Borneman* [1969] 3 All E.R. 275 (H.L.); *Regina* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417 (C.A.).

[32] *Supra,* note 1, 735.

[33] *Ibid.,* 736.

they were not "quasi-judicial" (however that characterization is determined).

The fallacy in de Grandpré J.'s analysis may be demonstrated by the following example. Suppose Crowe's brother were president of, or counsel to, Arctic Gas, or Crowe had been a shareholder in it. One rather suspects that, under these circumstances, the learned judge would have disqualified Crowe from taking part in the Board's hearings. But what would have been the basis for such a decision? On the one hand, de Grandpré J. might have changed his mind and held that the Board in fact *did* exercise a judicial or quasi-judicial function. Admittedly, such an analysis would maintain the supposed identity between the application of the rules of natural justice and the existence of a judicial or quasi-judicial function. However, it also underscores the chameleon-like nature of the adjective "quasi-judicial". And it would confirm the frequent suspicion that judges first decide whether or not to grant relief, and only thereafter characterize the function accordingly, and not *vice versa.*

On the other hand, de Grandpré J. might have persisted in classifying the National Energy Board as a merely administrative board, but held that the *nemo judex* rule nevertheless applied in these hypothetical circumstances. This approach would frankly admit that the principles of natural justice are not restricted only to the exercise of judicial or quasi-judicial functions. It would extend the application of the *nemo judex* rule, much as the English courts' adoption of the "duty to be fair"[34] has extended the *audi alteram partem* rule. And it would focus attention on whether a reasonable person would perceive bias in such circumstances. In other words, this approach would concentrate on whether the *nemo judex* rule has been breached, and not whether it applies at all. Since the public's confidence in impartiality is as important

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[34] See, *e.g., Fairmont Investment Ltd* v. *Secretary of State for the Environment* [1976] 2 All E.R. 865 (H.L.); *In re H.K. (An Infant)* [1967] 2 Q.B. 617 (C.A.); *Regina* v. *Gaming Board for Great Britain ex p. Benaim and Khaida, supra,* note 31; *Re Pergamon Press Ltd* [1971] Ch.388 (C.A.); *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534, 547 (H.L.) *per* Lord Pearson; *Bates* v. *Lord Hailsham of St Marylebone* [1972] 1 W.L.R. 1373, 1378 (Ch.D.); *Regina* v. *Liverpool Corp., ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 307-308 *per* Lord Denning M.R., 310 *per Roskill L.J.* For Canadian cases dealing with the duty to be fair, see *Lazarov* v. *Secretary of State of Canada* (1974) 39 D.L.R. (3d) 738 (Fed.C.A.); *Blais* v. *Basford* [1972] F.C. 151 (C.A.); and *Blais* v. *Andras* [1973] F.C. 182 (C.A.).

in "merely administrative" matters as in quasi-judicial ones, it is submitted that this analysis is the better view.

Therefore, with respect, it is submitted that de Grandpré J.'s attempt to avoid applying the *nemo judex* rule by denying the quasi-judicial nature of the Board is wrong, both because it restricts the concept of a quasi-judicial function and also because it ignores the policy underlying the rule against bias.

b) *Did the Study Group and the Board Decide the Same Issues?*

Since Chief Justice Laskin recognized that the Board was exercising a quasi-judicial function, he then proceeded to determine whether the *nemo judex* rule in fact would be breached by Crowe's continued participation in the Board's hearing. It was argued that this depended upon Crowe's involvement with the consortium concerning precisely the same issues which were now coming before the Board. Chief Justice Laskin pointed out,[35] however, that this was not a case where Crowe's alleged disqualification could be said to relate to matters which were undertaken by the consortium *after* his involvement with it had terminated. Rather, the Chief Justice found that Crowe had had a direct hand

> in developing and approving important underpinnings of the very application which eventually was brought before the panel [of the National Energy Board].[36]

This view of the facts differed significantly from that adopted by the Court of Appeal, which held[37] that Crowe's involvement with the consortium had involved *different* issues. It also did not coincide with the facts accepted by de Grandpré J., who said[38] that the major decisions had already been taken before Crowe became a member of the Study Group, and they had evolved a great deal in the interim before the application was made to the Board.

But does the *nemo judex* rule require an exact identity of the issues involved? The Chief Justice recognized the untenability of such a view, pressed upon the Court by the Board:

> This submission either begs the question of reasonable apprehension of bias or makes it depend on whether the Study Group can be said to have made the very decision which the Board has been called upon to make .... The vice of reasonable apprehension of bias lies ... rather in the fact that he [Crowe] participated in working out *some at least* of

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[35] *Supra*, note 1, 730.
[36] *Ibid.*, 731.
[37] *Supra*, note 10, 668.
[38] *Supra*, note 1, 742-43.

> the terms on which the application was later made and supported the decision to make it.[39]

One might, however, query whether the *ratio decidendi* of the Supreme Court's decision should depend upon the existence of *any* actual overlap between the issues decided by Crowe when involved with the Study Group and those later coming before the Board. Obviously, such overlap or previous involvement may well provide the factual basis which generates the reasonable apprehension of bias. But this does not necessarily mean that a reasonable apprehension of bias could not arise in other circumstances. For example, even if the Court of Appeal's appreciation of the facts were correct (that the issues to be decided by the Board *differed* from those in which Crowe participated in the consortium), the Court would still have had to ask whether Crowe's participation in the Study Group nevertheless raised a reasonable apprehension that he would be biased when sitting on the Board. Similarly, de Grandpré J.'s finding that the Study Group's application had evolved considerably since Crowe ceased to be associated with the consortium is not a complete answer to the allegation that his association with it did raise a reasonable apprehension that he would be biased as a member of the Board.

It is submitted, therefore, that whether the *nemo judex* rule is breached is a question of fact, which is not necessarily answered negatively merely by noting the absence of any previous involvement with the precise matter now being decided. Rather, the real question is: Do the facts disclose a reasonable apprehension that the decision-maker will, for whatever reason, be biased in dealing with the matter at hand?

c) *The Test for Bias: A Reasonable Apprehension*

Indeed, it was this broader view of the purpose of the *nemo judex* rule which led the majority of the Supreme Court to reverse the Court of Appeal. It will be remembered that the lower Court emphasized Crowe's ability to "listen to the evidence and decide fairly on it".[40] This led it to hold that there was neither a reasonable apprehension nor a real likelihood of Crowe's being biased. According to Chief Justice Laskin, however, the Federal Court of Appeal

> ... introduced considerations into its test of reasonable apprehension of bias which should not be part of its measure. When the concern is,

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[39] *Ibid.*, 732 (emphasis added).
[40] *Supra*, note 10, 667.

> as here, that there be no prejudgment of issues (and certainly no predetermination) relating not only to whether a particular application for a pipeline will succeed but also to whether any pipeline will be approved, the participation of Mr. Crowe in the discussions and decisions leading to the application made by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity, in my opinion, cannot but give rise to a reasonable apprehension, *which reasonably well-informed persons could properly have,* of a biased appraisal and judgment of the issues to be determined on a s.44 application.[41]

After referring to three previous decisions of the Supreme Court of Canada,[42] the Chief Justice clearly stated the rationale of the test as follows:

> This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies... .[43]

But does this rationale place a duty on a member of the public to confirm his apprehension by investigating whether there actually is bias? Thurlow J. in the Court of Appeal indicated that there was:

> It is true that all of the circumstances of the case, including the decisions in which Mr. Crowe participated as a member of the study group, might give rise in a very sensitive or scrupulous conscience to the uneasy suspicion that he might be unconsciously biased, and therefore should not serve. *But that is not, we think, the test to apply in this case. It is, rather, what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.*[44]

Accepting the Court of Appeal's (wrong) test, de Grandpré J. devoted a substantial part of his dissenting judgment to considering exactly what a well-informed person would have discovered about Crowe and his previous involvement with the Arctic Gas consortium.[45] Nevertheless, the policy behind the *nemo judex* rule only requires there to be a reasonable apprehension of bias for the court to strike down the decision. As the Chief Justice says, the purpose of the rule is to maintain public confidence in the impartiality of adjudicative agencies. Many people may quite reasonably doubt the impartiality of a decision-maker without feeling the necessity of verifying their suspicions beyond reasonable doubt. Therefore, the courts should not impose the same investigative duty

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[41] *Supra,* note 1, 732-33 (emphasis added).

[42] *Ghirardosi* v. *Minister of Highways (B.C.), supra,* note 3; *Blanchette* v. *C.I.S. Ltd, supra,* note 3, 842-43 *per* Pigeon J.; and *Szilard* v. *Szasz* [1955] S.C.R. 3, 6-7 *per* Rand J.

[43] *Supra,* note 1, 733.

[44] *Supra,* note 8, 667 (emphasis added).

[45] Indeed, this occupies all of the second part of his judgment: *supra,* note 1, 741-45.

on the person who alleges a breach of the *nemo judex* rule as it would on a prudent man who considers making a potentially defamatory statement. Of course, the *nemo judex* rule requires such suspicions to be reasonable, that is, not totally unfounded. But it is the perception of bias that counts, not its existence.

Similarly, therefore, objection should have been made to the exact wording of the reference to the Court of Appeal. It will be remembered that the question asked by the Board referred not only to the possibility of a reasonable *apprehension* of Crowe's bias, but also to a reasonable *likelihood* of it. If the policy underlying the *nemo judex* rule is indeed the preservation of the public's confidence in the impartiality of adjudicative agencies, the likelihood of actual bias is irrelevant. If this were not so, it is difficult to see how the intervenors could ever have sustained their objection to Crowe's participation on the Board, since they specifically disclaimed any suggestion that he actually was biased. And if a person is admitted actually not to be biased, how can there be any likelihood of such bias?

Nevertheless, de Grandpré J. asserted that he saw no difference between these two tests. With respect, there is a great difference between them, and the policy underlying the *nemo judex* rule clearly indicates that only the reasonable apprehension test is correct.

d) *Did Crowe's Representative Capacity Oust the Nemo Judex Rule?*

It is important to note that Chief Justice Laskin rejected[46] the submission that Crowe's previous representation of the Government of Canada in the Arctic Gas consortium necessarily implied that there could be no reasonable apprehension that he would subsequently be biased as a member of the National Energy Board. As the Chief Justice pointed out, Mr Crowe was not a mere cipher, carrying messages from the board of directors of the Canada Development Corporation and having no initiative or flexibility in the manner and degree of his participation in the work of the Study Group. However, this submission was accepted by de Grandpré J.:

> The Governement of Canada as well as the Governments of British Columbia, Saskatchewan, Manitoba, Ontario and Quebec have expressly recognized that they cannot entertain any reasonable apprehension of bias on the part of Mr. Crowe. Nothing has been heard from the Province of Alberta but considering its vital interest in the subject matter, it is

[46] *Ibid.*, 728-29.

> reasonable to infer that its silence is a complete acceptance of Mr. Crowe's ability to render justice. *It is not unreasonable to assume that these seven Governments together would look after the public interest and would be the first to raise the question of bias if any reasonable apprehension existed that the basic principles would be offended by the presence of Mr. Crowe.*[47]

This reasoning presumes that there is one, abstract and ascertainable "public interest", which is invariably represented by one or more Governments. How can this assumption possibly stand the light of day in view of the quite common spectacle of various levels of government hotly contesting the optimal policy for Canada to follow in countless areas? Further, the mere fact that the Government of Alberta (or *any* government, for that matter) did not challenge Mr Crowe's impartiality does not of itself necessarily mean that another person (whether a party or an intervenor in the proceedings, an independent observer, or even another government) could not have a reasonable apprehension that Mr Crowe was biased. It is simply not an answer to the five intervenors who raised the question of bias to reply that the 83 other parties or intervenors to the proceedings had no objection. What special weight, therefore, should be given to the acquiescence of the governments? The mere fact that Crowe's participation had been questioned by *someone* (and not a mere busybody, at that[48]) of itself requires the court to listen seriously to the allegations. And, in doing so, the court's job is not to consider whether any pipeline should be built (or which one), nor whether Crowe was the most qualified person to chair the Board on this occasion. Rather, the only public interest which should occupy the court is whether, on the facts, the public's confidence in the impartial administration of the affairs of state has been betrayed.

Of course, if the courts have discretion[49] not to quash a decision which breached the *nemo judex* rule, an exercise of that discretion implies that the public's interest in impartiality may be offset by other policy considerations. Indeed, in this particular case, such considerations might have included Crowe's extraordinary qualifications to sit on the Board, or the delay that would be occasioned by starting the hearing over again before a new panel. But recognizing the possible need to weigh such conflicting aspects of public policy does

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[47] *Ibid.*, 744 (emphasis added).

[48] See, *e.g.*, the dicta of Lord Denning M.R. in *R.* v. *Greater London Council, ex p. Blackburn* [1976] 3 All E.R. 184, 192c (C.A.) referring to *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corp Ltd* [1965] 2 All E.R. 836, 841, [1966] Q.B. 380, 401 (C.A.).

[49] See *R.* v. *Greater London Council, ex p. Blackburn, supra,* note 48.

not excuse the court from first determining whether the public's perception of impartiality has been betrayed. Only after the *nemo judex* rule has been explicitly considered should the court contemplate whether to exercise its discretion to decline to issue a remedy.

4) Attitudinal Bias and Conflicts of Interest

Chief Justice Laskin's judgment for the majority is based squarely on Crowe's previous involvement with the very application which now came before him as Chairman of the National Energy Board. On the other hand, de Grandpré J.'s dissent is directed principally against the appellants' alternative argument that Crowe should be disqualified for his "attitudinal bias", that he was in favour of *a* pipeline, whoever was to build it. In this section, therefore, we shall first examine de Grandpré J.'s reasons for rejecting the concept of attitudinal bias. We shall then compare his judgment with the treatment of this line of argument in two previous cases: *Franklin* v. *Minister of Town and Country Planning*[50] and *Regina* v. *Pickersgill, ex p. Smith.*[51] However, the rational for the *nemo judex* rule applies to many other public decisions, and not only to judicial or quasi-judicial ones. Therefore, in the next section we shall also consider a number of instances where Parliament has specifically forbidden certain persons to perform certain functions, as well as the proposed federal guidelines against conflicts of interest in members of the public service and Parliament. In addition, we shall look at the problem of regulatory agencies which have been "captured" by the industries they were established to regulate.

a) *De Grandpré J.'s Rejection of Attitudinal Bias*

De Grandpré J.'s dissenting judgment in the *National Energy Board* case squarely rejected the concept of attitudinal bias. After pointing out that "... the National Energy Board is a tribunal that must be staffed with persons of experience and expertise",[52] he quoted the following passage from the judgment rendered by Hyde J.A. of the Quebec Court of Appeal in *Regina* v. *Picard et al., ex p. Int'l Longshoremen's Association, Local 375*:[53]

> Professional persons are called upon to serve in judicial, *quasi*-judicial and administrative posts in many fields and if Governments were to

[50] [1948] A.C. 87 (H.L.).
[51] (1971) 14 D.L.R. (3d) 717 (Man.Q.B.).
[52] *Ibid.*, 737.
[53] [1968] Que.Q.B. 301, 312, (1968) 65 D.L.R. (2d) 658, 661.

> exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.[54]

De Grandpré J. referred to the decisions of both the Nova Scotia Court of Appeal and of the Supreme Court itself in *Tomko* v. *N.S. Labour Relations Board et al.*[55] to emphasize that "mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held *per se* to disqualify a Panel member".[56]

The learned judge then proceeded to buttress his rejection of attitudinal bias by referring to the Ontario High Court's judgment in *Re Schabas et al. and Caput of the University of Toronto et al.*,[57] Supreme Court Justice Frankfurter's judgment on behalf of the Supreme Court of the United States in *U.S. et al.* v. *Morgan et al.*,[58] *Halsbury's Laws of England*,[59] and the Australian High Court's judgment in *The Queen* v. *The Commonwealth Conciliation and Arbitration Commission et al., ex p. The Angliss Group*.[60] De Grandpré accepted the distinction made in the American decision of *New Hampshire Milk Dealers' Association* v. *New Hampshire Milk Control Board*[61] between a "predisposed view about... public or economic policies" (attitudinal bias) and "a prejudgment concerning issues of fact in a particular case" (bias-in-law):

> It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case. 2 Davis, Administrative Law Treatise, s.12.01, p.131. There is no doubt that the latter would constitute a cause for disqualification. However, "Bias in the sense of a crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." ... If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issue of law or policy on which they had previously manifested strong diverging views from the holdings of a majority of the members of their respective courts.[62]

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[54] *Supra*, note 1, 737.

[55] *Supra*, note 26.

[56] *Supra*, note 1, 738 *per* de Grandpré J. quoting MacKeigan C.J., *supra*, note 26, 298.

[57] (1975) 6 O.R. (2d) 271 (H.C.), (1974) 52 D.L.R. (3d) 495, 506.

[58] 313 U.S. 409, 421 (1940).

[59] *Halsbury's Laws* 4th ed. (1973) vol.1 by Lord Hailsham, 83, para.69.

[60] (1969) 122 C.L.R. 546 (Austl.H.C.), 43 A.L.J.R. 150 (H.C.).

[61] 222 A. 2d 194 (1966).

[62] *Supra*, note 1, 739-40 *per* de Grandpré J. quoting Lampron J., *supra*, note 63, 198.

Thus the learned judge rejected the appellants' second submission that Crowe should be disqualified because his background would naturally incline him to favour the building of *a* pipeline, and turned[63] to consider whether any particular incident or action on his part would impair his impartial consideration of the merits of the particular applications before the Board.

I submit that this distinction should be reconsidered. Perhaps it is not a question of arbitrarily drawing a line between "attitudinal bias" and "bias-in-law", automatically discounting the former and examining only the latter. Rather, the matter is really a question of degree. If the policy underlying both principles of natural justice is accepted (that justice must not only be done but must manifestly be seen to be done), then there would seem to be no logical impediment to extending the limits of the *nemo judex* rule in order to include "attitudinal bias". The jurisprudence supporting such an extension, it is admitted, is scarce; but the issues at stake are important.

b) *Previous Cases on Attitudinal Bias*

It is clear that the courts have not enthusiastically embraced the concept of attitudinal bias as a ground for judicial review of administrative action. Reference to two cases — one Canadian, the other English — illustrates this reticence, even where quite strong personal preferences are evident.

In *Regina* v. *Pickersgill, ex p. Smith,*[64] the Canadian Transport Commission was conducting public hearings in Winnipeg to determine whether the Canadian Pacific Railway should be permitted to discontinue its prestigious transcontinental train, *The Canadian.* The Chairman of the Commission was Mr J.W. Pickersgill, the former federal Minister of Transport who had been actively involved in the formulation of the controversial *National Transportation Act,*[65] which permitted the discontinuance of rail services under certain conditions. Two months prior to the Winnipeg hearings, he made a speech to the Canadian Manufacturers' Association in Montreal, entitled "Charting the Course of Canada's New Transportation Policy".[66] Although the speech did not mention *The Canadian* by name, the audience clearly would have understood it to refer to the

[63] *Supra,* note 1, 741.
[64] *Supra,* note 51, 717.
[65] S.C. 1966-67, c.69.
[66] See *Regina* v. *Pickersgill, ex p. Smith, supra,* note 51, 754.

operations of the C.P.R. When the Manitoba Queen's Bench Division was asked to rule whether Pickersgill would thereby be disqualified from presiding over the Commission's hearings, Wilson J. held that the speech would not lead reasonable people to

> ... conclude that Mr Pickersgill must be taken to harbour prejudice, or bias, such as would predispose him to allow the application now pending touching "The Canadian".[67]

The learned judge also rejected the applicants' submission that Pickersgill should be disqualified because he

> ... declared himself in favour of a policy which would equate the railways with other industries generally.[68]

Wilson J. said that, taking the speech as a whole, he was

> ... unable to conclude that reasonable people would decide that, consciously or unconsciously, the speaker is *seized with an attitude, a predilection, or bias, whereby he must be taken to have prejudged the fate of "The Canadian"*.[69]

This judgment does, however, clearly leave the door open to the possibility that, in other circumstances, "an attitude" or "a predilection" or "a prejudgment" might raise a reasonable apprehension of bias, which might disqualify a person from making this type of decision.[70]

An even more striking fact pattern occurred in the English case of *Franklin* v. *Minister of Town and Country Planning*.[71] There the Minister, Mr Lewis Silkin,[72] had appointed a committee[73] to advise the British government on the future development of metropolitan London. Its report in 1946 recommended the establishment of new towns separated from London by a green belt. Four months later, the Minister introduced legislation in the House of Commons to implement the report, and, in particular, to grant him power to expropriate the land required for the new towns. In May,

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[67] *Supra*, note 51, 725.

[68] *Ibid.*, 728.

[69] *Ibid.*, (emphasis added).

[70] *Ibid.*, 729, where Wilson J. clearly contemplated that other facts might have amounted to disqualifying bias: "[M]ore is needed than was here shown before the Court will restrain another tribunal from the exercise of its jurisdiction."

[71] [1948] A.C. 87 (H.L.).

[72] The father of Mr Samuel Silkin, the present British Attorney-General who refused to permit his name to be used in relator proceedings for an injunction against post office workers threatening an illegal boycott of mail and telegrams destined for South Africa. See "quis custodiet?", *The Economist*, Jan. 22, 1977, 11.

[73] The Reith Committee (to advise the U.K. government on future development of London), whose Interim Report was dated 21 Jan. 1946.

two days before second reading of the Bill, he attended a public meeting at Stevenage, where the following exchange took place:

> I think you will agree that if we are to carry out our policy of creating a number of new towns to relieve congestion in London we could hardly have chosen for the site of one of them a better place than Stevenage. Now I know that many objections have been raised by the inhabitants of Stevenage, perhaps not unnaturally.
>
> I want to carry out a daring exercise in town planning — (Jeers). It is no good your jeering: it is going to be done — (Applause and boos.) [*Cries of 'Dictator'*]. After all this new town is to be built in order to provide for the happiness and welfare of some sixty thousand men, women and children .... The project will go forward. It will do so more smoothly and more successfully with your help and co-operation. Stevenage will in a short time become world famous — (*Laughter*). People from all over the world will come to Stevenage to see how we here in this country are building for the new way of life.[74]

The Bill received Royal Assent on 1 August 1946. A draft expropriation notice concerning the Stevenage property was published (as required by the Act[74a]) on 6 August 1946. Formal objections to the expropriation were lodged and a public hearing was conducted in October by an inspector. The Minister considered this report, wrote a letter to the objectors stating why he did not accept their views, and on 11 November 1946 confirmed the expropriation order. Thereupon, the plaintiffs successfully applied to the High Court to quash the Minister's order. Henn Collins J. held[75] that the Minister was bound to consider the inspector's report in a judicial or quasi-judicial manner. Referring to the Minister's speech in May 1946, the learned Judge said:

> If I am to judge by what he said at the public meeting which was held very shortly before the Bill, then published, became an Act of Parliament, I could have no doubt but that any issue raised by objectors was forejudged. The Minister's language leaves no doubt about that. He was not saying there must be and shall be satellite towns, but he was saying that Stevenage was to be the first of them. But, when he made that speech, and gave his answers to questions which were asked, he had no administrative functions in relation to the Act in question, for the Act had not then been passed. Though that was his attitude two days before the Bill received its second reading, it is upon the objectors to prove that the Minister was in a like mind, or at least had not an open mind, from and after, at latest, the inception of the public inquiry, which was held in October, 1946.[76]

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[74] *Supra*, note 71, 90. This account of the Minister's speech differs slightly from that contained in the statement of facts and argument at p.104 of the reported case.

[74a] *New Towns Act, 1946*, 9-10 Geo.VI, c.68 (U.K.).

[75] Not reported.

[76] Quoted by Lord Thankerton in the House of Lords, *supra*, note 71, 100.

Disqualifying bias, therefore, had not been proved by the plaintiffs on the facts of this case, although its arguability was clearly recognized by the Judge. For other reasons, he struck down the Minister's order but was reversed by the Court of Appeal.[77]

Lord Thankerton in a unanimous decision of the House of Lords, like de Grandpré J. in the *National Energy Board* case, first held that the impugned decision was not required to be made quasi-judicially and only then did he justify not applying the *nemo judex* rule. Such reasoning is clearly not compelling where the impugned decision definitely is quasi-judicial. It might be noted that Wilson J. implicity realized this in *Pickersgill,* for he held that the speech in question there did not create a reasonable apprehension of bias; he did *not* hold that the *nemo judex* rule did not apply. Similarly, in the *National Energy Board* case, the majority of the Supreme Court held that the section 44 proceedings were quasi-judicial and that Crowe's previous involvement with Arctic Gas did, as a matter of fact, raise a reasonable apprehension of his bias. Unfortunately, Chief Justice Laskin only fleetingly referred[78] to Crowe's alleged prejudgment in favour of *a* pipeline (which would constitute "attitudinal bias"). The Chief Justice did not indicate whether such an attitude, if proved, would have disqualified Crowe. Instead, the majority's *ratio decidendi* rests squarely on Crowe's previous involvement with the consortium.

Although it appears, therefore, that there has been no clear case where the courts have specifically struck down even a quasi-judicial decision on the grounds of attitudinal bias, it is submitted that this may nevertheless be an effective ground for judicial review if the alleged prejudgment or preference does in fact raise a serious doubt as to the impartial judgment of the decision-maker.[79] Although

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[77] (1947) 176 L.T. 200.

[78] *Supra,* note 1, 732-33, where he said: *"When the concern is,* as here, *that there be no prejudgment of issues (and certainly no predetermination)* relating not only to whether a particular application for a pipeline will succeed but also to whether any pipeline will be approved, the participation of Mr Crowe in the discussions and decisions leading to the application made by Canadian Arctic Gas ... cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined ..." (emphasis added).

[79] An interesting example was the unsuccessful attempt by counsel to have de Grandpré J. recuse himself from hearing Dr Morgentaler's appeal on the ground that, before being appointed to the Supreme Court of Canada, Mr de Grandpré had made widely reported remarks strongly condemning abortion. See *Le Devoir,* Oct. 3, 1974, 1; *The Montreal Star,* Oct. 3, 1974, D-1;

both bias and the reasonable apprehension of it are questions of fact, in some circumstances at least, attitudinal preferences may well amount to disqualifying bias in the eyes of the court. After all, justice must be seen to be done.

c) *Other Examples of Recognition of Attitudinal Bias*

Despite the courts' reluctance to concede the existence of attitudinal bias, the *National Energy Board* case nevertheless pinpoints one of the weaknesses of our present regulatory system: the interchange of personnel between the bodies regulated and the regulatory agencies. As de Grandpré J. noted in the *National Energy Board* case, this interchange provides the regulatory agencies with the expertise which they require in order to understand and regulate their respective industries.[80] Unfortunately, however, the learned judge made no mention of the concomitant disadvantages of this convenient arrangement: the tendency of these "expert" members of the regulatory agencies to view the matters before them from the narrow perspective of their experience of the regulated industry, without taking into account the broader public interest which de Grandpré J. also recognized to be part of the task of regulatory agencies. And, perhaps too frequently, persons appointed to regulatory agencies use their position and experience as a springboard back into the industry at a very high level. However much this flow increases the agencies' expertise, it does not always foster the public's perception of impartiality on their part. It is interesting, therefore, to note President Carter's stated policy of prohibiting former members of such agencies from taking employment in the regulated industry for a period of two years after their retirement.[81] This, of course, will only stop the flow of personnel in one direction but it does acknowledge the exis-

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The Globe and Mail (Toronto), Oct. 3, 1974, 2; *The Gazette* (Montreal), Oct. 3, 1974, 1.

[80] *Supra*, note 1, 738.

[81] See "Carter expects...", *The Economist*, Jan. 8, 1977, 41, where the U.S. President's policy is described as follows: "Mr Carter has spoken out against the 'revolving door' through which outgoing members of regulator agencies pass to join up as lobbyists with the firms they have supervised. The new rules extend to two years the period poachers must wait before handling matters they touched as keepers. Retiring officials will also be barred for a year from formal or informal contact with former colleagues for financial gain. The occasional drink, it seems, is still permitted.

The stricter rules apply only to cabinet members and the most senior officials. Unless written into law they are not easily enforceable. But exacting penalties is hardly the point. Mr Carter's 'code' was felt necessary to dispel public mistrust and has its symbolic side."

tence of the problem of maintaining public confidence in quasi-judicial agencies.

Nor is the problem of attitudinal bias restricted to the exercise of judicial or quasi-judicial functions. Similar flows of personnel take place between the public service proper (as opposed to quasi-independent adjudicative or regulatory agencies) and the private sector. How often does a senior civil servant[82] quit his public position only to become, immediately thereafter, a consultant advising private interests on how best to deal with that very part of the government?

Perhaps not much can effectively be done to prevent such *flows* of personnel, given the wide variety of positions in the public service and the differing saleability of any expertise gained by the public's servants. Even President Carter's proposed limitations on members of regulatory agencies could not be generalized to apply to people *still* in the public service whose predispositions to certain courses of action arise from *previous* experience or hopes for future career openings. Certainly, the conflict of interest guidelines now being proposed for federal public servants and members of Parliament[83] are aimed at preventing conflicts which arise *while* the person is acting in a governmental capacity.

d) *Other statutory prohibitions*

Similarly, Parliament may explicitly consider whether particular persons should be excluded from exercising the powers which it delegates. A good example of such a prohibition is contained in subsection 251(4) of the *Criminal Code*,[84] which prevents a doctor who is a member of a hospital's abortion committee from performing any abortions in that hospital. The purpose of this provision is clear. However, it does not prevent a doctor from resigning from the committee and immediately thereafter performing an abortion in the same hospital. Indeed, it is understood that, in certain hospitals where abortions are readily available, the membership of the abortion

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[82] Or a Cabinet member?

[83] See the Green Paper, *Members of Parliament and Conflict of Interest*, July 1973 issued on behalf of the Government by the Hon. Allan J. MacEachen, then President of the Privy Council. See also *Report of the Senate's Standing Committee on Legal and Constitutional Affairs* (the Hon. H. Carl Goldenberg, Chairman), June 29, 1976 (Issue No.42). On the law relating to conflicts of interest in municipal politicians in Ontario, see Rogers, *Conflicts of Interest — A Trap for Unwary Politicians* (1973) 11 Osgoode Hall L.J. 537.

[84] R.S.C. 1970, c.C-34.

committees rotates very rapidly among the doctors performing the abortions at that hospital. Although this device may well fulfill the technical requirements of the *Criminal Code*, it frankly defeats the purpose for which Parliament enacted the provision. In the end, perhaps the only solution to such subterfuge lies in greater sensitivity to the policy underlying subsection 251(4) of the *Criminal Code*.

Greater awareness by the Government of possible or perceived conflicts of interest would cause it to exercise greater care in appointing its various officers, particularly to quasi-judicial bodies. For example, in the *National Energy Board* case, there were eight members of the Board, all of whom were presumably competent to hear the applications in question. Why, therefore, was Crowe so insistent on acting as Chairman of these hearings with the apparent support of the incumbent government? At any rate, if neither Parliament nor the government exhibits much sensitivity to the appearance of justice in appointing high officers of state, the courts should not quail at applying the *nemo judex* rule. The first principle of natural justice, the *audi alteram partem* rule, was the object of judicial scrutiny for many years. Perhaps the courts should now turn their attention to the second and, to date, seemingly neglected principle.