

# Law Society of Upper Canada v. French

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# LAW SOCIETY OF UPPER CANADA v. FRENCH

By RICHARD O. GASPARINI\*

The recent decision of the Supreme Court of Canada in *Law Society of Upper Canada v. French*<sup>1</sup> illustrates the necessity of relying upon precedent when one is confronted with the task of classifying an administrative function. The task of classifying an administrative function is at best, highly complex; at worst, desperately confusing. The decision in the *French* case only adds to the confusion.

Several complaints against Stephen French, an Ontario solicitor, were heard by the Discipline Committee of the Law Society of Upper Canada; the committee found that most of the complaints had been established. In a document prepared in accordance with *The Law Society Act*,<sup>2</sup> the committee recommended to the Convocation of Benchers that the solicitor be suspended for a period of three months. French was then notified that he might appeal as of right, and that any objections to the findings of fact or conclusions of law contained in the committee's decision must be filed forthwith.<sup>3</sup>

The solicitor responded with a letter addressed to the Law Society in which he insisted that none of the members of the Discipline Committee who had previously heard evidence against him participate in the deliberations of Convocation.

However, the Law Society concluded that the sitting of the Discipline Committee members on Convocation was a statutory right. Accordingly, Convocation, which included two members from the committee, upheld the decision of the Discipline Committee and then considered motions as to whether the solicitor should be suspended or disbarred.

At this point, French applied to the Supreme Court of Ontario<sup>4</sup> to quash the decisions of both the Discipline Committee and the Convocation on grounds that the Convocation proceedings were essentially an appeal from the decision of the committee, and therefore:

- 1) the members of the committee were disqualified by bias or a reasonable apprehension thereof from sitting on Convocation;

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<sup>1</sup> (1974), 49 D.L.R. (3d) 1.

<sup>2</sup> R.S.O. 1970, c. 238, s. 13(7)(b).

<sup>3</sup> At common law, failure to give notice has been held not to be a question of law and thus might not nullify proceedings: *C.P.R. v. Kindziarski, et al.* (1954), 2 D.L.R. 715. However, where the statute explicitly provides for notice, it must be strictly observed: *Forrest v. Caisse Populaire* (1963), 37 D.L.R. (2d) 440.

<sup>4</sup> (1972), 25 D.L.R. (3d) 692; [1972] 2 O.R. 766.

- 2) participation of committee members on Convocation amounted to a denial of natural justice.

Osler, J., of the Supreme Court of Ontario, found no breach of natural justice in the committee proceedings, but quashed the decision of Convocation; he ordered the Convocation to reconsider the findings of the Discipline Committee without the participation of any committee members. It was the court's view that a true construction of *The Law Society Act* "does in fact give a right of appeal and that this was the nature of the proceedings"<sup>5</sup> in Convocation; thus it would be against the rules of natural justice for committee members to sit on Convocation.

The subsequent appeals of both French and the Law Society to the Ontario Court of Appeal<sup>6</sup> were dismissed without written reasons. Leave to appeal to the Supreme Court of Canada was then granted.

In the majority judgment of the Supreme Court of Canada, Spence, J., does not perceive the Convocation as an appeal; he therefore holds that there was "no bar to the benchers who were members of the Discipline Committee sitting on Convocation."<sup>7</sup> The majority opinion is based on the reasoning of the Saskatchewan Court of Appeal in *Re Merchant and Benchers of the Law Society of Saskatchewan*<sup>8</sup> in which the court held that the Convocation of the Law Society of Saskatchewan is the second stage of a two-step procedure involving, initially, an investigation and report undertaken by the Discipline Committee, followed by judicial disposition in Convocation. In addition to adopting this view, Spence, J., notes that even if the Convocation were an appeal, *The Law Society Act* of Ontario abrogates the rules of natural justice by impliedly permitting the duplication of committee members on Convocation.

In his dissent, concurred in by Ritchie and Dickson, JJ., Chief Justice Laskin minimizes the importance of whether or not the Convocation was hearing an appeal; rather, he focusses on what he considered to be the "key issue"<sup>9</sup> before the court, namely, whether or not the proceedings of the Discipline Committee were 'adjudicative' and if they were, whether or not a reasonable apprehension of bias was created by the presence of committee members in Convocation. The learned Chief Justice observes that the Saskatchewan court failed to note that, in the *Re Merchant* case, committee members were "involved (in) an adjudication of guilt"<sup>10</sup>; the fact that the same members sat on appeal in Convocation clearly gave rise to a real likelihood of bias. Laskin, C.J.C., comments:

I do not think that I stretch the conception of bias beyond reasonable limits in supporting the disqualification of members of an adjudicative body when they

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<sup>5</sup> [1972] 2 O.R. 766 at 778.

<sup>6</sup> (1974), 41 D.L.R. (3d) 22n; 1 O.R. (2d) 513n.

<sup>7</sup> *Supra*, note 1 at 17.

<sup>8</sup> (1972), 32 D.L.R. (3d) 178.

<sup>9</sup> *Supra*, note 1 at 4.

<sup>10</sup> *Id.* at 8.

come to its proceedings with their names attached to previous findings of guilt upon which those proceedings are based.<sup>11</sup>

The dispute between the majority and dissenting opinions seems to focus upon the issues of whether the Discipline Committee proceedings may be classified as 'judicial' or 'investigatory' and, if judicial, whether the governing statute has superceded the rules of natural justice which would otherwise apply. An attempt to understand the issues and, perhaps, arrive at a conclusion as to whether the majority or the dissenting view is to be preferred, must begin with an examination of how the functions of an administrative body are classified.

#### A. JUDICIAL OR INVESTIGATORY FUNCTION

There is general agreement among both legal scholars and members of the judiciary<sup>12</sup> that the task of classifying an administrative function is extremely difficult. A few authors have gone so far as to suggest that administrative acts are not *a priori* amenable to classification.<sup>13</sup> Yet the courts must make such determinations in order to decide whether or not, in the absence of overriding statutory provisions, certain common law procedural requirements have been satisfied. Their task has been made easier by the formulation of certain "tests", according to which an administrative<sup>14</sup> function may be classified. These tests are derived from numerous decisions in the area of administrative law; while no single test will result in a definitive solution to a given classificatory problem, the tests, when applied as a whole, provide a fairly reliable indicator as to whether a function is judicial,<sup>15</sup> and thus subject to certain procedural requirements of the rules of natural justice.

An examination of the *French* case, in the light of these tests, points to the conclusion that the dissenting opinion is the preferable position.

A common test used to distinguish judicial functions from purely investigatory (non-judicial) functions involves examining whether or not the exercise of that function results in a "conclusive effect".<sup>16</sup> Where a decision

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<sup>11</sup> *Id.*

<sup>12</sup> *E.g.*, see, L. L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown & Co., 1965) at 181. Also, the words of Pennel, J., in *Voyager Explorations Ltd. v. Ont. Securities Commission*, [1970] 1 O.R. 237 at 242, "The test to distinguish between an administrative act and a quasi-judicial act is almost as elusive as the Scarlet Pimpernel."

<sup>13</sup> L. L. Jaffe, *Id.* at 181.

<sup>14</sup> The term 'administrative' bears *two* meanings which differ widely. On the one hand, it means 'agencies of administration' in the sense that the Law Society 'administers' the statutory regulations in the *Law Society Act*, see, *Gruen Watch Co. v. A.G. (Can.)* (1950), O.R. 429 *et passim*. On the other hand, it means a function which is 'non-judicial' and therefore not subject to the rules of natural justice, see, *Composers, Authors, et al. v. Maple Leaf Broadcasting*, [1953] Ex. C.R. 130. It should now be clear that, in its context, the word, here, is being used in the former sense.

<sup>15</sup> S. A. DeSmith, *Judicial Review of Administrative Action* (London: Stevens & Sons, Ltd., 3d ed., 1973) at 68-77, *et passim*.

<sup>16</sup> *Id.* at 69.

rendered by an administrative body is conclusive in its effect, it is immune from collateral<sup>17</sup> or indirect challenge and is legally binding until it is set aside on appeal.<sup>18</sup> Moreover, a conclusive decision is a strong indication that the body making the decision is not investigatory.<sup>19</sup> The appropriate question, therefore, is whether or not the decision of the Discipline Committee was conclusive.

The wording of the relevant portions of the governing statute indicates that it was. For example, references are found to the "decision" made by the committee<sup>20</sup> which may include "conclusions of law"<sup>21</sup> and "findings of guilt"<sup>22</sup> from which a person is given a "right of appeal".<sup>23</sup> In other words, a "decision" made by the Discipline Committee has a "legal effect" in and of itself.<sup>24</sup> Confirmation by another body is not necessary for the decision of the committee to affect the rights of the party in question.<sup>25</sup> This kind of 'conclusive' authority is normally vested only in judicial or quasi-judicial bodies.<sup>26</sup> However, DeSmith warns that 'conclusiveness' alone "is not a decisive factor"<sup>27</sup> and that certain other tests must be satisfied before it can be stated with assurance that the function of a statutory body is judicial.

The other tests are concerned with 'form' and 'procedure'; they focus upon the presence, or noticeable absence, of certain formal attributes accorded to the proceedings of a statutory body. For example, it is important that the body may call witnesses to testify before it under oath,<sup>28</sup> that a "decision" has been made; that "notice" has been given;<sup>29</sup> and that the body is entitled to

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<sup>17</sup> D. M. Gordon, "Administrative Tribunals" (1964), 12 Chitty's Law Journal, 92 at 93, suggests that the only time a 'judicial' function may be attacked collaterally is "when it is void, that is, when it has been made without jurisdiction."

<sup>18</sup> To the extent that a 'conclusive decision' is legally binding until overturned on appeal, the rights of the party in question will be affected. See, *Fairburn v. Highway Traffic Bd. of Sask.* (1958), 11 D.L.R. (2d) 709; *L'Alliance des Professeurs v. Labour Relations Bd. (Quebec)*, [1953] 2 S.C.R. 140, (see, also, note 25).

<sup>19</sup> *Supra*, note 15 at 93.

<sup>20</sup> R.S.O. 1970, c. 238, s. 33(12).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, s. 38.

<sup>23</sup> *Id.*, s. 33(12).

<sup>24</sup> Notice, for example, the authority of the Discipline Committee to 'reprimand' a member whose conduct has been found to be unprofessional: R.S.O. 1970, c. 238, s. 37.

<sup>25</sup> The majority of the S.C.C. in *French* advanced a weak argument which suggested that only the Convocation may take the requisite disciplinary action under s. 34. Surely this view is an obfuscation of the distinction between a finding of guilt and a decision as to the appropriate punishment flowing from that finding! Moreover, it has been explicitly held that where a statutory body has the power to affect rights, that body is exercising a judicial (or quasi-judicial) function; see, *Korytko v. Calgary* (1964), 42 D.L.R. (2d) 717; *L'Alliance des Professeurs v. Labour Relations Board (Quebec)*, [1953] S.C.R. 140.

<sup>26</sup> *Supra*, note 15 at 69.

<sup>27</sup> *Id.*

<sup>28</sup> See, *Jackson v. Price Tribunal (No. 2)*, [1950] N.Z.L.R. 448 at 449.

<sup>29</sup> See, *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18.

impose "sanctions" upon the offending party.<sup>30</sup> An examination of *The Law Society Act* of Ontario will reveal that the authority vested in the Discipline Committee embraces each of the above attributes: ss. 33(10) and 33(11) deal with the summoning of witnesses who are compelled to testify under oath; ss. 33(12) and 33(13) explicitly refer to "decisions" made by the Discipline Committee after which "notice" must be given. Finally, s. 37 gives authority to the committee to impose a "sanction", a formal reprimand.

It might be argued, nevertheless, that a judicial function is not convincingly established until there can be shown a *lis inter partes*.<sup>31</sup> This objection has little merit;<sup>32</sup> the courts have held that, in many instances, a statutory body is under an "implied duty" to act judicially in accordance with the rules of natural justice, even though that body is not expressly required to determine a *lis* between parties.<sup>33</sup> For example, in administrative law, licensing bodies have been found to possess aspects of form and procedure sufficiently judicial in scope that they have been said to settle disputes.<sup>34</sup> In light of this, it can be said with some certainty that the statutory procedures according to which the committee was empowered to function — conducting the hearing, summoning witnesses, finding guilt, giving notice, *etc.*, — were more than sufficient to imbue it with the aura of a judicial body.

## B. DO THE RULES OF NATURAL JUSTICE APPLY?

Except where a statute indicates otherwise, the proceedings of a statutory body characterized as judicial (or quasi-judicial) in nature must adhere to the principles of natural justice.<sup>35</sup> This term is used in varying contexts to

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<sup>30</sup> See, *British Columbia Packers v. Smith* (1961), 28 D.L.R. (2d) 711 at 716 (*obiter*), where an example was given of a disciplinary committee of a law society characterized as a body exercising judicial or quasi-judicial functions. Note, that where a statutory body has the power to administer disciplinary functions, the presumption is strong that the body is acting judicially or quasi-judicially. Compare with: *The Law Society Act*, R.S.O. 1970, c. 238, s. 37.

<sup>31</sup> Literally, a dispute between parties.

<sup>32</sup> J. F. Northey, "Administrative Law: Executive or Judicial Function — The Problem of Characterization" (1954), 32 C.B.R. 87 at 92 suggests that "[t]he mere existence of a 'lis' or a duty to hear two sides will not alone serve as a test of whether a tribunal is exercising a quasi-judicial function. However, the existence of a 'lis', taken together with other circumstances, may incline the court to characterize the function as quasi-judicial." See, also, *R. v. Manchester Legal Aid Comm., ex p. Brand*, [1952] 2 Q.B. 413 at 425 where counsel argued that a duty to act judicially does not arise unless there is some form of 'lis' and there is a duty to hear both sides. Parker, J., at 428, refused to accept that test and pointed out that where "the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision notwithstanding the absence of a 'lis inter partes'."

<sup>33</sup> *Ridge v. Baldwin*, [1964] A.C. 40.

<sup>34</sup> Discussed with case annotations, *supra*, note 15 at 71-72.

<sup>35</sup> This topic is discussed lucidly and thoroughly in: McRuer, *Royal Commission Inquiry Into Civil Rights*, 1968, Report #1, Vol. 1, Ch. II, at 136-47.

denote different concepts.<sup>36</sup> Most often, natural justice refers to two basic legal principles: *audi alteram partem*,<sup>37</sup> and *nemo iudex in causa sua*.<sup>38</sup> It has been held in both Britain<sup>39</sup> and Canada<sup>40</sup> that, at common law, actual bias<sup>41</sup> or even the real likelihood of bias<sup>42</sup> on the part of any member of a judicial body is so grave a breach of natural justice<sup>43</sup> that it is sufficient ground for the disqualification of the entire tribunal.<sup>44</sup>

There are numerous circumstances which may give rise to bias<sup>45</sup> or, at

<sup>36</sup> The term 'natural justice', apparently, "cannot be comprehensively or precisely defined" and, indeed, "other language and terms have been used to express the same concept;" the *McRuer Report*, #1, Vol. 1, Ch. II, at 136. See, also, James McL. Hendry, "Some Problems on Canadian Administrative Law" (1967), 2 *Ottawa Law Review*, 71 at 79, who writes that, quite simply, "the concept 'natural justice' lacks precision. . . ."

<sup>37</sup> Literally, no one shall be condemned unheard.

<sup>38</sup> No one can be the judge in his own cause. This rule is often referred to as the rule against bias on the part of the decision maker. It is discussed briefly in R. I. Cheffins, *The Constitutional Process in Canada* (Toronto: McGraw-Hill Co. of Canada, 1969), at 127-28 and more extensively in H. W. R. Wade, *Administrative Law* (Oxford: The Clarendon Press, 3d ed., 1974) at 186, *et passim*.

<sup>39</sup> *Local Government Bd. v. Arlidge*, [1915] A.C. 120; *Leeson v. General Council of Medical Education* (1889), 43 Ch. Div. 366.

<sup>40</sup> *International Union of Mine Workers v. United Steel Workers of America* (1964), 48 W.W.R. 15 (B.C.C.A.), where the allegedly biased member merely sat at the hearing without actually participating in the final disposition of the case.

<sup>41</sup> David J. Mullan, *Administrative Law*, title #3 from Vol. 1 of the Canadian Encyclopaedic Digest (Ontario), 3d ed. (Montreal: Carswell Co. Ltd., 1973) at 3-72, suggests that the "courts will seldom, if ever, look for proof of actual bias in a decision-maker before they are prepared to grant a remedy." See, for example, *Ex parte Perry* (1929), 2 D.L.R. 289.

<sup>42</sup> J. McL. Hendry, *supra*, note 36 at 81, writes: "Bias may take two forms. The first is pecuniary interest and the second is where there is a real likelihood, arising from circumstances such as would give rise to a challenge to the favour that a judge or justice would have bias." On the existence of a 'real likelihood of bias', see, *R. v. Rand*, [1866] L.R. 1; Q.B. 230, which is reputed to be the foundation case of all modern law on the subject of bias. At 232-33, Blackburn, J. was of the view that "[w]herever there is a 'real likelihood' (emphasis added) that the judge would, from kindred or any other cause, have bias in favour of one of the parties, it would be very wrong for him to act . . ."; also, see, *Magee v. Cookson, et al.* (1968), 65 W.W.R. 321 where it was held that "it is not necessary that actual bias be shown; it is enough that an applicant can show a real likelihood of prejudice."

<sup>43</sup> The essence of the violation is summed-up in the classic phrase, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done." *R. v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256.

<sup>44</sup> See, *R. v. Ontario Lab. Rel. Bd.; ex p. Hall*, [1963] 2 O.R. 239 at 243-44; *Re: Labour Rel. Bd., Int'l Union of Mine, Mill and Smelter Workers, Loc. 1011 v. United Steel Workers of America, Loc. 2592 and Lab. Rel. Bd.* (1964), 48 W.W.R. (N.S.) 15 at 17. See, also, *R. v. Allan*, 4 B & S 915 at 926, where in an *obiter* comment, it was suggested that judges who are even "suspected of improper motives" might be disqualified. An interesting comment has been made by Robert M. Sedgewick, Jr., in "Disqualification on the Ground of Bias as Applied to Administrative Tribunals" (1945), 23 C.B.R. 456, where it is suggested that "Where a person acts as both prosecutor and judge in the same case, it is clear that there is a reasonable apprehension of bias. To say that such a person would not be interested in securing a conviction would be to hold too high an opinion of the integrity of mankind."

<sup>45</sup> These are discussed and illustrated by Mullan, *supra*, note 41 at 3-73.

least the 'real likelihood' of it; among the more obvious is the participation of the decision-maker on an appeal from his own decision.<sup>46</sup> Nevertheless, in some cases, this kind of duplication is permitted by virtue of statutory authorization which supercedes the common law principles of natural justice.<sup>47</sup> However, if the statute is not clear about such authorization, the courts are generally reluctant to imply it into the statute.<sup>48</sup>

For example, in *R. v. Alberta Securities Commission*,<sup>49</sup> it was held that, since the statute did not authorize it, the presence on the review tribunal of the chairman whose order was under review constituted bias. In *R. v. Law Society of Alberta*,<sup>50</sup> duplication was reluctantly allowed, but only because s. 67(2) of *The Legal Profession Act*<sup>51</sup> — the governing statute of the Law Society of Alberta — specifically authorized such duplication.

Unfortunately, the majority of the Supreme Court of Canada in the *French* case does not follow those judgments; instead it upholds the decision in *Re Merchant*, which holds that, "unless there is legislation to the contrary," there is no prohibition upon a committee member sitting on appeal from his own decision. In the *French* case, the majority pursues this line of reasoning by noting that while s. 39 of *The Law Society Act* of Ontario forbids duplication of committee members on Convocation to hear an appeal against an order of reprimand, s. 33(12), under which the proceedings against French were conducted, is silent on the same matter. Because of this silence, Spence, J., concludes that even if the Convocation were an appeal (and not merely the second stage of a single proceeding), then, by implication, "members of the Discipline Committee could sit in Convocation on the hearing of that appeal."<sup>52</sup>

By now, it should be clear that the majority view is inappropriate on two grounds. First, the holding asserts that the Convocation hearings were not in the nature of an appeal, but rather the adjudicative phase of a single proceeding, commenced by an investigation conducted in committee. This view would appear to be improper since the committee proceedings, when analysed in the light of certain traditional tests used to determine the nature of an administrative function, must be reasonably characterized as judicial. This, of course, means that the hearings in Convocation were, in fact, an appeal. As such, the Convocation should have abided by the rules of natural justice.

Chief Justice Laskin, in his dissenting opinion, did not doubt that the

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<sup>46</sup> *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. Div. 276, where it was held that a council had acted "as both accusers and judges" by sitting on both the Discipline Committee and the governing council. The decision of the council was declared invalid and *ultra vires*. See, also, *R. v. Carroll and Johnson, ex p. Sutherland*, [1970] 1 O.R. 66.

<sup>47</sup> *King v. University of Saskatchewan* (1969), 6 D.L.R. (3d) 120 (S.C.C.).

<sup>48</sup> *Wingrove v. Martin* (1934), Ch. Div. 423.

<sup>49</sup> (1967), 64 D.L.R. (2d) 140.

<sup>50</sup> (1962), 36 D.L.R. (2d) 199.

<sup>51</sup> R.S.A. 1966, c. 46, s. 67(2).

<sup>52</sup> *Supra*, note 1 at 15.

committee was exercising a judicial function and that with respect to the Convocation, the rules of natural justice must "be evidenced not by *post facto* review of proceedings to determine whether there was bias in fact but rather by a scrupulous regard for any reasonable apprehension of bias or of interest."<sup>53</sup>

Secondly, the majority opinion insisted that even if the committee was exercising a judicial function, and even if the rules of natural justice would "normally" apply, the governing statute of the Law Society, by implication, superceded those rules. This view seems improper since it goes against the holdings of other courts in both Britain and Canada. As noted above, courts are generally reluctant to exclude the rules of natural justice from judicial or quasi-judicial functions unless the empowering statute expressly provides for such exclusion. Laskin, C.J.C., observed that regard for this tendency of the courts is even more important "when it is the organized legal profession whose conduct is under scrutiny. It is a reasonable expectation that lawyers, in their organized capacity as the governing body of their profession, should be most sensitive to the application of the rationale underlying the principle of impartiality."<sup>54</sup>

In short, the majority decision in the *French* case has done very little to clear-up the singularly 'cloudy' branch of administrative law concerning the classification of administrative functions; nor has it impressed anyone by its apparent blindness to the ancient axiom that justice should not only be done, it should also appear to have been done. The appearance given here is anything but that of justice being done.<sup>55</sup>

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<sup>53</sup> *Supra*, note 1 at 4.

<sup>54</sup> *Supra*, note 1 at 6.

<sup>55</sup> Mr. French was ultimately disbarred by the Law Society of Upper Canada.