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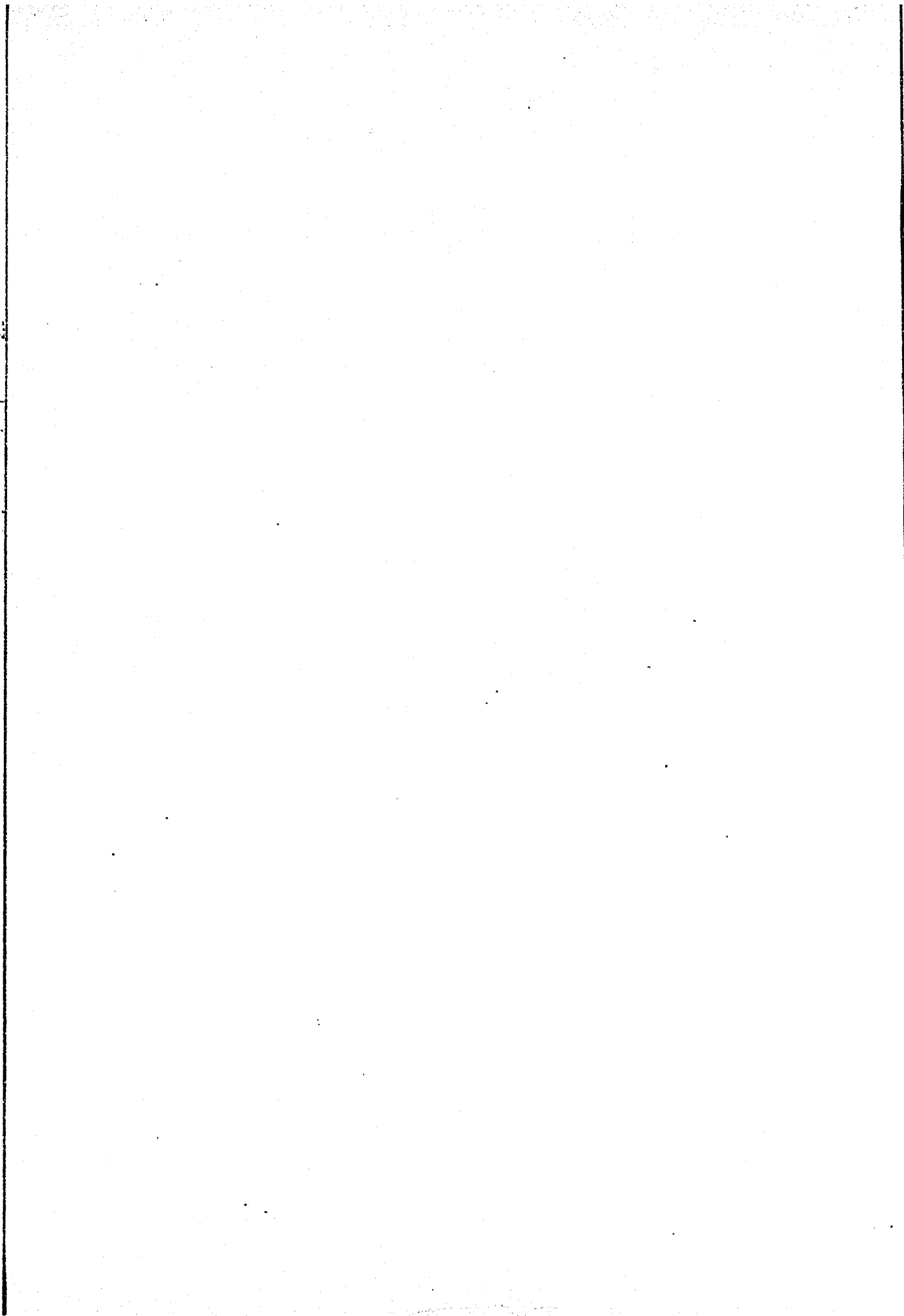
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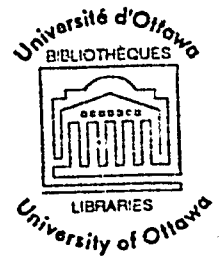
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**LEGITIMATE EXPECTATION
AND ITS APPLICATION TO ADMINISTRATIVE POLICY**

Paula A. MacPherson



Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements
for the LL.M. degree in Law

University of Ottawa

April 28, 1995



Paula A. MacPherson, Ottawa, Canada, 1995

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I. THESIS STATEMENT

The subject of this thesis is the doctrine of legitimate expectation. Since its inception there has been substantial doubt regarding the import of the notion as well as its usefulness and application in administrative law. This uncertainty has, in part, emanated from the duality of the concept's origins in the doctrines of fairness and estoppel.¹ The objective of this paper is to elucidate the potential reach, as well as the limitations, of legitimate expectation. In particular, the application of the doctrine to policy guidelines formulated and employed by administrative decision-makers in the exercise of their discretionary powers will be examined.

II. INTRODUCTION

The difficulties which can arise from representations made by a public authority or one of its officials are complex and significant.² The first section of this paper will discuss the application of estoppel in public law as a means of resolving the dilemma created when a public authority wishes to resile from an earlier stated position. The jurisprudence indicates that the doctrine of *ultra vires* has severely circumscribed the value of estoppel in these situations, thereby generating the necessity for a more flexible and accommodating doctrine. The conclusion will be

¹Ganz, "Legitimate Expectation: A Confusion of Concepts" in Public Law & Politics (ed. Harlow, 1986), chapter 5, at p. 159.

²P.P. Craig, "Representations By Public Bodies", (1977) 93 L.Q.R. 398, at p. 398.

drawn that legitimate expectation can fulfil that objective.

The next section will survey the development of legitimate expectation from its inception to present. A chronological analysis of the caselaw in common law jurisdictions will be undertaken for the purpose of consolidating the principles set out therein, and in order to identify the circumstances which will give rise to a legitimate expectation being recognized by the courts.

The third section will focus on those cases where the doctrine has been implemented to establish a legal postulate a public authority will observe its administrative policy statements. The meaning of the term "policy" generally, as well as in the context of legitimate expectation, will be examined. A premise will be put forth concerning the appropriate analysis to be conducted by the courts when the doctrine is relied on in the context of policy.

Finally, conclusions will be drawn concerning the legitimate expectation doctrine and its application to policy guidelines formulated by public authorities to assist in the exercise of their discretionary decision-making power. In this respect, the argument will be made that, much like the doctrines of natural justice and fairness³, legitimate expectation operates on a spectrum. If the representation in question has generated an expectation of some

³D.J. Mullan, "Fairness: The New Natural Justice" (1975) 25 U.Tor.L.J. 281 at p. 300.

form of procedural fairness, such as a hearing, the threshold to be met by an applicant will be lower than if the expectation is that policy will be adhered to and, accordingly, a particular decision rendered.

III. THE RESTRICTED APPLICATION OF ESTOPPEL IN PUBLIC LAW

An undesirable precedent, improper or misleading advice, an inappropriate representation, a rudimentary communication, an imprudent decision: these are but some of the catalysts which may give rise to an administrative authority wanting to resile from a prior assurance given as to the manner in which a statutory power vested in it will be exercised. The recurrent dilemma facing the courts in these situations is whether an individual should be accorded the right to compel a public authority to honour a pronouncement made by it which has spawned the belief a certain procedure will be followed or a particular decision rendered, or whether the authority is at liberty to change its mind, or to disclaim the conduct or statement of an official, which has resulted in such a belief.

One approach to this problem has been the application of the doctrine of estoppel. An act of a public authority done or given within its jurisdiction becomes a final and conclusive decision which cannot be reviewed by the deciding body itself or by any higher authority, including a court, unless the enabling legislation provides for appeal or review. When a public body

lawfully authorises one of its officials to deal with a certain matter, the act or advice of that official is a binding and irrevocable decision of the body itself.⁴

. . . where Parliament confers on a body . . . the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made or communicated in terms which are not expressly preliminary or provisional is final and conclusive and cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body.⁵

But the application of estoppel in public law is severely restricted by the *ultra vires* doctrine. Estoppel cannot be invoked where a representation would lead to a decision or action which is *ultra vires* a public body's authority. To do otherwise would permit extension of its powers by making representations outside its statutory or common law limits, which would in turn be binding through the vehicle of estoppel.⁶

Due in large part to the efforts of Lord Denning, there exists a body of jurisprudence which provides that, in some circumstances, when a public authority undertakes to assume or asserts authority over a matter, an individual is entitled to rely on that and should not be compelled to suffer in the event the requisite authority is

⁴M.A. Fazal, "Reliability of Official Acts and Advice" [1972] P.L. 43 at pp. 48-9.

⁵*Re Denton*, [1952] 2 All E.R. 799 at p. 802.

⁶*Minister of Agriculture and Fisheries v. Hulin* unreported but cited in *Minister of Agriculture and Fisheries v. Mathews*, [1950] 1 K.B. 148.

ultimately lacking. *Robertson v. Minister of Pensions*⁷ is the leading case on this principle. Mr. Robertson was an army officer already suffering from a back condition but who was injured in an accident while on military duty. He was later found unfit for service. He wrote to the War Office requesting a decision on whether his disability was attributable to war service for the purposes of the war pensions scheme. A month later, the Director of Personal Services at the War Office answered Mr. Robertson's inquiry, stating his case had been duly considered and his disability accepted as attributable to military service.

After relying on this assurance, Mr. Robertson learned that administration over war injuries had been transferred to the Ministry of Pensions. It had not been consulted by the War Office concerning his inquiry and subsequently refused to accept his disability was attributable to military service. On appeal from the pensions appeal tribunal, Denning, J. (as he then was) held the War Office letter was binding on the Ministry of Pensions:

In my opinion, if a government department, in its dealings with a subject, takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes.⁸

⁷[1949] 1 K.B. 227.

⁸*Ibid.*, at p. 232. The decision has been criticized on the grounds the War Office letter was *ultra vires* and therefore a nullity, since the powers of the Ministry of Pensions were not in law exercisable by the War Office. See for example; G. Ganz, "Estoppel and Res Judicata in Administrative Law" [1965] P.L. 237 at p. 245; M. A. Fazal, "Reliability of Official Acts and Advice" [1972] P.L. 43 at p. 46; P.P. Craig, *op.cit.*, footnote 2 at p. 411; A.W. Bradley, "Administrative Justice and the Binding Effect of Official Acts" (1981) *Current Legal Problems* 1 at p. 4.

A year later, Denning L.J. relied on the same proposition in *Falmouth Boat Construction Co. v. Howell*⁹ in order to decide that permission to effect certain repairs, granted by a licensing officer who in fact had no authority to do so, was nevertheless binding on the government department concerned. However, the decision was overturned by the House of Lords¹⁰ on the grounds "[t]he illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy"¹¹.

The conflict between the application of the *ultra vires* doctrine and the resulting injustice to an individual relying upon such a representation has been considered in a number of English planning cases. In *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*¹², a builder relied on a letter from the corporation's engineer and surveyor stating that certain land had an existing use right as a builder's yard and planning permission was not required. The builder bought the land and commenced using it, but later discovered the planning authority had taken a contrary view. It served an enforcement notice upon him. The court held that, just as estoppel could not affect the performance of a statutory duty, so it could not hinder the exercise of a

⁹[1950] 1 K.B. 16 at p. 26.

¹⁰[1951] All E. R. 278.

¹¹*Ibid.*, at p. 280, per Lord Simonds.

¹²[1961] 2 All E. R. 46.

statutory discretion, namely the planning authority's power to act against unauthorized development.

In *Wells v. Minister of Housing*¹³, a company wishing to expand its business of making concrete blocks, applied for planning permission to build a plant. The planning authority sent a letter to the effect the works could be regarded as a permitted development. The applicant constructed a plant of larger proportion than originally indicated in its application, but assumed the building would be covered by the planning authority's letter. When local residents complained, the authority served an enforcement notice requiring the applicants to take the building down.

A majority of the Court of Appeal held the letter bound the authority as a valid determination that planning permission was not necessary. Lord Denning, reflecting back to *Robertson*, stated:

. . . a public authority cannot be estopped from doing its public duty, but I do think that it can be estopped from relying on technicalities; and this is a technicality, to be sure. We were told that for many years the planning authorities, including the Minister himself, have written letters on the same lines as the letter of Mar. 1, 1963. It has been their practice to tell applicants that no planning permission is necessary. Are they now allowed to say that this practice was all wrong and their letters were of no effect? I do not think so. I take the law to be that a defect in procedure can be cured, as an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid.¹⁴

¹³[1967] 2 All E.R. 1041.

¹⁴*Ibid.*, at p. 1044.

His Lordship applied the same reasoning in *Lever (Finance) Ltd. v. Westminster Corporation*.¹⁵ A developer obtained planning permission to build fourteen houses. Subsequently his architect wished to alter the layout, situating one of the houses twenty-three feet away from existing houses. A letter to this effect was sent to the council's planning officer who, in a subsequent telephone conversation, mistakenly stated the alterations were not material and he was satisfied with them. Building commenced, but when the neighbours complained, the planning authority took enforcement action.

Lord Denning held the officer's statement given over the telephone was a representation within his ostensible authority and, having been acted upon, was binding. Sachs L.J. agreed in the result, but based his decision on a statutory provision which permitted councils to delegate some planning decisions to their officers.

The decision has been criticized as undermining the principle that acts of subordinate officials cannot be allowed to destroy the power of public authorities to enforce the law.¹⁶ That was re-established however by the Court of Appeal's decision in *Western*

¹⁵[1971] 1 Q.B. 22.

¹⁶Bradley, *op. cit.*, footnote 8, at p. 5.

Fish Products Ltd. v. Penwith District Council.¹⁷ The company had bought a disused fertilizer factory with the intention of developing a new business manufacturing fish-oil and fish-meal. It wanted to renovate some of the existing buildings and erect a new one. Conversations ensued with the planning officials and letters were exchanged after which the company went ahead with the work without seeking formal planning permission. The Council later insisted a planning application be made. When it was, the application was refused.

The Court rejected the argument that an estoppel arose out of the planning officer's letter and held that, in general, no estoppel could prevent the exercise of statutory discretion or the discharge of a statutory duty. It applied the same principle in *Rootkin v. Kent County Council*¹⁸, stating "it is a general principle of law that the doctrine of estoppel cannot be used against local authorities for the purpose of preventing them from using the statutory discretion which an Act of Parliament requires them to use."¹⁹

Canadian cases have, for the most part, taken the same

¹⁷[1981] 2 All E.R. 204.

¹⁸[1981] 2 All E.R. 227.

¹⁹*Ibid.*, at p. 234 per Lawton L.J.

position.²⁰ The leading case is *Maritime Electric Co. v. General Dairies Ltd.*²¹ The electric company erroneously calculated the amount of electricity consumed by the dairy and had undercharged for a period of twenty-nine months. The Supreme Court of Canada found the dairy company had relied on the public utility's representation of the amount owing to its detriment, adjusting the cost of its product on the basis of the monthly statements. The defence of estoppel was therefore available to preclude the utility from collecting the correct amount, even though that position was in conflict with the rates fixed under the Act. The Privy Council reversed the decision on the grounds the Act imposed a statutory obligation on the electric company to charge, and on the dairy to pay, the scheduled rates for all electricity consumed, and estoppel could not apply to defeat the obligation.²²

²⁰One recent exception is the decision of Strayer J. in *Aurchem Exploration Ltd. v. Canada* (1992), 7 Admin. L.R. (2d) 168, wherein it was held the mining recorder's practice during the previous six years, of recording claims even though they did not comply strictly with the terms of the Act, estopped him from relying on the requirements of the Act in the instant case. In "Canada Assistance Plan - Denying Legitimate Expectation a Fair Start?" (1993) 7 Admin. L.R. (2d) 269 at p. 286, Professor Mullan comments on Strayer J.'s recourse to the principles of estoppel rather than legitimate expectation. This may best be explained by an examination of the court file which indicates the doctrine of legitimate expectation was neither pleaded nor argued by the applicant in its originating notice of motion nor in its memorandum of fact and law. The only issue raised by the parties was estoppel.

²¹[1935] 4 D.L.R. 196 (S.C.C.); overturned in [1937] 1 D.L.R. 609 (P.C.).

²²But see recent decision of Supreme Court of Canada in *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-Operative Ltd.* (1994), 18 Admin L.R. (2d) 1, a case with virtually identical facts as *Maritime Electric*. In a five to four judgment the majority allowed the defence of equitable estoppel on the grounds the statute did not contain the type of clear and precise expression of duty that was required to bar it. The minority also defined the issue as whether the statute contained such a duty and came to the conclusion it did. The public utility's duty to charge the co-op, gave rise to its duty to take all necessary steps to collect on the debt. That being so, the co-op was not entitled to rely on the defence of estoppel.

In *Woon v. Minister of National Revenue*²³, the taxpayer obtained a ruling from the Commissioner of Income Tax that tax would not be payable on a particular scheme of property distribution. The Court held this could not work any estoppel against the Commissioner or the Minister in the face of a legislative provision requiring the distributed property to be included in income as dividends:

Parliament has said that under certain circumstances certain things are deemed to be dividends and manifestly the Commissioner of Taxation had no power to declare otherwise or to settle the limit of taxation thereunder, other than according to the statute itself.

[The ruling] cannot be invoked by the appellant as a ground for raising estoppel in this case, as to do so would be to nullify the requirement of the statute itself.²⁴

The Divisional Court in Ontario employed the same reasoning in *Re David Gallo Building Co. and City of Toronto*.²⁵ The builder purchased land for the purpose of constructing a hotel apartment, conditional on obtaining a zoning by-law permit. An application for a building permit was filed in September of 1972, but structural, electrical and mechanical drawings were not submitted as required by the building by-law. A month later, the company was advised the proposal complied with the zoning by-law. Although it was altered in a number of respects over the next few months, the applicant considered the proposal to still fall within the zoning

²³[1951] Ex. C.R. 18.

²⁴*Ibid.*, at pp. 25-6 and 27.

²⁵(1973), 38 D.L.R. (3d) 536.

by-law. Thereafter however, the city council expressed its intention to pass a by-law to prohibit hotels and apartments in the city, with the exception of two defined areas. The company applied for a new permit and submitted supporting drawings but was advised that, in light of council's new intentions, a permit could not be issued.

The developer applied for an order of *mandamus* to compel the issuance of a building permit arguing that by specific waivers and consistent practice, the City had waived the requirements of the building by-law or had at least lulled it into a false sense of security. The Court held the conduct of the City could not convert a deficient application into a valid one.

Those who rely on legal rights must comply with the legal requirements. They cannot absolutely rely on the sensible indulgences often granted by public servants . . . These may be discontinued as readily as they were instituted or maintained.

. . . once a City Council has passed a by-law, its employees are bound to do the business of the city, when they have a discretion to exercise, in accordance with the by-law, even if the by-law has not passed the Municipal Board. But this can be asserted more broadly and can be extended to the duty of civic employees to conform to the declared intention or policy of Council, and of course to the normal obedience to direction that every employee, in the course of his duties, owes to his employer. In this case, once Council had expressed its intention to enact the by-law and had set in motion the machinery to do this, civic officials were bound to act accordingly. In acting as they did, they only did their bounden duty, in the circumstances.²⁶

Earlier representations therefore could not prevent a public authority from subsequently considering all the relevant

²⁶*Ibid.*, at p. 543-4.

facts of a particular case in deciding how to exercise a discretionary power vested in it. This was so regardless of the potential hardship incurred by the individual who had relied on the representation. As noted by Schwartz this reasoning, "which results in denial of any remedy, has all the beauty of logic and all the ugliness of injustice".²⁷ Craig agrees:

The objective of preventing extension of power by public officials is obviously correct, but the operation of the doctrine in practice is misdirected. In the rare cases of intentional extension of power it strikes at the wrong person, the innocent representee, rather than the public official. In the more common case of careless, or inadvertent, extension of power any deterrent effect upon the public officer will be minimal. The unspoken hypothesis must be that whenever, in fact, the powers of the body are extended any hardship to the representee must be outweighed by the harm to the public, who are the beneficiaries of the ultra vires principle, were estoppel to operate.

. . . The balance of public and individual interest will produce different answers in areas as diverse as planning and licensing, social security and taxation, and even within each area. A doctrine with sufficient flexibility to recognise this diversity is needed.²⁸

The courts have attempted to devise other means for justly dealing with cases where a public authority has made a representation and an individual, understandably innocent of the extent of the authority's power, has relied on it. One approach is demonstrated in *Laker Airways Ltd. v. Department of Trade*²⁹ and *R. v. Inland Revenue Commissioners ex p. Preston*³⁰ where the

²⁷Administrative Law (1976), at p. 134.

²⁸Craig, *op. cit.*, footnote 2 at p. 420.

²⁹[1977] 2 All E.R. 182.

³⁰[1985] 2 All E.R. 327.

courts, in keeping with the hypothesis formulated by Craig, have weighed the injustice visited upon an individual who is precluded from relying on an *ultra vires* representation against the harm to the public interest should the authority be bound by it. If the former outweighs the latter, it is considered an abuse of discretion for the public authority to resile from the representation. In *Laker Airways Ltd.*, Lord Denning, returning once again to the principle he employed in *Robertson*, stated:

The law on this subject [estoppel against the Crown] has developed a good deal lately. The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual . . . It can, however, be estopped when it is not properly exercising its powers, but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public. . .³¹

Preston involved a complex set of facts originating in prolonged correspondence between the Special Investigation Section of the Commissioners and the appellant concerning his returns for certain taxation years. The essence of the Commissioners' concern was that Mr. Preston's disposition of shares in a particular company may have been an attempt to obtain a tax advantage which they could counteract by issuing an adjustment. Mr. Preston provided information on the transaction and indicated he would relinquish unconnected claims to loan interest and capital loss

³¹*Supra.*, footnote 29, at p. 194.

relief for the taxation years in question provided inquiries into his returns were dropped.

The Special Investigation Section did not pursue further inquiries at that stage, but some time later, upon receiving further information, reopened them. The Commissioners decided to exercise their power to issue an adjustment under the Act to counteract the tax advantage allegedly gained by Mr. Preston when the shares were sold. He sought a declaration that they were estopped from doing so in light of their earlier representation that no further action would be taken.

Although the House of Lords accepted that the Commissioners could not bind themselves not to perform the statutory duty imposed upon them by the statute, it went on to hold the court could grant judicial review of the Commissioners' decision if they failed to discharge their statutory duty to the taxpayer or if they abused or exceeded their powers. For judicial review purposes, abuse of power included the unfair exercise of a statutory authority if the decision was equivalent to a breach of a representation giving rise to an estoppel.

The decision is significant because it recognizes a public authority's duty to act fairly can be contravened by a decision which is inconsistent with earlier representations on which

reliance had been placed.³² In *Preston*, Lord Templeman stated:

In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of contract or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief. In the present case, however, I consider that the taxpayer is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representation on their part.³³

There has been judicial recognition of this principle in Canada. Although the reasoning of the majority of the Federal Court of Appeal in *Granger v. Canada Employment and Immigration Commission*³⁴ is a classic example of the "beauty of logic" and the "ugliness of injustice" which results from a strict application of estoppel to representations made by a public authority, the dissenting judgment of Hugessen J. employs the more flexible reasoning of the House of Lords in *Preston*.

Mr. Granger was a senior employee of a company experiencing

³²See also *H.T.V. Ltd. v. Price Commission*, [1976] 1 I.C.R. 170.

³³*Supra*, footnote 30, at p. 341. The Lords were satisfied however, that the Commissioners were not guilty of unfair conduct amounting to an abuse of power, since the correspondence between the parties did not in fact disclose any agreement or representation that the Commissioners would abandon their right to raise further assessments.

³⁴[1986] 3 F.C. 70.

difficult economic times. In order to avoid layoffs, the employer encouraged its most senior employees to take early retirement. The applicant accepted the offer. During the year following his departure he received unemployment insurance benefits, after which he became eligible for benefits pursuant to the *Labour Adjustment Benefits Act*.³⁵ He was also entitled to receive certain benefits in accordance with his employer's pension plan, which could, depending on an irrevocable choice made by the applicant, take the form of either a life annuity, a larger annuity paid to him until age sixty-five, or a lump sum.

Before making any decision, he contacted the Canada Employment and Immigration Commission in order to ascertain what impact any benefits from the pension plan might have on his labour adjustment benefits, and specifically whether monies paid by the employer directly into his RRSP account would be deducted from his adjustment benefits. The Commission advised him that its interpretation of section 17 of the *Labour Adjustment Benefits Act* was that pension benefits paid directly into an RRSP did not have to be deducted from his labour adjustment benefits. Based on this, Mr. Granger opted to receive a monthly annuity from his employer's pension plan and requested the monthly payments be made directly into an RRSP. At the end of his year of unemployment insurance benefits, he received the full amount of the adjustment benefits without any deduction for the amount paid into his RRSP.

³⁵S.C. 1980-81-82-83, c. 89.

Shortly after however, the Commission changed its mind on the grounds its interpretation of section 17 was not supported by the wording of the statute. This was true and the point was not in contention before the Federal Court of Appeal. The Commission admitted its first interpretation was wrong and that incorrect information had been given to the applicant which caused him to take action he thought was to his advantage but in fact was to his detriment. Nevertheless, it maintained it had a duty to apply the statute. The applicant argued that allowing the Commission to resile from its earlier position, on which he had relied to his detriment, infringed the rules of natural justice.

The majority of the Court held the rules of natural justice did not apply and "any commitment which the Commission or its representatives may give, whether in good or bad faith, to act in a way other than that prescribed by the law would be absolutely void and contrary to public order."³⁶

Hugessen J., relying on the decisions in *Robertson, Falmouth Boat Construction, Ltd. v. Howell, Wells, Lever Finance, and Preston* strongly disavowed that position.

There may have been a time when the courts could close their eyes to reality and say that, however unfair the results might be, Parliament intended that the statute should always be applied. The individual relied at his peril on the interpretation of the legislation given by the authorities. . .

Fortunately, this principle no longer applies. In a

³⁶*Supra*, footnote 34 at p. 77, per Pratte, J.

series of judgments, mainly but not exclusively by Lord Denning, the English courts have recognized that, in some circumstances, the theory of estoppel could be applied to bar government from acting in a way which would otherwise be permissible.

The applicant was entitled to apply to the Commission, and the latter had a duty to give him information to the best of its knowledge. In reliance on the information so obtained, he took irrevocable action to his detriment. If the Commission were a private person, the doctrine of estoppel by representation would apply to bar it from changing its position and now deciding to deduct from the adjustment benefits payable to the applicant the amounts paid into his RRSP. As it is a government body, its decision, notwithstanding that it is in accordance with the text of the statute, constitutes an abuse of power and is subject to judicial review.³⁷

Another ameliorative strategy, becoming increasingly prevalent in administrative law, is the legitimate expectation doctrine which decrees that where a representation or undertaking given by a public authority or one of its officials has served to arouse a legitimate expectation, the authority may be obliged to fulfil it.³⁸ The following section undertakes an analysis of the cases where the doctrine has been applied in an attempt to delineate the circumstances which give rise to a legitimate expectation. It is submitted the concept is capable of providing the flexibility necessary to resolve the problems created by representations made by a public authority. To this extent, it surpasses the usefulness of the doctrine of estoppel in public law and if allowed to develop to its full potential "could drive a huge hole in the principle

³⁷*Ibid.*, at pp. 78, 82 and 83.

³⁸C.F. Forsyth, "The Provenance and Protection of Legitimate Expectations" [1988] Cam. L.J. 238 at p. 239; Alistair R. Mowbray, "Legitimate Expectations and Departmental Representations" (1990) 106 L.Q.Rev. 568 at p. 568.

that public authorities could not be estopped from the exercise of their statutory powers and discretions."³⁹

It has been suggested the doctrine will not be of assistance where the representation in question is *ultra vires*. At issue in this debate is whether legitimate expectation, like estoppel, is constrained by the *ultra vires* doctrine. Craig maintains:

The short answer is that the concept of legitimate expectations cannot resolve the dilemma adumbrated above [an *ultra vires* representation], either in the sense of telling us when an individual should be able to rely, or in the sense of indicating when such reliance will not be allowed. The reasons why it cannot do the former are as follows. It is of course true that a representation, if made by one on whom it was reasonable to rely, can be said to give rise to a legitimate expectation that the representation will be followed. This is indeed the normative foundation, or at least part of it, justifying the application of estoppel in private law. In this sense the idea of a legitimate or reasonable expectation is inherent in the very notion of a binding representation. This fact does not however "solve" the dilemma described above quite simply because the problem in public law cases is that even if the representation does create a legitimate expectation in the above sense, this does not remove the difficulty that it may be outside the power of the public body.

...

Thus in cases such as *Lever Finance*, *Robertson* and *Western Fish* it may well be the case that the representation which was made was one on which it was reasonable or legitimate for the representee to rely. If however that representation was outside the powers of the relevant public body, or officer of it, the problem considered above would still be present.⁴⁰

Although persuasive, this contention fails to recognize the origins of the doctrine as being, not only in estoppel, but in

³⁹Mullan, *op. cit.*, footnote 20 at p. 271.

⁴⁰P.P. Craig, "Legitimate Expectations: A Conceptual Analysis" (1992) 108 L.Q.R. 79 at pp. 88-9.

fairness as well. While an *ultra vires* representation cannot serve to generate an estoppel, there is no sound reason for imposing a similar restriction on legitimate expectation. Estoppel is dependant upon the *vires* of a representation because its application is based upon statutory interpretation. Legitimate expectation on the other hand, is a factual determination based on principles of fairness.

This is why the judicial trend in legitimate expectation cases is to balance the injustice to the individual against the harm to the public; a similar approach to the one taken in *Laker Airways Ltd.* and *Preston*. The claim of a legitimate expectation based on a representation made by a public authority either by way of conduct, statement or past practice, leads to a two-fold inquiry. First, given the facts and circumstances of the case, would a reasonable person hold the legitimate expectation being relied upon by the applicant. If so, is there some overriding public interest which justifies allowing the public authority to resile from the representation which created the expectation. If not, the public authority will be bound by it.

This is not to suggest the *ultra vires* doctrine will never be a factor in legitimate expectation cases. It may be that when an *ultra vires* representation is made, the effect of requiring compliance and thereby enlarging the scope of an authority's powers, would constitute an overriding public interest sufficient

to warrant permitting the authority to resile from it. However, the issue of the vires of the representation, rather than being the primary focus, becomes merely one consideration among many. The heart of the analysis is not whether the public body had authority to make the representation which generated a legitimate expectation, but rather the inequity created by failure to fulfil the expectation against the harm to the public interest if the authority is required to honour its undertaking. The fact the representation is ultra vires does not necessarily and automatically negate any legitimate expectation it may have generated, as would be the case were estoppel relied on. There may well be instances, as in *Granger*, where an ultra vires representation raises a legitimate expectation, and in balancing the injury to the individual were the expectation not fulfilled against the effect of binding the public authority to it, the former will be found to outweigh the latter.

Judicial analysis of this nature, and there are examples, will prevent legitimate expectation from being confined by the ultra vires doctrine, and will give recognition to the its dual origins in estoppel and fairness.

IV. LEGITIMATE EXPECTATION: THE ADVENT OF A NEW DOCTRINE

This section will survey the development of the doctrine of legitimate expectation from its inception to present. A chronological analysis of the caselaw in common law jurisdictions

will be undertaken for the purpose of consolidating the principles set out and in order to identify the circumstances which will give rise to a legitimate expectation being recognized by the courts.

(i) England

There is widespread acceptance among those who have written about the doctrine that it originated with the dictum of Lord Denning M.R. in *Schmidt v. Secretary of State for Home Affairs*.⁴¹ The plaintiffs, both aliens, had been granted permits for a limited stay in the United Kingdom in order to engage in full-time study at a college of Scientology. After an application had been made for an extension of their stay, the government announced it was satisfied Scientology was socially harmful and steps would be taken to curb its growth. To that end, all foreign nationals who were in the United Kingdom for the purpose of attending Scientology institutions would not be granted an extension of stay in order to continue their studies.

Schmidt sought a declaration that the Home Secretary was obliged to consider his application for an extension of stay upon its merits and in accordance with the principles of natural justice. Lord Denning stated:

The speeches in *Ridge v. Baldwin* show that an administrative body may, in a proper case, be bound to

⁴¹[1969] 1 All E.R. 904; see C.F. Forsyth, *op. cit.*, footnote 38 at p. 241. In a letter to the author Lord Denning states he felt "sure it [legitimate expectation concept] came out of my own head and not from any continental or other source".

give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.⁴²

Even without a legal right therefore, it might still be possible to establish a requirement for the application of natural justice by way of a legitimate expectation. An individual in possession of a permit to remain in the country can legitimately expect the permit to continue for the duration of its term. Since revocation would defeat that expectation, procedural fairness in the form of a right to a hearing would apply. Lord Denning's statement is based on the fact an existing interest is being interfered with and, although such interference is lawful, there is nevertheless an expectation which deserves protection. The expectation is that "interests presently enjoyed should continue unmolested and that a change of practice by the public body, even if otherwise legal, has to be justified according to the principles of natural justice."⁴³

In *Schmidt* however, the plaintiffs, having been permitted to remain for the duration of the permits granted to them, could not be considered to have an expectation to an extension.

He [a foreign alien] has no right to enter this country except by leave: and, if he is given leave to come for

⁴²*Ibid.*, at pp. 908-9.

⁴³Robert Baldwin and David Horne, "Expectations in a Joyless Landscape" (1986) 49 Mod. L.R. 685 at pp. 694-5.

a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right and, I would add, no legitimate expectation - of being allowed to stay. He can be refused without reasons given and without a hearing.⁴⁴

The concept therefore, apparently did not extend to situations of expected renewal, which was arguably a legitimate expectation held by Schmidt prior to the change in the government's policy.⁴⁵

His Lordship invoked the doctrine again in *Breen v. Amalgamated Engineering Union*.⁴⁶ The appellant had been elected by his fellow workers as their shop steward under Rule 13(21) of the union rules which provided that "Shop stewards elected by members are subject to approval by the district committee and shall not function until such approval is given". Although Mr. Breen's election had been approved in previous years, the district committee decided not to approve his latest one. He sought a declaration the decision had been without regard to the rules of natural justice.

Lord Denning M.R., in dissent, was prepared to grant the

⁴⁴*Supra*, footnote 41, at p. 909.

⁴⁵Simon France, "Legitimate Expectations in New Zealand" (1980) 14 N.Z.U.L.R. 123 at p. 130.

⁴⁶[1971] 2 Q.B. 175 (C.A.).

declaration. Citing his own reasons in *Schmidt*, he reiterated the position a legitimate expectation of some benefit could form the basis of a requirement for procedural fairness.⁴⁷ The other two members of the Court agreed the committee was under a duty to act fairly, but in the circumstances, were satisfied it had done so and neither a hearing nor reasons were required. No reference was made to the phrase "legitimate expectation".

*R. v. Liverpool Corporation, Ex parte Taxi Fleet Operators Association*⁴⁸, is invariably analyzed as a classic legitimate expectation case and is viewed as an important step in the doctrine's development⁴⁹, although the decision makes no reference to the concept at all. The city council had pursued a policy of limiting the number of licensed taxis to three hundred. On a number of occasions, the applicants had been provided with assurances this number would not be increased without consultation. In fact, they had been given an undertaking by the committee chairman the figure would not be increased until relevant legislation had been passed. Despite these assurances, the municipal council resolved to increase the number of taxis.

When the applicants sought judicial review, the municipality argued that, with respect to policy, the Court could not require it

⁴⁷*Ibid.*, at p. 191.

⁴⁸[1972] 2 Q.B. 299.

⁴⁹*France, op. cit.*, footnote 45.

to fetter its statutory discretion by any prior undertaking given. Lord Denning, referring to his decision in *Robertson and Lever Finance*, responded:

. . . that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. And I should have thought that this undertaking was so compatible. At any rate they ought not to depart from it except after most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding public interest requires it. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case.⁵⁰

Even if a proper hearing had been given therefore, his Lordship would still have been inclined to strike the council's decision on the basis it constituted a flagrant breach of their original representation. In other words, the legitimate expectation was that undertakings given would be honoured. This was the first indication the doctrine was not confined to simply being a branch of the *audi alteram partem* rule. The corporation's breach of its undertaking and the resulting failure to fulfil the legitimate expectation in question was not purely a matter of natural justice.⁵¹

Five years after *Breen*, legitimate expectation surfaced again in *R. v. Barnsley Metropolitan Borough Council; Ex parte Hook*.⁵²

⁵⁰*Supra*, footnote 48, at p. 308.

⁵¹*Forsyth, op. cit.*, footnote 38, at pp. 254-5.

⁵²[1976] 1 W.L.R. 1052.

There, a licence holder had operated a stall in the town market for several years. Due to an altercation with Council employees, the licence was revoked. Two hearings were held, but alleged to be invalid because the applicant had not been present nor had he been given an opportunity to hear or question the evidence on the which the decision to revoke his licence was made. Lord Denning held he had a right to carry on his business; a right which could not be taken away except for just cause and only in accordance with the principles of natural justice. Lord Scarman employed the concept of legitimate expectation, stating a licence holder should be heard when "there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the licence."⁵³

*McInnes v. Onslow-Fane*⁵⁴, also involved the application of legitimate expectation in the context of a licence. The plaintiff made application to the British Boxing Board of Control for a boxers' manager's licence. He had never held such a licence and in fact, had unsuccessfully applied on five previous occasions. Upon making the instant application, he requested an oral hearing as well as prior notice of anything which might impede grant of the licence. The Board refused the application without providing an oral hearing or reasons for its decision.

⁵³*Ibid.*, at p. 1058.

⁵⁴[1978] 1 W.L.R. 1520.

Sir Robert Megarry V.C., identified three categories of licensing cases, each having profoundly disparate requirements of natural justice and fairness:

First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority . . .⁵⁵

As the plaintiff fell within the second category, the Court held the Board was under no duty to provide him with either a hearing or with reasons. In the Vice-Chancellor's opinion, "the case is plainly an application case in which the plaintiff is seeking to obtain a licence that he has never held and had no legitimate expectation of holding; he had only the hope . . . which any applicant for anything may always have."⁵⁶

These early cases, with the exception of *Liverpool*, indicate the doctrine was evolving as an offshoot of the principles of natural justice in order to impose a fairness obligation in

⁵⁵*Ibid.*, at p. 1529.

⁵⁶*Ibid.*, at p. 1530.

circumstances where justice and good administration demanded it.⁵⁷ In *Hook* for example, the same result could have been achieved without invoking the legitimate expectation doctrine at all, since the application of a fairness requirement was clearly warranted.⁵⁸ Hodgson makes a similar observation with respect to the doctrine's application to licensing cases in general:

. . . do the rules of natural justice apply to revocation cases on the basis of the loss of a right, privilege, liberty or property, or do they so apply on the basis of a legitimate expectation? The answer is that the rules may apply to the revocation cases on both bases. Although Megarry V-C in *McInnes v. Onslow-Fane* regarded the revocation of a licence as properly belonging to the forfeiture cases involving the taking away of some existing right, some judges have treated revocation as falling within the expectation cases as well.⁵⁹

Two years after *McInnis*, the English Court of Appeal recognized the legitimate expectation doctrine for the first time. In *Cinamond v. British Airports Authority*⁶⁰, the applicant cabdrivers had a long history of unlawful solicitation of passengers at Heathrow Airport. They had numerous convictions and unpaid fines for overcharging passengers and had demonstrated a general disregard of airport regulations. As a last resort,

⁵⁷France, *op. cit.*, footnote 45, at p. 132.

⁵⁸D.C. Hodgson, "Licensing and the Legitimate Expectation" (1985) 9 *Adelaide L.R.* 465 at 482, wherein the author observes it is now authoritatively established that the exercise of a statutory power revoking a licence will attract the rules of natural justice when revocation results in the loss of a right to earn a livelihood or to carry on a financially rewarding activity, or is based on the misconduct of a licence holder.

⁵⁹*Ibid.*, at p. 483.

⁶⁰[1980] 1 *W.L.R.* 582.

airport authorities sent written notice to each applicant advising they were prohibited from entering the airport. The applicants challenged the ban on the grounds, *inter alia*, they should have been permitted to make representations before the prohibition was imposed, as they had a legitimate expectation of continuing their taxi business at the airport.

The Court found the facts rendered the case an "expectation" one, but in light of the applicants' past conduct concluded the expectation of engaging in further criminal activity was not one which gave rise to a claim to natural justice. Lord Denning, quoting from his decision in *Schmidt*, held that while a legitimate expectation could raise an issue of natural justice, the appellants' conduct in these circumstances, had robbed them of any such expectation. Based on the facts, the airport authority could be seen to have discharged its duty to act fairly and reasonably without the necessity of a hearing.⁶¹

The first recognition of the doctrine by the House of Lords was in *O'Reilly v. Mackman*.⁶² The plaintiffs were prisoners who had brought a civil action against the Prison Board seeking a declaration that it had violated the rules of natural justice in

⁶¹Lord Denning's decision has been criticized on the grounds it confuses issues of merit with procedure. See France, *op cit.*, footnote 45, at p. 132, "Whether the drivers should be permitted to use the airport given their past conduct was the substantive issue, rather than the factor which should have determined their right to a hearing."

⁶²[1983] 2 A. C. 237.

exercising its disciplinary jurisdiction to impose upon them a forfeiture of remission of sentence. Lord Diplock held the prisoners had no right to remission of sentence but did have a legitimate expectation that general past practice on remissions would be adhered to in the absence of reasons to the contrary and such expectation could not be denied except in accordance with the principles of natural justice.⁶³

The decision in *O'Reilly* is notable insofar as the House of Lords' explicitly approved legitimate expectation as a ground for judicial review of the legality of a public authority's actions. In so doing the Lords recognized the existence of a general expectation that public authorities will exercise their discretionary powers in a fair and just manner and official powers will not be used arbitrarily.⁶⁴ As stated by Baldwin and Horne:

The expectation brings in the substantive case which in turn allows review of decisions or acts that are unreasonable because arbitrary. Arbitrariness here involves departing from a practice or policy that has created expectations and doing so without being able to give adequate justification.⁶⁵

Three months later, *Attorney General of Hong Kong v. Ng Yuen Shiu*⁶⁶ was decided by the Privy Council. The respondent entered

⁶³*Ibid.*, at p. 275.

⁶⁴Keith Davies, *All England Law Reports: Annual Review of Administrative Law* (1984) 1 at p. 5.

⁶⁵Baldwin & Horne, *op. cit.*, footnote 43 at p. 705.

⁶⁶[1983] 2 All E.R. 346.

Hong Kong illegally in 1976, and in time became part owner of a factory which employed several workers. In 1980, the government announced a change in its immigration policy, namely, that illegal immigrants would be interviewed and although there were no guarantees they would not be removed, each case would be treated on its merits. The day after the announcement, the respondent reported to an immigration officer and, after being interviewed, was detained until a removal order was issued against him. He appealed to the immigration tribunal, which, as it was entitled to do, dismissed his appeal without a hearing. The respondent applied to the Hong Kong Court of Appeal for judicial review seeking an order of prohibition against the execution of the removal order until such time as he had been afforded an opportunity of stating his case before the director.

Of critical importance was the fact that five days after the government had announced its policy change, a senior immigration official provided a group of illegal immigrants with a series of questions and answers, which had been prepared in the office of the Secretary for Security. One of the questions and its answer was:

Q. Will we be given identity cards?

A. Those illegal immigrants from Macau will be treated in accordance with procedures for illegal immigrants from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits.

It was this reassurance, that each case would be considered on its merits, which formed the basis of the respondent's position he should have been given a hearing as he legitimately expected, by reason of the official's representation, a procedure which accorded with natural justice. The Privy Council agreed. Such an expectation, Lord Fraser said, "may be based upon some statement or undertaking by or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."⁶⁷ The statement made in the instant case was held to be sufficient foundation for a legitimate expectation since the doctrine was "capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis."⁶⁸

The decision confirms the principle first eluded to in *Liverpool*; the content of a legitimate expectation can be that representations made or assurances given by a public authority will be honoured. The Privy Council's reasoning was not based on the notion that an individual subject to deportation has an interest sufficient to warrant the protection of natural justice or fairness. Rather, *certiorari* issued on the ground the public authority's representation that certain procedures would be followed, generated a legitimate expectation this would be so.

⁶⁷*Ibid.*, at pp. 350-1.

⁶⁸*Ibid.*, at p. 351.

Good administration and public interest required that expectation be fulfilled.

*Council of Civil Service Unions et al. v. Minister for the Civil Service*⁶⁹, involved the Government Communications Headquarters (GCHQ), the function of which was to ensure the security of military and official communications and to provide the government with intelligence signals. This entailed handling secret information vital to national security. Employees of GCHQ had been permitted to belong to a national trade union since 1947 and many had done so. Since that time there had been a well-established practice of consultation between the government and the trade unions concerning all significant changes in terms and conditions of employment.

However in 1984, the government announced that employees of GCHQ would no longer be permitted to belong to trade unions but only to departmental staff associations approved by the Director of GCHQ. Prior to the announcement, there had been no consultation with either the trade unions or the employees. The applicants sought judicial review on the grounds the Minister was under a duty to act fairly by consulting those concerned before making the decision.

The House of Lords held that the applicants had no legal right

⁶⁹[1985] A.C. 374.

to be consulted. Nevertheless, in keeping with the principle established in *O'Reilly v. Mackman* and reaffirmed in *Shiu*, the Lords interpreted the doctrine as encompassing expectations which go beyond enforceable legal rights. The fact there was an established practice of consultation with trade unions and employees concerning terms and conditions of employment created a legitimate expectation such a procedure would continue to be followed. Lord Fraser stated:

Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue... Legitimate expectations such as are now under consideration will always relate to a benefit or privilege to which the claimant has no right in private law, and it may even be to one which conflicts with his private law rights.⁷⁰

Lord Diplock expressed the legitimate expectation doctrine in the following terms:

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.⁷¹

⁷⁰*Ibid.*, at p. 401.

⁷¹*Ibid.*, at p. 408.

On the facts however, the Lords were satisfied there was a national security interest which justified the Minister's decision being made without following the established practice of consultation.

Fairness may be required therefore because a public authority has conducted itself in a manner which creates a legitimate expectation fairness will be applied. *GCHQ* demonstrates a legitimate expectation may arise, not only by way of an express undertaking or assurance, but also on the basis of past practice or conduct which creates an expectation it will continue to be followed. However, by establishing the existence of an overriding public interest, a public body may be able to justify its refusal to fulfil the expectation in question. Once again, this is in keeping with the dicta of Lord Denning in *Liverpool*, that an undertaking may be breached only after serious consideration and hearing what the other party has to say and then, only if the overriding public interest requires it.

Since the doctrine was introduced and applied by Lord Denning in *Schmidt and Breen*, acknowledged by the House of Lords in *O'Reilly v. Mackman*, and applied by the Privy Council in *Shiu*, there has been a substantial increase in the number of English cases with claims based on a legitimate expectation.⁷² Meanwhile,

⁷²Robert E. Riggs, "Legitimate Expectations and Procedural Fairness in English Law" (1986) 36 *American J. of Comp. Law* 395 at pp. 399-404.

the doctrine was evolving in other jurisdictions.

(ii) Australia

One of the most prolific sources of legitimate expectation cases has been Australia, although the doctrine had a precarious introduction with the High Court's decision in *Salemi v. Minister of Immigration and Ethnic Affairs*,⁷³ decided six years prior to *Shiu*. Salemi had entered the country on a temporary visa and overstayed it. The government made a public declaration and advertisement of a general amnesty for all prohibited immigrants, provided they met normal standards of good health, did not have serious criminal records and took up the offer by a certain date. The offer contained the following words, "This is a genuine offer of amnesty to give security to the many people currently living under a cloud in this country. They have nothing to fear by coming forward. It is an open and honest invitation to people to legalise their status in Australia."

The plaintiff completed an amnesty application in the form provided by the Department of Immigration and Ethnic Affairs, seeking resident status, and pending determination of his application, a temporary entry permit authorising him to remain in Australia for three months. The Minister refused his request and ordered him deported on the grounds that since Mr. Salemi "did not come to Australia on the most recent occasion as a visitor but

⁷³(1977) 137 C.L.R. 396.

entered as a temporary resident with authority to engage in specified employment, he does not come within the Amnesty eligibility." The fact there were exceptions to the amnesty had never been made clear by the government in any of its publications. The plaintiff argued he had been denied natural justice on the basis the amnesty created a legitimate expectation of being permitted to remain in Australia.

The six member bench split equally on the question of whether the Minister was bound to comply with the rules of natural justice in exercising his discretion to order deportation, with a statutory majority finding he was not. Of the three dissenting judges, only Stephen J. relied on the legitimate expectation doctrine in upholding the plaintiff's right to be advised of the grounds upon which he was excluded from the terms of the amnesty and to make representations in reply. Mr. Salemi's expectation arose from an express assurance given by the Minister as to the particular manner in which he intended to exercise his statutory discretionary powers, and in accordance with the Court of Appeal's decision in *Liverpool*, that assurance could only be departed from after the plaintiff had been afforded an opportunity to make representations.

Barwick, C.J. was highly critical of the doctrine and interpreted the word "legitimate" as meaning "entitlement or recognition by law".

. . . no matter how far the phrase [legitimate expectation] may have been intended to reach, at its

centre is the concept of legality, that is to say, it is a lawful expectation which is in mind So understood, the expression probably adds little, if anything, to the concept of a right.⁷⁴

That reasoning obscures the underlying rationale of the doctrine. The legitimacy of an expectation is not dependent upon its legality. On the contrary, it is the expectation's legitimacy which gives it legality, or in other words, renders it enforceable at law. Barwick, C.J.'s strict construction of the word "legitimate" was subsequently disapproved by the House of Lords in *Shiu* in the following terms:

With great respect to the learned Chief Justice, their Lordships consider that the word "legitimate" in that expression falls to be read as meaning "reasonable". Accordingly "legitimate expectations" in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. . . .⁷⁵

A majority of the High Court of Australia also rejected the Chief Justice's approach in *Heatley v. Tasmanian Racing and Gaming Commission*.⁷⁶ The applicant was served with a "warning-off notice" by the Commission pursuant to subsection 39(3) of the Racing and Gaming Act, 1952 (Tas.) prohibiting him from entering any racecourse in Tasmania until such time as the notice was rescinded. He had not been notified of the Commission's intent to

⁷⁴*Ibid.*, at p. 404.

⁷⁵*Supra*, footnote 66, at p. 350, per Lord Fraser.

⁷⁶(1977) 137 CLR 487. Although in *Heatley*, the Chief Justice maintained the position he took in *Salemi*.

serve him with the notice and had not been given an opportunity to make representations, nor did the notice specify the reasons for its issue.

Heatley applied for an order of *certiorari* on the ground the Commission had failed to comply with the rules of natural justice. The High Court held the Commission was bound to observe those rules in the exercise of its power to issue warning-off notices, where the effect of such notice was to deprive the individual of a legitimate expectation of being allowed to enter race courses on payment of the entry fee.

Delivering the majority judgement, Aickin J. described the concept of legitimate expectation as a "reasonable expectation" of some entitlement, for example an expectation that some form of right or liberty will be available, or will not be taken away without an opportunity for the individual affected to make representations to the decision maker. Based on the nature of the premises, and the fact members of the public were invited to attend, they had a legitimate expectation, that upon payment of the stated charge, they would be granted the right to be admitted to the racecourse.⁷⁷ The rules of natural justice applied on the grounds that the issuing of a warning-off notice defeated the applicant's legitimate expectation as a member of the public that he would be admitted to racecourses on payment of the required fee.

⁷⁷*Ibid.*, at pp. 507-8.

Stephen J. concurred and Mason J. specifically agreed on the point of legitimate expectation.

The decision in *Heatley* served to extend the application of the doctrine in Australian administrative law well beyond the limitations imposed in *Salemi*. Natural justice applied, not only when the complainant could demonstrate a right or privilege, but also when there existed a legitimate expectation of entitlement to a benefit, such as "the customary permission to go onto racecourses upon payment of a stated fee to the racecourse owner".⁷⁸ It has been suggested however, that legitimate expectation was not the only ground for the decision in *Heatley* and the result may be "explained on the basis that powers affecting a person's right to earn a livelihood must be exercised in accordance with the rules of natural justice."⁷⁹ As in *Hook*, the doctrine was employed where the nature of the interest involved warranted the application of a fairness requirement.

F.A.I. Insurances Ltd. v. Winneke,⁸⁰ applied legitimate

⁷⁸*Ibid.*, at p. 509. See also *Forbes v. New South Wales Trotting Club Ltd* (1979) 143 C.L.R. 242 where the High Court applied *Heatley* to a similar fact situation to uphold the appellant's position he could not be validly warned off racecourses without first being afforded an opportunity to be heard on the basis of his legitimate expectation of admission as a member of the public. The case is distinguishable from *Heatley* in that the warning-off notice was issued pursuant to private club rules, rather than statutory power, and was not issued by a public authority but rather by the racecourse proprietor itself.

⁷⁹Ken Mackie, "Expectation and Natural Justice" (1985) 59 Australian Law Journal 33 at p. 38.

⁸⁰(1982) 56 A.L.J.R. 388.

expectation to a licence renewal situation. In accordance with regulations made under the Workers Compensation Act 1958 (Vic), companies wanting to carry on insurance business against workers' compensation liability were prohibited from doing so unless they had previously secured approval of the Governor-in-Council. The approval operated for a one year period and was renewable for a further one year period at the discretion of the Governor-in-Council depending on the financial position of the applicant.

The appellant insurance company had carried on a workers' compensation insurance business for twenty years. In late 1980, it applied for renewal of its annual approval, requesting notice of any matter which might impede it and an opportunity to make representations. The Governor-in-Council refused the application without granting the appellant's request. The company sought a declaration the decision was void on the ground the Governor-in-Council had breached the rules of natural justice.

Six of the seven High Court justices held the appellant had a legitimate expectation its approval would be renewed and supported the proposition that licence renewal cases should be treated on the same footing as revocation cases. The majority concluded it would be unfair to deny that expectation without providing an opportunity to make submissions.⁸¹ Gibbs C.J. was particularly influenced by the economic hardship the appellant would suffer in the face of an

⁸¹*Ibid.*, at p. 390.

adverse decision:

In these circumstances, a company which becomes an approved insurer has a legitimate expectation that its approval will be renewed unless some good reason exists for refusing to renew it. It would not be fair to deprive a company of the ability to carry on its business without revealing the reason for doing so, and, . . . without allowing the company a full and fair opportunity of placing before the authority making the decision its case . . .⁸²

Mason J. concluded an applicant for renewal of a licence generally has a legitimate expectation it will be renewed. In the instant case, "the appellant had a legitimate expectation that its approval would be renewed or at the very least that it would not be refused without its having an opportunity of meeting objections raised against it."⁸³ Wilson J. was also prepared to find a requirement for natural justice on the basis of a legitimate expectation in the case of a licence renewal, although he was not prepared to do so for cases of an initial application.⁸⁴

F.A.I. is another example of the doctrine being employed in circumstances where, as in *Hook and Heatley*, the nature of the interest involved, the right to earn a livelihood, was one which courts have consistently been inclined to recognize as calling for fair procedure prior to any interference by a public authority. Nevertheless, the case represents an important application of

⁸²*Ibid.*

⁸³*Ibid.*, at p. 399.

⁸⁴*Ibid.*, at p. 399.

legitimate expectation insofar as it was employed to impose a fairness requirement on the decision-making process of the Governor-in-Council, a function which is not always viewed as attracting natural justice or fairness.

Although legitimate expectation has been successfully applied in Australia in certain contexts, the following group of cases demonstrates the apparent reluctance of the judiciary to find a legitimate expectation in an alien whose temporary entry permit is revoked or not renewed.⁸⁵ Generally, this group of individuals is not regarded as having a legitimate expectation of being allowed to remain in the country and the Minister, in exercising the broad discretionary power conferred by statute, is not obliged to comply with the rules of natural justice in revoking or refusing to renew temporary entry permits. One explanation for this is

. . . a general recognition by the courts that decisions pertaining to immigration have significant political content. The Government must have a high degree of control over who is permitted to enter and stay in Australia. There is some reluctance to in any way "fetter" the absolute discretions entrusted to the Minister.⁸⁶

⁸⁵Other immigration cases not discussed in this section include *Simsek v. Minister for Immigration and Ethnic Affairs* (1982) 40 A.L.R. 61; *Barbaro v. Minister for Immigration and Ethnic Affairs* (1982) 46 A.L.R. 123; *Arslan v. Durrell* (1983) 48 A.L.R. 577; *Kioa v. Minister for Immigration and Ethnic Affairs* (1985), 62 A.L.R. 559.

⁸⁶Graeme Johnson, "Natural Justice and Legitimate Expectations in Australia" (1985-86) 15 Federal L.R. 39 at p. 55. See also D.C. Hodgson, "The Current Status of Legitimate Expectation in Administrative Law" (1984) 14 Melb. U.L.R. 686 at p. 711 wherein the author maintains the reason for the disparity of treatment in immigration matters is due to "a judicial conviction based on public policy grounds that the treatment of aliens falls into a special category notwithstanding the obvious parallels that exist between the revocation and non-renewal of temporary entry permits and licences."

*R. v. Minister for Immigration and Ethnic Affairs; ex parte Ratu*⁸⁷ involved two Fijian nationals who entered Australia pursuant to a one-month temporary entry permit after having signed undertakings they would not engage in employment. They breached the undertakings and upon expiry of their permits, became prohibited immigrants. Deportation orders were issued against them. The applicants commenced proceedings to have the deportation order quashed on the ground the Minister had denied them natural justice by failing to reveal the contents of certain departmental reports allegedly containing the reasons for deportation.

The Court, relying on *Salemi*, dismissed the applications on the grounds the Minister's power to order deportation under the Act did not require the observance of the rules of natural justice, and in any event, there had been no denial of natural justice on the facts. The deportation orders "did not deprive the applicants of any right or interest or of the legitimate expectation of a benefit in such circumstances as to impose upon the Minister an obligation to give advance notice of his reasons for making the orders."⁸⁸

Nor was the doctrine successfully invoked in *Minister for Immigration and Ethnic Affairs v. Gaillard*.⁸⁹ The applicant was an alien who had been granted a temporary entry permit to enter

⁸⁷(1977) 137 C.L.R. 461.

⁸⁸*Ibid.*, at pp. 476-7.

⁸⁹(1984) 49 A.L.R. 277.

Australia to work as a domestic on the basis of an undertaking she would leave the country when her employment ended. She was granted further permits, and during the last one, married an Australian citizen and left her employment. The Minister cancelled the permit and ordered her deported, alleging the marriage was contrived to enable the applicant to remain in Australia.

The Federal Court unanimously held the applicant could not have had any reasonable or legitimate expectation of being permitted to remain in Australia.

In my opinion, the applicant, having been given a temporary entry permit which was subject to cancellation by the Minister in his absolute discretion at any time, having obtained entry into Australia on the faith of the acknowledgement which she signed, and having herself brought to an end her employment which was a "strict condition" of the approval of her entry into and stay in Australia, does not have a legitimate expectation, of being allowed to remain in Australia, of which it would not be fair to deprive her without hearing what she has to say. The Minister was not bound to comply with the rules of natural justice in making his decision to cancel the applicant's temporary entry permit.⁹⁰

In *Haj-Ismail v. Minister for Immigration and Ethnic Affairs*,⁹¹ the first applicant entered Australia in 1972 pursuant to a temporary entry permit. He continued to reside in the country on the authority of further permits and in 1975 was approved as a private overseas student for a Doctorate of Philosophy. In 1980, he and his wife made application for resident status. The Minister

⁹⁰*Ibid.*, at pp. 282-3.

⁹¹(1982) 40 A.L.R. 341.

of Immigration responded by letter stating that their applications would be granted provided they were able to meet normal immigration health and character requirements.

Thereafter, the Minister was advised of security files on the first applicant, and of a report prepared by the Australian Federal Police which contained a number of highly damaging allegations. The applicants were not told about the report nor provided with an opportunity to answer the allegations contained therein. On the basis of these revelations, the Minister approved a recommendation their applications for resident status be refused and signed deportation orders against them. The applicants sought judicial review on the grounds the Minister's letter had given them a legitimate expectation they would be granted resident status, which entitled them to an opportunity to be heard. In the alternative, the first applicant argued he possessed a legitimate expectation of being allowed to remain in Australia until his studies were completed.

The Federal Court agreed a private overseas student should not ordinarily be refused a renewal of his entry permit during his course of studies without observance of the rules of natural justice. Under the circumstances however, the applicant could not be considered to have a legitimate expectation of being permitted to remain in order to complete his studies since five years of research towards a doctorate had failed to produce any positive

results. Accordingly, there was no obligation on the Minister to observe the rules of natural justice before refusing resident status or ordering deportation.

In contrast, individuals subject to disciplinary proceedings are more readily viewed as having a legitimate expectation of fair procedure. The doctrine was so applied by the full Supreme Court of Victoria in *O'Rourke v. Miller*.⁹² The respondent had been appointed a constable to the police force subject to a two year probation period. A number of department assessments had reported his service, conduct and efficiency as exemplary and he had passed a requisite probationary examination. When a complaint was filed against him alleging drunkenness, intimidation and the use of obscene language, the Chief Commissioner of Police sought to terminate his appointment. The respondent applied for judicial review on the grounds he had a legitimate expectation his appointment would be confirmed and the Commissioner had breached the rules of natural justice by failing to provide him with a hearing.

Murphy J. examined the case law on legitimate expectation which, in his view, supported the proposition that "if something akin to past misconduct lies at the root of a proposed decision not to renew or to terminate a licence previously granted, . . . or an

⁹²[1984] V.R. 277. And see also *Dixon v. Commonwealth* (1981), 3 A.L.J. 289.

appointment made, . . . it is as a general rule the legitimate (reasonable) expectation of the person who is to be affected by the decision that [it] shall not be taken away without giving him a reasonable opportunity to be heard."⁹³ Having a legitimate expectation of some particular benefit therefore was only seen as affording protection to the manner in which the impugned decision was reached. The right arising from the legitimate expectation was the right to natural justice rather than the right to the particular benefit itself.

In some instances, the doctrine's application has been rejected on the grounds the representation in question is not express⁹⁴ or is subject to conditions which have not been met.⁹⁵ Under those circumstances, the courts will not be inclined to impose an obligation on the public authority to act in a certain manner in exercising its discretionary power, particularly if that power is otherwise unfettered.⁹⁶

Such an express undertaking was the underlying reason for the application of the doctrine in *Cole v. Cunningham*.⁹⁷ Mr. Cole was an employee of the Public Service. Allegations of misconduct arose

⁹³*Ibid.*, at p. 291-2.

⁹⁴*Nicol v. Attorney General of Victoria*, [1982] V.R. 353.

⁹⁵*Nashua Australia Property Ltd. v. Channon* (1981), 26 A.L.R. 215.

⁹⁶*Mackie, op. cit.*, footnote 79 at p. 42.

⁹⁷(1983) 49 A.L.R. 123.

and towards the end of his employment he was advised if he resigned, his resignation would be treated as a normal one and he would leave with a clean record. He subsequently applied for reappointment. In refusing the application, the Public Service Board took into account the alleged incidents of misconduct, although details of the allegations were not revealed to Mr. Cole.

The Court, although not bound by the Privy Council decision's in *Shiu*, held it should be given substantial weight as it was in keeping with the judicial trend to accord natural justice to an individual's legitimate expectation. Here, the express representation given by his employer that "no finding adverse to him would be made in respect of the allegations of misconduct",⁹⁸ was sufficient to give rise to a legitimate expectation on Mr. Cole's part, that if the department intended to later change its position, he would be afforded an opportunity of answering the allegations against him.

(iii) New Zealand

The doctrine has been considered by the New Zealand High Court in *Jim Harris Ltd. v. Minister of Energy*,⁹⁹ a case similar on its facts in certain respects to the *F.A.I.* case. The applicant company had successfully tendered for a period of twenty three years for contracts to transport coal and had expended considerable

⁹⁸*Ibid.*, at p. 133.

⁹⁹[1980] 2 N.Z.L.R. 559.

amounts during that period in acquiring a plant and equipment. After its first unsuccessful tender the company sought judicial review on the grounds the Minister breached an implied agreement not to tender to an individual, who at the time, did not possess the necessary transport licence and specialized plant and equipment.

Although relief was denied on other grounds, the Court, relying on *Schmidt, Liverpool, Hook and Heatley*, upheld the applicant's submission it had a legitimate expectation concerning the manner in which the contract would be awarded.

I am satisfied. . . the decision has affected its right or privilege or eligibility to receive a benefit, in the sense accepted by the cases I have cited because it resulted in the frustration of a settled or legitimate expectation about the way the contract was to be awarded.¹⁰⁰

In *Smitty's Industries Ltd. v. Attorney-General*,¹⁰¹ the applicant operated a business pursuant to a licence. During the currency of the licence the National Roads Board promulgated a by-law which required the applicant to obtain an additional licence from it in order to continue his business. The applicant applied but was refused without reasons or an opportunity to make representations. The court held the applicant had a legitimate expectation its application for the new licence would be granted on

¹⁰⁰*Ibid.*, at p. 297.

¹⁰¹[1980] 1 N.Z.L.R. 355 (S.C.).

the grounds it was

. . . carrying on a licensed business which it simply sought to continue to carry on pursuant to the additional licensing requirement imposed upon it by this new bylaw. The provision referred to, it will be noted, provided for an annual fee and a grantee would accordingly assume that unless circumstances changed he would be able to renew his licence from year to year by paying the annual fee."¹⁰²

A more restrictive approach was taken by the court a year later in *Paterson v. Dunedin City Council*.¹⁰³ The respondent filled a vacancy of an elected position on a hospital board in accordance with statutory provisions, but contrary to the established practice of appointing the highest ranking unsuccessful candidate of the last election. The Chairperson of the Dunedin Labour Local Body Committee applied for judicial review on the grounds the Committee had a legitimate expectation that another individual would be appointed to fill the vacancy on the basis of precedent.

The majority of the New Zealand High Court accepted a legitimate expectation could give rise to judicial review, but was unwilling to imply a duty of fairness in light of the broad discretion conferred upon the council by virtue of the statute. Hardie Boys J. however, was critical of the doctrine. He rejected the argument that council was required to observe the rules of natural justice in filling a vacancy on the basis of a legitimate

¹⁰²*Ibid.*, at p. 369.

¹⁰³[1981] 2 N.Z.L.R. 619.

expectation or any other basis. Even assuming the applicant did have a legitimate expectation, his Honour was not prepared to extend relief to an individual who was not directly and personally affected by the decision.

The New Zealand Court of Appeal subsequently adopted and approved the doctrine as a basis for judicial review in *Webster v. Auckland Harbour Board*.¹⁰⁴ The applicant's family had held a waterfront lease for fifty years and his mother had built a house and other improvements on the land. The rent was \$1.00 per year, terminable on one months notice. The Harbour Board, in accordance with a policy decision to raise more revenues from its land holdings, increased the rent to \$640.00 per year. After a dispute with the applicant, the Harbour Board terminated the lease giving one month's notice.

The trial judge was of the view the matter was one of a contractual power and did not involve a statutory power of decision. The Court of Appeal disagreed holding that all acts of statutory bodies derive their authority either directly or indirectly from statute, and although the Harbour Board was exercising contractual powers, it still had public law duties.

Other principles which may be relevant are those of natural justice or fairness. It is certainly arguable (we need say no more for present purposes) that a person who has held a valuable license for years is entitled to an adequate "hearing" (not necessarily an oral hearing)

¹⁰⁴[1983] N.Z.L.R. 646.

and fair consideration of his position before the license is terminated or, we think, before it is decided that a new license will be offered to him only on much more onerous terms. He has a legitimate expectation of reasonable treatment.¹⁰⁵

*Daganayasi v. Minister of Immigration*¹⁰⁶ is an important application of the doctrine to the case of an overstayed alien. The appellant had been convicted of remaining in New Zealand after her temporary entry permit had expired. The automatic consequence of such conviction was a court deportation order. The appellant appealed to the Minister of Immigration against her deportation under section 20A of the Immigration Act which conferred on the Minister a discretion to order that an offender not be deported if it would be unduly harsh or unjust because of "exceptional circumstances of a humanitarian nature". The appellant maintained she satisfied the statutory requirement as one of her New Zealand-born children had a rare metabolic disease and had to remain in the country in order to receive proper medical treatment.

When the Minister refused to make the order, the appellant sought judicial review arguing the substance of a prejudicial report of the medical referee appointed by the Immigration Division should have been disclosed to her prior to the Minister making his decision. The Court of Appeal agreed that, given the unique circumstances of the case, the appellant had a legitimate

¹⁰⁵*Ibid.*, at pp. 650-1.

¹⁰⁶[1980] 2 N.Z.L.R. 130.

expectation the contents of the report would be made known to her and she would be permitted to make representations.¹⁰⁷

The decision demonstrates the inherent flexibility of legitimate expectation and how its applicability is largely dependant upon the particular facts of a given case. While it has not enjoyed a large measure of success in immigration matters generally, *Daganayasi* is an example of the doctrine's application to impose a duty to observe natural justice and fairness even where the relevant statute does not.¹⁰⁸ That judicial approach bodes well for the future development of the doctrine.

If the attention of the court is directed solely towards the specific wording of legislation and its effect, the scope for the doctrine of legitimate expectation is greatly reduced. On this view an individual expectation is irrelevant in determining whether natural justice attaches to a general exercise of the power in question. On the other hand, if the individual case is considered it becomes easier to give weight to expectations. To examine a statutory power closely is to concentrate on rights or interests which are common to all. It is what Brennan J contemplated in *FAI Insurances* and what Barwick CJ did in both *Salemi* and *Heatley*. Such an attempt to ascertain legislative intention by exegesis of the statutory text is necessarily an artificial process. It was never provided by statute that natural justice would be attracted only where "rights" were affected. That was a convenient judicial rule to limit review. While such a yardstick promotes certainty it is submitted that it leans too heavily in favour of public interests at the expense of "justice".¹⁰⁹

¹⁰⁷*Ibid.*, at p. 145, per Cooke J.

¹⁰⁸Pamela Tate, "The Coherence of Legitimate Expectations and the Foundations of Natural Justice" (1988) 14 Monash U.L.R. 15 at p. 61.

¹⁰⁹Johnson, *op. cit.*, footnote 86 at p. 70.

(iv) Canada

Early Canadian jurisprudence, while not lacking in classic legitimate expectation fact patterns, approached the issue as one of bad faith, unreasonableness, estoppel or simply on the basis of fairness.¹¹⁰ Although the doctrine has emerged, it has not always enjoyed the progressive interpretation displayed in other jurisdictions. Nevertheless, there is evidence to substantiate a claim legitimate expectation is an established principle of Canadian administrative law and there exists at least some judicial inclination to accord it a liberal and generous application.

In *Re Hardayal and Minister of Manpower and Immigration*,¹¹¹ the applicant had been granted a permit to remain in Canada for one year and to take employment for that period. Prior to the expiry of the permit, he received notice advising him of its cancellation. The notice did not contain reasons for the cancellation, although the letter which accompanied it implied the permit had originally been granted on the basis of a sponsorship application made by the applicant's wife and cancellation was due to the fact the parties

¹¹⁰e.g., *Re Multi Malls v. Minister of Transportation and Communication* (1976), 14 O.R. (2d) 49 where the Ontario Court of Appeal expressly characterized their approach as estoppel; *Canadian Occidental Petroleum v. Corporation of the District of North Vancouver* (1983), 148 D.L.R. (2d) 255 where Mr. Justice Locke, while approving the result in *Liverpool* commented the principle expressed therein came precariously close to the "slippery doctrine of estoppel". (The primary ground on which relief was granted in *Canadian Occidental* was bad faith and no mention was made of legitimate expectation.); *McIntyre Ranching Co. Ltd. v. Cardston*, [1984] 1 W.W.R. 36 where relief was granted on grounds of bad faith; *Friends of the Public Gardens v. Halifax Planning Advisory Committee* (1985), 13 Admin. L.R. 247 where relief was granted on the basis of procedural fairness.

¹¹¹(1976), 67 D.L.R. (3d) 738.

were no longer residing together. Mr. Hardayal was not given an opportunity to make representations.

The majority of the Federal Court of Appeal relied on Lord Denning's decision in *Schmidt* to find the applicant had a legitimate expectation of being allowed to remain in Canada for the duration of his permit; an expectation which could not be frustrated without the benefit of a hearing.

. . . the legitimate expectation of the applicant in this case was that he could stay in Canada for a year and accept employment. From this flows the expectation that he could, for example, acquire accommodation, household effects and other amenities of life for his period of residence in this country. A cancellation which will deprive him of these expectations without permitting him to make representations in respect of the proposed cancellation . . . seems to me to lack the element of fairness. It follows then that the failure to give the applicant in this case a reasonable opportunity to make representations constitutes a denial of a principle of natural justice. . .¹¹²

Relying on *Liverpool and Shiu*, the Federal Court again invoked the doctrine in *Gaw v. Commissioner of Corrections*¹¹³ to hold a public authority bound by its undertaking to follow a certain procedure. The Commissioner of Corrections had assured an employee a preliminary inquiry respecting his alleged misconduct was only for the purpose of determining whether the matter should

¹¹²*Ibid.*, at 743, per Urie, J.; overturned by Supreme Court of Canada in (1977), 75 D.L.R. (3d) 465 on grounds the Minister's power to grant, extend or cancel temporary permits was purely administrative. Accordingly, there was no obligation to provide a hearing before cancellation and pursuant to section 28 of the *Federal Court Act* the Federal Court of Appeal had no jurisdiction to hear an application to review the Minister's decision. No reference was made to the legitimate expectation doctrine.

¹¹³(1986), 19 Admin. L.R. 137.

be investigated further, and, if necessary, a formal hearing with full procedural protection would follow. The preliminary inquiry resulted in a recommendation for a formal hearing, but the Commissioner proceeded to dispose of the matter without one.

Dube, J. found the jurisprudence clearly established that when a public authority has promised to follow a certain procedure, and an interested person relies and acts upon it, neither good administration nor fairness are justly served if the authority is permitted to disregard its promise. "One does not change the rules in the middle of the game, especially where the basic rights of a person are at play."¹¹⁴ The respondent, having clearly committed himself to deal with the grave allegations against the applicant by way of a formal hearing, could not later resile from that undertaking on the basis the matter should be expedited and quickly brought to a conclusion.¹¹⁵

In *Bendahmane v. Minister of Employment & Immigration*,¹¹⁶ an exclusion order had been issued against the respondent on the ground he was not a genuine visitor. Thereafter, he inexplicably received an official letter advising him he might be eligible for

¹¹⁴*Ibid.*, at p. 140.

¹¹⁵See also *Pulp, Paper and Woodworkers of Canada Local 8 v. Canada (Minister of Agriculture)*, [1992] 1 F.C. 372 (T.D.) wherein Martin, J. granted relief to the union on the grounds the Department of Agriculture's promise to consult with Health and Welfare Canada prior to registering a pesticide created a legitimate expectation such a procedure would be followed.

¹¹⁶[1989] 3 F.C. 16.

administrative review under the *Refugee Claims Backlog Regulations*.¹¹⁷ When he filed a refugee claim in reliance on that advice, the Minister refused to grant the administrative review. Upon learning the Minister intended to remove him from Canada without giving his claim any further consideration, the respondent sought an order of *certiorari* and *mandamus* on the basis the doctrine of legitimate expectation applied to compel the Minister to act in accordance with his own representation.

The majority of the Federal Court of Appeal held that past practices and assurances given by the Minister, albeit perhaps wrongly, gave rise to a legitimate expectation the appellants' claim for Convention refugee status would be considered. Relying on *Shiu, Hugessen, J.* stated:

The Minister has promised to give consideration to the respondent's claim for refugee status. While such consideration is not specifically provided for in the statute, there is nothing to prohibit it and the Minister has, in fact, considered other claims for refugee status by persons for whom the statutory procedure was not available. For the Minister to consider the respondent's claim would not conflict with his statutory duty.¹¹⁸

Marceau, J. was not prepared to compel the Minister to consider the appellant's claim on the basis of his legitimate expectation. He considered the doctrine could only be applied in a procedural context:

¹¹⁷SOR/86-701, s. 2(c).

¹¹⁸*Supra*, footnote 116 at p. 32.

. . . I do not think any attempt has ever been made to apply this principle of "legitimate expectation" outside a procedural context. It is at the level of procedure then involving the exercise of the discretion conferred on an administrative authority, that the principle can be applied. The problem here is not of that kind: compelling the consideration of a refugee status claim made in a manner inconsistent with the provision of the Act is not a procedural matter. Further, this is not for the Minister the exercise of a pure discretion: the fact that consideration of a refugee status claim made outside the inquiry is not strictly speaking prohibited by the Act - and the fact that the courts sometimes agree to accept this . . . does not mean that the Minister is free to disregard the provisions of section 45.¹¹⁹

The doctrine was discussed in *Rural Dignity of Canada v. Canada Post Corp.*¹²⁰ Canada Post decided to close four rural post offices and to replace them with retail postal outlets. Once the decision had been made, the corporation sent out a form letter to all residents, advising them of the change, the reasons for it, and stating that "representatives will meet with you in the near future to respond to questions and to listen to your suggestions concerning the changes in postal service in your community."

The applicants brought an application for an order of *certiorari* setting aside the decision to close the post offices and an order of *mandamus* compelling the corporation to re-open them. They maintained the corporation's letter had given them a legitimate expectation of being consulted before a decision to close the post offices was made.

¹¹⁹*Ibid.*, at pp. 25-6.

¹²⁰(1991), 7 Admin. L.R. 242 (F.C.T.D.); appeal dismissed (1992), 7 Admin.L.R. (2d) 242 (F.C.A.).

Martin J. reviewed the doctrine citing the Federal Court of Appeal's decision in *Bendahmane*. In his view however, the letters on which the applicants relied to establish their legitimate expectation could not be seen as a promise of consultation, but rather were "an announcement or statement that the postal services to the community would henceforth be provided through a retail postal outlet and that the corporation would respond to any questions and listen to any suggestions the residents might care to raise. . . ."121

The doctrine was first considered by the Supreme Court of Canada in *Old St. Boniface Residents Association Inc. v. The City of Winnipeg and the St. Boniface-St. Vital Community Committee*.¹²² The City approved a proposed land development in Old St. Boniface and adopted the recommendations of the Finance Committee, the Community Committee, the Planning and Community Services Committee and ultimately, City Council, that the land in question be rezoned to permit the erection of two condominium towers. Certain streets were to be closed and sold, together with other city-owned land, to the developer. In the course of reviewing the area plan, the Community Committee indicated to members of the Residents Association that they would be involved in the formation of a new area prior to any redevelopment. However, no consultation took place prior to the City's approval of the

¹²¹*Ibid.*, at p. 258.

¹²²[1990] 3 S.C.R. 1170.

proposed plan.

The Association argued the conduct of the Committee had created a legitimate expectation of consultation. After citing the cases in which the doctrine had been considered, Sopinka J. concluded it was an extension of the rules of natural justice and procedural fairness and, at most, could afford an individual the right to make representations. Since the statutory scheme in place had already afforded the Association the opportunity to take part in the process, there was no basis for requiring further consultation.

The planning and zoning process is an elaborate structure designed to enable all those affected not only to be consulted but to be heard. The appellant availed itself of this process by making representations before the Community Committee. Even if the conduct of this Committee raised expectations on the part of the appellant, I am of the opinion that this would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation.¹²³

The following year, the Supreme Court rendered its decision in *Reference re Canada Pension Plan*.¹²⁴ Under the Canada Assistance Plan, the Federal government concluded agreements with the provinces to share the cost of their expenditures on social assistance and welfare. In 1990, it decided to cut expenditures and limit the growth of payments made to financially stronger provinces under the Plan. This change was embodied in Bill C-69,

¹²³*Ibid.*, at p. 1204.

¹²⁴[1991] 2 S.C.R. 526.

passed as the Government Expenditures Restraint Act.

British Columbia referred two constitutional questions to the Court, one being whether the terms of the Agreement between itself and the federal government, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the Plan,¹²⁵ gave rise to a legitimate expectation the Federal government would not introduce a bill into Parliament to limit its obligation under the Agreement or the Plan without the consent of British Columbia. Sopinka J. rejected that argument:

If the doctrine of legitimate expectations required consent, and not merely consultation, then it would be the source of substantive rights; in this case, a substantive right to veto proposed federal legislation.

There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultation.¹²⁶

Furthermore, the Court was not prepared to apply the legitimate expectation doctrine to the legislative process:

Parliamentary government would be paralysed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts. Furthermore, it is fundamental to our system of

¹²⁵Section 8 of the Plan provided that the agreements with the Provinces would continue in force subject to termination by consent or unilaterally by either party on one years notice.

¹²⁶*Ibid.*, at pp. 557-8.

government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy.¹²⁷

The decision has been criticized on the grounds it went further than necessary in the restrictions it placed on the legitimate expectation doctrine "thereby excluding from its reach at least some situations where there are strong policy reasons in favour of its application."¹²⁸ That disapproval has been echoed by Dyzenhaus:

. . . had Sopinka J. dealt with the doctrine of legitimate expectations by saying it did not give British Columbia the substantive right it sought, that would have been more satisfactory. He would then have left the door open in principle for a proper consideration of the application of the doctrine of legitimate expectations . . .¹²⁹

The judgment inappropriately restricts the parameters of legitimate expectation, particularly by excluding its application to legislative functions and therefore the realm of policy. Contrary to Sopinka J.'s statement, the cases in the next section demonstrate there is both English and Canadian support for the principle that the context in which a legitimate expectation arises

¹²⁷*Ibid.*, at p. 559.

¹²⁸Mullan, *op. cit.*, footnote 20 at p. 274.

¹²⁹David Dyzenhaus, "Developments in Administrative Law: The 1991-92 Term" (1993) 4 *Supreme Court Law Review* 177 at p. 192. The author also points out that it would be difficult to imagine a stronger means of generating a legitimate expectation than the executive will act in a certain way than by legislating that it will. A decision to keep the executive to their promise in these special circumstances, it is argued, is unlikely to open the "floodgates" described by Sopinka, J..

may well extend its parameters beyond procedural fairness.

Nevertheless, the Supreme Court's interpretation has sometimes resulted in a limited application of the doctrine. In *Lidder v. Minister of Employment & Immigration*,¹³⁰ the respondent submitted an undertaking of assistance to sponsor his orphaned nephew who, at the time, was seventeen year old. After doing so, he was advised by an immigration official there was nothing further for him to do. He was not informed a "no objection" certificate was required confirming the provincial child welfare authority approved of his caring for his nephew. By the time he became cognizant of this fact, his nephew had turned eighteen and the certificate could not be obtained. The respondent was then notified by the Minister his nephew's application had been refused.

One issue before the court was whether the doctrine of legitimate expectation could be invoked to prevent the Minister from refusing the nephew's application for landing. Relying on *Canada Assistance Plan*, Marceau, J. concluded the doctrine could not be raised to preclude the exercise of a statutory duty or to confer a status on an individual who clearly did not meet the statutory criteria, such as being under eighteen years of age. In his Lordship's opinion, while a "public authority may be bound by its undertakings as to the procedure it will follow, but in no case can it place itself in conflict with its duty and forego the

¹³⁰[1992] 2 F.C. 621.

requirements of the law."¹³¹ Desjardins J. concluded the doctrine was procedural only and could not create substantive rights, citing *Old St. Boniface* in support.¹³²

It would be premature however, to predict the doctrine's future development in Canada will be impeded by this type of reasoning. As lower courts continue to encounter an increasing number of claims based on legitimate expectation, the results confirm a difference of judicial opinion concerning the scope of the doctrine and the situations in which it can be applied. It would appear to be only a matter of time before the Supreme Court is called upon to reassess the impact of the doctrine, in a context which necessitates thoughtful reflection of its scope and implications.

(v) Conclusion

The legitimate expectation doctrine was introduced into administrative law as a progeny of the duty of fairness. After its conception in *Schmidt*, subsequent cases endeavoured to give the concept meaning and substance. As with the evolution of any contemporary doctrine, it has been an intricate and complex process, beset in its initial phase with a characteristic lack of precision. However, the increasing reliance on legitimate expectation by individuals subject to various forms of government

¹³¹*Ibid.*, at p. 625.

¹³²*Ibid.*, at p. 632.

control has served to eradicate a measure of the uncertainty and two decades of judicial consideration make it possible to extract some principles concerning the doctrine, its application and its potential. A critical analysis of the authorities reveals a fairly coherent and definable concept.

The cases discussed in this section demonstrate three principal sources of legitimate expectation. The first is where the interest in question is, in and of itself, deserving of some form of procedural protection. *Schmidt*, *Breen*, *Hook*, *McInnis*, *O'Reilly v. Mackman*, *FAI Insurance*, *Heatley*, all involved an expectation relating to a particular interest. The essence of the court's inquiry was whether the nature of the interest was such that it could not be denied or taken away, unless the principles of natural justice and fairness had been complied with.

This approach is in keeping with the Privy Council's decision in *Durrayapah v. Fernando*,¹³³ wherein Lord Upjohn set out three matters to be considered in determining whether the exercise of a statutory power is qualified by an implied duty to observe the rules of natural justice:

. . . first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the

¹³³[1967] 2 A.C. 337 at p. 349.

latter entitled to impose upon the other.¹³⁴

It was these three factors on which Stephen J. relied in *Salemi* to uphold the plaintiff's right to natural justice on the basis of his legitimate expectation. If the interest is one that attracts the rules of natural justice or principles of fairness, the result can be achieved either by their application or legitimate expectation. In many cases, the doctrine was perhaps not the sole, or even principal reason for the decision, but rather was employed as a means of fortifying a result which could have been arrived at on the basis of natural justice or fairness alone.

The second principal source of legitimate expectation is an express representation or undertaking given by a public authority that some form of procedural protection will be given. In these cases, the expectation arises solely from the assurances given. In *Shiu* for example, the applicant's right to a hearing generated, not from his status as an alien, but from the government's representation each case would be considered on its merits. The same approach was used in *Gaw* to bind the public authority to its promise of a full hearing. In those cases, the application of the doctrine is relatively straightforward and the courts have demonstrated a willingness to oblige public authorities to make good any undertaking given of fair procedure.

¹³⁴*Ibid.*, at p. 349.

Also straightforward, is the third principal source which is where past conduct or practice of a public authority has served to create a legitimate expectation certain procedures, such as consultation, will be followed prior to any decision being made. This is demonstrated by the *GCHQ* case where, although not having any legal right to consultation, the applicants were recognized as having a legitimate expectation based on past practice that such an agenda would continue to be followed.¹³⁵

Whatever its source, the cases analyzed thus far are clear a legitimate expectation was protected by way of a hearing and the opportunity to make representations prior to a decision being made. Judicial recognition of the expectation did not entitle the applicant to receive the benefit, but merely to receive an unbiased hearing before a decision was rendered. Although a decision-maker was not bound to exercise its discretion in a particular way, it was obliged to comply with the *audi alteram partem* rule, whether the expectation was directed to fair procedure or whether it related to some right or benefit, such as the grant of a licence or permission to enter a racecourse.

Certainly, this is what Lord Denning envisaged in *Schmidt* and

¹³⁵But see *Brinks Canada Limited v. The Canada Council of Teamsters and the Canada Labour Relations Board* (August 9, 1995, A-409-94, F.C.A.), where the Court, relying on the *GCHQ* case, held that for the doctrine to apply, an individual must provide evidence to establish the existence of a "regular practice", which means demonstrating that a procedure has been followed over an extended period of time.

in *Breen* where he said "if he is a man who has some . . . legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him as the case may demand."¹³⁶ And it is, for the most part, the context in which the doctrine has been applied in other jurisdictions as well. In *Salemi*, Stephen J. stated "where the discretionary grant of a license, permit or the like carries with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard."¹³⁷ And in *Reference re Canada Pension Plan*, Sopinka J. was of the view the doctrine was part of the rules of procedural fairness which "can create a right to make representations or to be consulted".¹³⁸

It would be erroneous however to conclude the doctrine must always be so confined. As early as *Liverpool*, there were indications it could apply to situations which entailed something other than procedural fairness. Legitimate expectations which arise from an undertaking or representation a public authority will exercise its discretion in a particular manner, may not be fulfilled by providing the individual affected with a hearing. That is why, in *Liverpool*, Lord Denning would have been prepared to

¹³⁶*Supra*, footnote 46 at p. 191.

¹³⁷*Supra*, footnote 73 at p. 439.

¹³⁸*Supra*, footnote 124 at pp. 557-8.

set the decision aside even if a hearing had been given, in light of the authority's blatant breach of its undertaking.

This is consistent with the notion there exists a general legitimate expectation a public authority will exercise the discretionary powers bestowed upon it by statute in a fair and impartial manner. Where a representation or undertaking has aroused a legitimate expectation, then in general, it will be an abuse of discretion not to fulfil it. To allow undertakings to be flagrantly broken not only undermines respect for public bodies, it endorses decisions or acts which are unreasonable because of the arbitrary fashion in which they are made.¹³⁹

This premise is most aptly demonstrated by the cases discussed in the following section which reveal a fourth principal source of legitimate expectation, where a public body has adopted a policy which it then refuses to apply. Procedural justice is of little value in protecting an expectation of this nature. The cases examined in the following section demonstrate that where a legitimate expectation arises in this context, the public authority may be required to comply with its policy, provided there is no overriding public interest to warrant otherwise.

These decisions illustrate the inherent flexibility of the doctrine generated by its dual origins in estoppel and fairness.

¹³⁹Baldwin and Horne, *op. cit.*, footnote 43, at p. 705.

A legitimate expectation a public authority will exercise its discretionary power in accordance with stated criteria, has the capacity of attracting fairness. The result is to require the authority to provide a justifiable explanation for the inconsistent application of its own policy, thereby holding it accountable for its change of mind. In the absence of an explanation, it may be compelled to adhere to its previous policy. In this context, the doctrine is capable of including expectations beyond that of fair procedure or natural justice.

To simply describe legitimate expectation as an undefined aspect of the duty of fairness is inadequate and avoids its true nature. The normal situations in which the duty of fairness will give rise to the *audi alteram partem* rule do not extend to those with high policy content. It is a mark of legitimate expectation that it is capable of spanning the entire continuum of administrative action. It is in fact the two essential elements of estoppel - representation and reliance which in part give "legitimate expectation" this breadth. The reliance in such circumstances being the state of mind induced by the representation.¹⁴⁰

V. LEGITIMATE EXPECTATION AND POLICY

Administrative tribunals frequently develop a coherent set of guidelines to assist in the exercise of their discretionary powers. The purpose of this section is to examine the potential impact of the legitimate expectation doctrine on the formulation and application of "administrative guidance".¹⁴¹ The meaning of the term "policy" in general, as well as in the context of legitimate

¹⁴⁰Raymond Young, "Legitimate Expectations - Judicial Review of Administrative Policy Action" (1986) 44 Advocate 803 at p. 813.

¹⁴¹Alistair R. Mowbray, "Administrative Guidance and Judicial Review" [1985] P.L. 558.

expectation, will be discussed and the relevant caselaw analyzed in order to demonstrate how the doctrine has evolved as a potential means of bestowing administrative policy statements with legal consequence. It will be concluded that the capacity of public authorities to develop policy freely will be accorded wide judicial deference. However, the liberty to make and change it will be subject to the qualification that, in certain circumstances, the refusal to adhere to policy, means a public body has exercised its discretion in an arbitrary and therefore unlawful manner.

Discretionary power and policy-making "often travel together".¹⁴² Policies allow a public body to develop guidelines which bridge the gap between a general discretionary statutory power and its specific application to a particular case. The term "policy" can include any criteria an administrative body applies in the exercise of its statutory powers. Some authors distinguish policy from terms such as "rules" and "standards"¹⁴³ and others view it as generally any "administrative guidance" issued by an authority as to its policies and procedures.¹⁴⁴ And it can take

¹⁴²D.J. Galligan, "The Nature and Function of Policies within Discretionary Power" [1976] P.L. 332 at p. 333.

¹⁴³Peter Bayne, "The Exercise of Discretion According to Policy Guidelines" (1993) 67 Australian Law Journal 212 at p. 218; Jeffrey Jowell, "The Legal Control of Administrative Discretion" [1973] P.L. 178 at pp. 201 and 203; and see also Henry Molot, "Self Created Rule of Policy" (1972) 18 McGill L.J. 310, footnote 100, wherein the author states there is a "semantic trap that lies in wait for those that are unaware of the variety of expressions used synonymously with "regulation", on the one hand, and "policy", on the other. Already noted are rules and guidelines that may serve to describe the policies of a tribunal; and by-laws, rules and regulations can also interchange with one another."

¹⁴⁴Mowbray, *op. cit.*, footnote 139.

a variety of forms:

. . . in formulating and breathing life into its policies a tribunal is exercising but a single facet, albeit a most important one, of the discretionary power conferred on it. As has already been observed, there is available a variety of modalities or instrumentalities by which a policy may be expressed, but all have this in common. Whether the tribunal is acting by means of regulation, the less formal rule or guideline, advisory opinion, or adjudicative order or decision, it is merely selecting a vehicle for indulging in policy-making or planning through the exercise of discretion.¹⁴⁵

However it is defined and whatever form it takes, there is judicial recognition that the consistent exercise of discretionary administrative power inevitably leads to the formulation of some general policy relating to the exercise of that power, especially where there are numerous decision-makers of co-ordinate standing.¹⁴⁶ The content of the policy must be within the scope of the powers bestowed by the enabling legislation and the authority may apply it only after considering the merits of each case before it. A concise statement of these principles was made by Bankes L.J. in *R. v. Port of London Authority, ex. p. Kynoch*:¹⁴⁷

There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case . . . if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a

¹⁴⁵Molot, *op. cit.*, footnote 141 at p. 341.

¹⁴⁶Bayne, *op. cit.*, footnote 141.

¹⁴⁷[1919] 1 K.B. 176.

determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.¹⁴⁸

When a tribunal refuses to entertain a request for waiver of its policy, it loses sight of the underlying purpose of that policy as being the facilitation of efficient and consistent decision-making. Policy cannot be applied as if it were some extra-statutory criteria. A public authority which errs in that direction fails to exercise the discretion given it by statute.

There are on the other hand, situations where a public authority refuses to apply a policy already in existence and instead attempts to apply different or additional criteria. An applicant seeking judicial review in these cases takes the position the original policy should be applied and the public authority precluded from resiling from its previously stated position. The authority maintains its right to an unfettered exercise of its discretionary power.

The decision of the English Court of Appeal in *R. v. Secretary of State for the Home Department, ex p. Asif Khan*¹⁴⁹ represents a turning point in the ability of individuals to employ the legitimate expectation doctrine to establish a legal presumption a

¹⁴⁸*Ibid.*, at p. 184.

¹⁴⁹[1985] 1 All E.R. 40.

public authority will comply with its own policy statements. That decision, and the others discussed in this section, centre on whether, and in what circumstances, an individual can compel an authority to observe its own administrative policy. The term policy here is used in the sense referred to by Mowbray; that is, "administrative guidance" in the form of statements outlining the criteria or factors the public authority will take into account in exercising its discretionary powers.

In *Khan* the applicant was a citizen of Pakistan with indefinite leave to remain in England. He and his wife were unable to have children and wished to adopt his brother's child who lived in Pakistan. A Home Office circular stated that although the immigration rules did not permit a foreign child to enter the United Kingdom for the purposes of adoption, the Secretary of State would, in exceptional circumstances, allow a child to enter the United Kingdom for adoption, where he was satisfied of the following criteria: the intention to adopt was genuine; the child's welfare in England was assured; a British court would be likely to grant an adoption order; and, one of the intending adopters was domiciled in Britain. The circular set out the two-stage procedure followed to ensure these criteria were met. First, an inquiry would be made by an entry clearance officer regarding the wishes of the child and its natural parents. Second, an investigation would be conducted through the Department of Health and Social Security and local social services into the prospective

adopters' domestic circumstances.

Mr. Khan obtained a copy of the circular and applied for an entry clearance certificate for the child. The first stage of the procedure set out in the circular, the inquiries in Pakistan, were completed. However, when the application was subsequently referred to the Secretary of State no inquiries were made within the Department of Health and Social Security nor were the criteria set out in the circular applied. The DHSS simply issued a refusal of entry clearance for the child.

The applicant applied for judicial review seeking an order of *certiorari* to quash the Secretary of States's decision on the grounds he had a legitimate expectation the criteria and procedure set out in the circular would be followed. During the ensuing legal proceedings, it became clear the respondent had exercised his discretion to refuse the entry clearance primarily on the grounds the child's natural parents were capable of caring for him, although the circular letter contained no reference to this consideration. The Secretary of State argued he had an unfettered discretion with respect to the granting of leave to a child to enter the country for the purpose of adoption. In exercising that discretion, he was entitled to take into account considerations other than those stated in the circular.

The respondent's decision was challenged on two grounds before

the Court of Appeal. First, relying on *Liverpool*, it was argued the Secretary of State was bound by the policy factors set out in the circular. Second, on the basis of the Privy Council's decision in *Shiu*, it was contended the respondent was obliged to carry out both stages of the procedural inquiries stated in the circular.

Parker L.J. accepted there was a presumption in administrative law that public bodies would follow their policy statements:

. . . just as in the *Liverpool Taxi Owners* case, the Corporation was held not to be entitled to resile from an undertaking and change its policy without giving a fair hearing, so, in principle, the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it.

. . .

I have no doubt that the Home Office letter afforded the applicant a reasonable expectation that the procedures it set out, which were just as certain in their terms as the question and answer in Mr. Ng's case, would be followed, that if the result of the implementation of those procedures satisfied the Secretary of State of the four matters mentioned a temporary entry clearance certificate would be granted and that the ultimate fate of the child would then be decided by the adoption court of this country. I have equally no doubt that it was considered by the department at the time the letter was sent out that if those procedures were fully implemented they would be sufficient to safeguard the public interest. The letter can mean nothing else.¹⁵⁰

Dunn L.J. reached a similar conclusion, although his analysis focused on the policy criteria set out in the circular and how they prescribed the boundaries of the respondent's relevant considerations. In his view, the Home Secretary's consideration of

¹⁵⁰*Ibid.*, at pp. 46 and 48.

factors not set out in the circular, meant he had reached his decision on irrelevant considerations. In so doing, "he misdirected himself according to his own criteria and acted unreasonably".¹⁵¹

Watkins L.J. in dissent, sought to distinguish the nature of the undertakings given in the instant case from those in *Liverpool* and *Shiu*. He also disagreed with the majority's view of the status of the policy criteria. In his opinion, the four criteria set out in the circular were simply preliminary matters upon which the Home Secretary had to be satisfied before he would exercise his discretion to approve or refuse entry clearance.

Mowbray makes the following observation with respect to the decision in *Khan*:

It is submitted that the approach of the majority and particularly the reasoning of Parker L.J. towards administrative guidance, such as the Home Secretary's circular letter, should be preferred to the views of Watkins L.J., as it reflects a more just balance between the interests of the citizen and the State. By acknowledging that the courts will normally require public bodies to observe their policy and procedural promises, the decision of the majority enables citizens to rely on the statements contained in administrative guidance and thereby plan their conduct with a degree of certainty regarding the attitude of the State to such conduct which is an essential component of the modern conception of the rule of law. Furthermore, the individual citizen can have the confidence that he will not be arbitrarily discriminated against by public bodies adopting different policies or procedures with regard to his case when compared with the treatment accorded to other similar cases.¹⁵²

¹⁵¹*Ibid.*, at p. 52.

¹⁵²Mowbray, *op. cit.*, footnote 139 at pp. 561-2.

The author also describes the ultimate effect of the Court of Appeal's decision. Although Mr. Khan's application was determined according to the policy criteria contained in the original letter, the department subsequently revised the circular "in such a way as to significantly reduce the ability of any future recipient to claim that the Secretary of State has published an exhaustive list of policy criteria". The new circular explicitly made reference to the criteria that the original parents be unable to look after the child, and in addition stated "the Home Secretary may exceptionally exercise discretion to allow a child to come here for (adoption) if he is satisfied that this is appropriate in all the circumstances of the case."¹⁵³

The decision in *Khan* served to extend the legitimate expectation doctrine. This was not a situation, as in *Liverpool*, where an express undertaking had been given by a public authority to a specific group or individual. Rather, the parties affected by the decision had relied on policy of general application as stated in a government circular. Nevertheless, the Court applied the doctrine, holding that while a new policy could be implemented, an individual affected by previous policy must be given an opportunity to argue it applied to him.

¹⁵³*Ibid.*, at p. 563. The author concludes ". . . it seems that the Home Office has responded to the judgments of Parker and Dunn L.J.J. by reducing the specificity and precision of its administrative guidance. Presumably, intending adopters will suffer to the extent that they can no longer be so certain as to the range of criteria to be taken into account by the Home Secretary when exercising his discretion to grant entry clearance. Such a reaction by government departments and other public bodies who issue administrative guidance is the Achilles heel of the majority's decision in *Khan's* case."

*Re Findlay*¹⁵⁴ was decided a month after *Khan*. The Home Secretary announced a change in its parole policy, to the effect that certain categories of prisoners would serve more of their sentences than had been the case under the previous policy. Findlay and a number of other prisoners, whose release had been imminent were, as a result of the new policy, required to serve more of their sentences than expected. They sought judicial review arguing the Secretary of State should have consulted the Parole Board prior to executing the new policy and the policy was contrary to their legitimate expectation of having their cases for parole individually considered on their merits.

Their appeals were dismissed by the Court of Appeal and the House of Lords. Both emphatically rejected the notion the prisoners' expectations arising from the previous policy created any right against subsequent policy change.

The House of Lords held the relevant legislation did not require the Secretary of State to consult the Parole Board before implementing the change. Lord Scarman noted that while the concept of legitimate expectations might enable the applicants to seek the leave of the court to apply for review, it did not support their contention of a legitimate expectation the previous policy would be applied to them:

The doctrine of legitimate expectation has an important

¹⁵⁴[1984] 3 All E.R. 801 (H. L.).

place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review. These . . . applicants obtained leave. But their submission goes further. It is said that the refusal to except them from the new policy was an unlawful act on the part of the Secretary of State in that his decision frustrated their expectation. But what was their *legitimate* expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in light of whatever policy the Secretary of State sees fit to adopt, provided always that the adopted policy is a lawful exercise of the discretion conferred on him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute on the minister can in some cases be restricted so as to hamper, or even prevent, changes of policy. Bearing in mind the complexity of the issues which the Secretary of State has to consider and the importance of the public interest in the administration of parole, I cannot think that Parliament intended the discretion to be limited in this way.¹⁵⁵

The decision has been criticized as a restrictive application of the doctrine in the context of policy. Rather than relying on the applicants status as prisoners in order to define the content of their legitimate expectation, the same result could have been reached by relying on the "public interest factor" referred to by Parker L.J. in *Khan*; an approach that would have permitted the change in policy, while at the same time giving credence to the applicants' legitimate expectation.¹⁵⁶

In *R. v. Secretary of State for the Home Department, ex p.*

¹⁵⁵*Ibid.*, at p. 830.

¹⁵⁶Brigid Hadfield, "Judicial Review and the Concept of Legitimate Expectation" (1988) 39 N.I.L.Q. 103 at p. 115.

Ruddock,¹⁵⁷ the applicant discovered her telephone calls had been intercepted pursuant to a warrant signed by the Secretary of State for the Home Department in August of 1983. She applied for judicial review of the Secretary of State's decision to sign the warrant, contending *inter alia*, the criteria for issuing such warrants, as confirmed by Parliament, were well known and were available in public documents. They were:

. . . that a warrant to intercept should only issue where there is reasonable cause to believe that major subversive activity is already being carried on and is likely to injure the national interest . . . Normal methods of investigation must either have failed or be unlikely to succeed. Interception must be strictly limited to what is necessary to the Security Service's defined function and must not be used for party political purposes or for the purposes of any particular section of the community".¹⁵⁸

The applicant argued she legitimately expected these criteria to be faithfully applied. The Secretary of State maintained the doctrine of legitimate expectation applied only to those cases where the applicant's expectation was of being consulted or an opportunity to make representations prior to an adverse decision being made. Since there was no expectation of that nature in the instant case, the doctrine did not apply.

After reviewing the authorities, Taylor J. did not agree the doctrine was as limited in its application as the Secretary of State contended.

¹⁵⁷[1987] 2 All E.R. 518.

¹⁵⁸*Ibid.*, at p. 522.

. . . the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, [*in Council of Civil Service Unions et al. v. Minister for the Civil Service*], with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where *ex hypothesi* there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept . . .

As to the strength of the legitimate expectation here, not only were the criteria repeated publicly in similar terms some six times between 1952 and 1982, the Home Secretary in office at the relevant time adopted them in the most trenchant terms . . . as follows: "I would authorise interception only in those cases where the criteria set out in the White Paper were clearly met." It would be hard to imagine a stronger case of an expectation arising in Lord Fraser's word in the *GCHQ* case "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue". Here it was both.¹⁵⁹

The doctrine was again pleaded in the context of policy in *R. v. Secretary of State for Health, ex p. United States Tobacco International Inc.*¹⁶⁰ Discussions took place between the applicant and various government departments concerning the company's intention to locate a manufacturing base for their oral snuff product in the United Kingdom. The government encouraged the applicant to do so and offered grants by way of incentive.

The government then asked for a medical opinion from the Committee on Carcinogenicity of Chemicals (the "COC") on the health implications of oral snuff. In response to that request, the COC

¹⁵⁹*Ibid.*, at p. 531. The application was dismissed however on the grounds the evidence did not support a claim the Secretary of State had acted with improper motive or had deliberately ignored the criteria stated in the policy.

¹⁶⁰[1992] 1 All E.R. 212.

advised the government in January of 1984, there was a causal link between oral snuff and cancer. An agreement was subsequently negotiated between the government and the applicant whereby the latter agreed not to sell its product to persons under the age of eighteen. A year later, the agreement was revised to include a requirement the applicant provide health warnings concerning its product.

In June of 1986, the COC advised the government to ban oral snuff. The applicant was never given any indication of this recommendation. Two years later, by letter dated February 8, 1988, the revised agreement between the applicant and the government was extended to April 30, 1988, and discussions continued to take place concerning possible variations. On February 26, 1988, the Secretary of State announced a proposal to make regulations banning oral snuff. The applicant had no idea such a proposal was being considered.

It sought an order of *certiorari* to quash the regulations, alleging a legitimate expectation, based on the government's previous conduct, that it would be permitted to carry on its operations, provided it abided by the voluntary agreements. The alleged expectation was not based on any express promise or representation, but rather on the government's previous course of conduct.

Taylor L.J. dismissed the argument, holding that so long as the Minister was acting rationally and fairly within his statutory powers, he was entitled to change the policy. In his Lordship's opinion, the applicant could not have a legitimate expectation of being permitted to continue its operations, when there was a public interest consideration which clearly warranted a change in policy.

In the present case, if the Secretary of State concluded on rational grounds that a policy change was required and oral snuff should be banned in the public interest, his discretion could not be fettered by moral obligations to the applicants deriving from his earlier favourable treatment of them. It would be absurd to suggest that some moral commitment to a single company should prevail over the public interest. Accordingly, although it is regrettable that the applicants were kept in the dark for so long about the recommendation of a ban, I do not consider their plea of legitimate expectation can be upheld.¹⁶¹

Morland J. was of the same view:

The applicants were entitled to expect that their commercial operations would be allowed to continue and expand subject to their compliance with the voluntary agreements unless there were good and substantial reasons for a change in government policy. However, they must have been aware that their expectations could never fetter the Secretary of State's duty to promote and safeguard the health of the public. That is a duty which must, in my judgment, override private commercial expectations and interests. The right of government to change its policy in the field of health must be unfettered. This is so even if the basic scientific evidence remains unchanged or substantially unchanged. Reconsideration and re-evaluation of that evidence may call for a change of policy. That is an entirely proper province of government and, in my judgment, should not be questionable in this court.¹⁶²

¹⁶¹*Ibid.*, at p. 223. However, the Court admitted the applicants had been "led up the garden path" by the government's actions. Although Taylor, L.J. refused to recognize that the applicants had a legitimate expectation, he nevertheless quashed the regulations on the grounds the Secretary of State was under a duty to act fairly and it was in breach of that duty when it failed to disclose the reasons which led the Committee to recommend the ban.

¹⁶²*Ibid.*, at p. 226.

Although the court's conclusion may have been correct, the reasoning on legitimate expectation lacks the precision and clarity displayed in *Khan*. As in *Findlay*, the overriding public interest which justified a change in policy, was used to negate the existence of the applicant's legitimate expectation. However, in the context of policy, the doctrine raises two distinct questions. First, is there a legitimate expectation the policy will be adhered to; and if so, is there nevertheless an overriding public interest which vindicates its frustration. It is erroneous to conclude the latter necessarily and automatically negates the former.¹⁶³

In *R. v. Board of Inland Revenue, ex. p. MFK Underwriting Agencies Ltd. and others*,¹⁶⁴ the High Court established certain criteria which must be met before an argument of legitimate expectation in the context of policy can succeed. The case revolved around a potential tax liability of certain Lloyd's syndicates. Under Lloyd's rules the syndicates had to retain their premiums in trust funds for two years after they were received. Furthermore, where the premiums were paid in U.S. or Canadian dollars, the trust funds had to retain the monies in those

¹⁶³P.P. Craig, *op. cit.*, footnote 40 at p. 97 wherein the author states: ". . . it is necessary to keep two issues separate. The first is whether the facts warrant the conclusion that the applicant had any expectation of a substantive nature. The second is whether the overriding public interest nonetheless requires or justifies the government's change of policy. . . a positive response to the second inquiry should not lead to the conclusion that the applicant never had any legitimate expectation of a substantive nature at all, but rather that the expectation was overridden by the need for the public body to alter its policy in this area".

¹⁶⁴[1990] 1 All E.R. 91.

currencies or equivalent securities. Once the two years had expired, the residue of the trust funds remaining after the payment of claims and expenses was available for distribution to the syndicates' members.

The members wished to minimize their tax liabilities regarding their receipts from the trust funds and therefore sought to invest premiums in funds which provided capital gains, rather than income, as the former was subject to lower rates of taxation. Consequently, between 1986 and 1988, sixty-two issues of index-linked bonds denominated in U.S./Canadian dollars were offered by foreign institutions. Lloyd's underwriting agents purchased approximately 2 billion pounds worth of these bonds.

The five applicants were underwriting agents who claimed they had bought the bonds on the basis of statements made by Inland Revenue officials that the indexation uplift of the bonds paid on redemption would be treated as capital gains. These statements were made by five different officials in the technical division of the department, in reply to various written and oral queries about the tax liabilities of index-linked bond schemes raised by a number of banks and their professional advisers. The officials's statements were subsequently widely distributed among the applicants. But towards the end of 1988, the Director-General of the department resolved the indexation uplift of the bonds purchased by the applicants should be taxable as income rather than

capital gains.

The applicants contended, on the basis of *Preston* and *Khan*, that Revenue's actions were unfair as they conflicted with an assurance given by the department. The statements made by the various officials were alleged to constitute such assurances regarding the taxation of the bonds in issue. Counsel for the Crown argued the statements could not oblige Revenue to act contrary to its statutory duty of collecting the tax Parliament had ordained.

In the leading judgment, Bingham L.J. held Revenue had a wider statutory duty than that asserted by the Crown and it was within the department's mandate to give assurances to taxpayers. The determination of when such assurances became legally binding, depended on the factual context in which the statement was made. If it was "formally published by the Revenue to the world" then he thought it ". . . might safely be regarded as binding, subject to its terms, in any case falling within them."¹⁶⁵

However, where the statement was made in response to a "less formal" approach to the department by an individual taxpayer, two general conditions had to be met if the taxpayer was to be legally entitled to assert that the department had thereby represented it would forgo tax.

¹⁶⁵*Ibid.*, at p. 110.

First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling . . . It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given.¹⁶⁶

Such explicitness is necessary according to Bingham L.J.:

. . . because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all.¹⁶⁷

The second condition is that "the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification".¹⁶⁸ His Lordship thought these conditions did not diminish the doctrine of legitimate expectation:

In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. . . . The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street, it imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen.¹⁶⁹

¹⁶⁶*Ibid.*

¹⁶⁷*Ibid.*

¹⁶⁸*Ibid.*

¹⁶⁹*Ibid.*, at p. 111.

Applying the above two conditions to the questions posed in the instant case, and the responses provided by the various Revenue officials, Bingham L.J. (with whom Judge J. agreed) concluded they had not been satisfied and therefore it was not an unfair abuse of power for the department to treat the bonds indexation uplifts as income. The banks and their professional advisers, while acting honourably and professionally, had not requested specific rulings nor had they indicated their intention to circulate the officials' statements to Lloyd's syndicates. Additionally, the views expressed by the officials were not sufficiently unqualified or unequivocal.

The decision is commendable both in its reasoning and in its result insofar as it recognizes the necessity for balancing the right of individuals to rely on policy statements made by public authorities against the necessity of allowing public authorities to develop policy as various fact patterns materialise. By placing an onus on the individual to be forthright in its reasons for the requested information, the decision provides the public authority with an opportunity to make rational policy formulations, which will then be binding upon it. Overall the result is fair, just and consistent administration of policy guidelines.¹⁷⁰

The High Court of Australia's decision in *Attorney General for*

¹⁷⁰Mowbray, *op. cit.*, footnote 38 at pp. 570-1.

*New South Wales v. Quin*¹⁷¹ is noteworthy because the facts and reasoning serve to focus attention on many of the general issues surrounding the doctrine of legitimate expectation, including its application to policy.

The case involved the Local Courts Act 1982 (N.S.W.) which abolished Courts of Petty Sessions and replaced them with Local Courts. Section 12 of the Act gave the Governor power to appoint any qualified person to be a magistrate in the new court system. Quin had been a Stipendiary Magistrate in charge of a Court of Petty Sessions under the old System. All but five of the one hundred former stipendiary magistrates who applied were appointed to the new courts in accordance with a policy under which they would be appointed unless they were considered unfit for judicial office. Mr. Quin successfully challenged the decision on the grounds the selection committee had taken into account an adverse report on him made by the Chief Stipendiary Magistrate without giving him notice of the contents of the report. By the time that judgment was rendered however, the Local Courts had already been constituted, and the Attorney-General then indicated he would treat an application by the former magistrate in the same way as those of any other applicants.

The applicant sought judicial review on the grounds he had a legitimate expectation he would be treated in the same way as his

¹⁷¹(1990) 170 C.L.R. 1.

former colleagues who had now been appointed to the new Courts. This meant his application should be considered on its own merits rather than in competition with other applicants who had not been magistrates. The Attorney General argued there was nothing to give rise to a legitimate expectation Mr. Quin's application would be considered separately from the new applications and the only legitimate expectation he could reasonably hold was that the adverse report would be disclosed to him.

The majority of the Court held the Attorney General was not obliged to treat the application in accordance with policy pertaining at the time of the appointment of former stipendiary magistrates. To require otherwise would compel the Attorney General to depart from a method of appointing judicial officers which conformed to the relevant statutes and was within the discretionary power of the Executive.

Toohy J. in dissent, was of the view the applicant had a legitimate expectation and requiring the Attorney General to fulfil it was not tantamount to judicial interference with the formulation and application of government policy.

He says that he had a legitimate expectation that it would be dealt with in a certain way. The basis for his expectation was the office of stipendiary magistrate he previously held and the policy adopted by the Attorney-General in regard to the making of recommendations for appointment, a policy which gave recognition to the unusual circumstance in which a judicial office had been abolished and its functions transferred to another court. In those circumstances, it is but a short and inevitable step to say . . . that Mr. Quin had a legitimate expectation that his application would be

dealt with as the applications of other former stipendiary magistrates had been dealt with, namely, on its merits.

In the circumstances described, there is no restriction on the exercise of executive power to require the Attorney-General to give effect to the previous policy, on the expectation of which Mr. Quin made application for appointment as a magistrate. It is true that circumstances have changed but, as Deane J. has pointed out, there is no insuperable obstacle to giving effect to that policy. The Court's hands are not tied, as *F.A.I. Insurances Ltd. v. Winneke* demonstrates.¹⁷²

The application of the doctrine in the context of policy has been considered in a number of Canadian cases. *Gingras v. Canada*¹⁷³ involved the government's policy on official languages which provided for payment of a bilingualism bonus to members of the public service. Shortly after the bonus was introduced, the Commissioner of the RCMP issued a directive that the new policy did not cover members of the RCMP and the Force would not be seeking authority from Treasury Board to pay the bonus to its members. The plaintiff, a member of the RCMP, was bilingual, had passed all requisite bilingualism tests, and had occupied positions in Quebec which were designated as bilingual. He commenced an action for a declaratory judgment that he was entitled to the bonus.

Dube J. held that the exclusion of RCMP members from payment of the bonus was illegal. Relying on *Khan*, his Lordship agreed the

¹⁷²*Ibid.*, at pp. 66 and 68-9.

¹⁷³[1990] 2 F.C. 68 (T.D.); appeal allowed in part in [1994], 2 F.C. 734, but only with respect to the period of time for which relief should be granted. The Court of Appeal's decision makes no reference to the legitimate expectation doctrine.

plaintiff had a legitimate expectation the bilingualism policy would apply to him and he would be paid the bonus in question.

In issuing its bilingualism policy the Treasury Board and the Public Service Commission set out an elaborate code on the use of official languages in departments and other agencies of the public service. Clearly, this detailed code did not establish merely indicative rules, but rather normative rules which were to be observed not only by departments, public servants and other public service employees to whom they applied, but also by their authors themselves.¹⁷⁴

His Lordship acknowledged however, what the Home Secretary quickly realized in *Khan*; formulation of policy in more general terms permits a public authority to consider factors not expressly set out therein, rendering it more difficult for an individual to establish a legitimate expectation specific criteria will be applied.

The Board and the Commission could have defined the application of the bilingualism policy in accordance with a wider and more flexible formula, thereby giving themselves some room for manoeuvre to exercise their discretion in specific cases. In defining the application as covering all the departments and agencies listed in Part I of Schedule I of the *Public Service Staff Relations Act*, they created a legitimate expectation by persons affected that the policy would be observed.¹⁷⁵

An individual who claims to have a legitimate expectation that policy will not be changed without the benefit of consultation must show an established practice of that nature. This proposition is aptly demonstrated by the Federal Court decision of *Canadian Assn.*

¹⁷⁴*Ibid.*, at pp. 93-4.

¹⁷⁵*Ibid.*, at p. 94.

of *Regulated Importers v. Canada*.¹⁷⁶ In 1989, the Governor in Council amended the Import Control List made under the *Export and Import Permits Act*¹⁷⁷ to include broiler and hatching eggs. Notice of the change was issued to importers stating the annual global quota and principles of allocation. The objective was to shift the allocation of import quota gradually from those who had imported in the past to federally registered hatcheries on the basis of market share.

The importers applied for an order of *certiorari* quashing the import allocation quota decision and *mandamus* requiring the Minister to issue import permits, at least temporarily, based on historic importation patterns and directing the Minister to provide them with an opportunity to be heard before adopting any new policy.

Relying on *Schmidt*, *Liverpool* and *GCHQ*, Reed J. held the plaintiffs should have been afforded an opportunity to make representations prior to a change in policy which would adversely affect their importing rights.

The effect of the decision was to cause considerable economic harm to the applicants and others. There surely is an implied principle that Parliament intended that the statutory powers being exercised in this case would be exercised in accordance with the administrative law rules of fairness. These rules surely include notice to the applicants of what is being proposed and an opportunity (an effective opportunity) to comment

¹⁷⁶(1993), 15 Admin. L.R. (2d) 161.

¹⁷⁷R.S.C. 1985, c. E-19.

thereon. This they did not have.

. . .

In the present case the applicants may not have had a "right to import" but, for many years, they had in an unregulated environment been importing. They had established a position in the market and an economic viability based on this practice of importing. There is no doubt they have established an interest sufficient to found a claim for review of the decision taken by the Minister with respect to the allocation of import quotas.¹⁷⁸

The decision is significant in two respects. First, Reed J.'s application of the legitimate expectation doctrine to the policy in question was based on the nature of the importers' interest. In her view, the economic hardship suffered by the plaintiffs because of the change in policy, was an interest which, under the circumstances, far outweighed the necessity of allowing an unhindered exercise of the Governor in Council's statutory power to alter its policy. That reasoning is entirely in keeping with Lord Denning's dicta in *Schmidt* and true to the natural justice considerations enunciated by the Privy Council in *Durrayapah*.

Second, the reasoning used to compel fair procedure by a public authority in changing its policy was the same reasoning applied in *Khan* to require compliance with policy. That is, when a public authority exercises a statutory power, there exists a presumption Parliament intended it to do so in accordance with principles of fairness, regardless of whether the authority is

¹⁷⁸ *Supra*, footnote 174 at pp. 188-9.

exercising its discretion to formulate a policy or to alter an already existing one.

The decision was overturned by the Federal Court of Appeal¹⁷⁹ which, relying on Sopinka J.'s statement in *Canada Assistance Plan*, held that legislative functions did not attract procedural fairness, and there was accordingly no duty on the Minister to engage in a consultation process prior to changing the policy. The Court summarily dismissed the legitimate expectation argument on the basis it did not apply to the facts, "since there was no promise to consult nor any such practice which might have been reasonably relied upon by the respondents."¹⁸⁰

It is difficult to assess the implication of the Court of Appeals judgment. On the one hand, the legitimate expectation doctrine was curbed by excluding its application to legislative functions; the approach taken by the Supreme Court in *Canada Assistance Plan* and one which renders it difficult to raise a legitimate expectation argument in the context of policy.¹⁸¹ Arguably however, had the applicants been able to establish a prior practice of consultation with respect to policy changes, the decision suggests they may have succeeded in their legitimate

¹⁷⁹(1994), 17 Admin. L.R. (2d) 121; leave to appeal to the Supreme Court of Canada dismissed (1994), 21 Admin. L.R. (2d) 159.

¹⁸⁰*Ibid.*, at p. 133.

¹⁸¹Mullan, *op. cit.*, footnote 20 at p. 283.

expectation argument.

The requirement established in *MFK Underwriting*, that there be an established policy in place, was the underlying basis of the Federal Court decision in *Demirtas v. Canada*.¹⁸² The Minister of Employment and Immigration issued a statement announcing measures would be taken with respect to a backlog of Convention refugee claims. Attached to the statement was an information document on the backlog procedures, including a brief description of the process which involved a hearing before a Credible Basis Tribunal. The applicants wished to have their claims considered under this procedure, but were refused on the grounds of statutory provisions which required they be heard by the Immigration and Refugee Board instead. On judicial review, the applicants argued the Minister's statement had created a legitimate expectation their claims would be determined in accordance with the new procedure.

The Trial Division agreed,¹⁸³ but the Federal Court of Appeal held the statement and the information document on backlog procedures, did not constitute a policy which the government had promised would be applied to the applicants.

At most, they contain only a general indication of the new policies in this respect, and the information document concludes that the method used to clear the claims backlog is consistent with the principles of the new legislative measures adopted. It is clear that the

¹⁸²[1991] 3 F.C. 489 (T.D.).

¹⁸³[1991] 3 F.C. 489.

Minister's statement is merely a method of distributing information and that we must look to the legislation, which represents the definitive intention of Parliament in the matter, if we wish to ascertain its exact substance and the manner in which it is to be applied.¹⁸⁴

The estoppel aspect of the doctrine's origins raises some questions concerning the issues of representation and reliance. For example, will an applicant will be required to have knowledge of the policy before a claim of legitimate expectation can succeed, or must a public authority have represented the policy would be adhered to, or past procedures for implementing change would be followed.

In *Sunshine Coast Parents for French v. Sunshine Coast School District No. 46*,¹⁸⁵ the school board decided to eliminate its early French immersion program and replace it with a middle immersion program. The association and affected parents sought judicial review on the grounds the board had created a legitimate expectation they would be consulted before any decision was made, and, having failed to do so, had breached the rules of natural justice and procedural fairness.

Spencer J. held the implementation of a French immersion program was a policy decision which did not give rise to an

¹⁸⁴[1993] 1 F.C. 602 at pp. 609-10.

¹⁸⁵(1990), 44 Admin. L.R. 252 (B.C.S.C.).

obligation on the Board to afford any form of procedural fairness. Nor did the doctrine of legitimate expectation apply to the implementation of policy or its modification. However, procedures adopted in implementing changes could create a legitimate expectation that they would continue to be followed. Here, although one aspect of the procedure had not been followed, there was no evidence the applicants were aware such procedures even existed, and accordingly they could not establish the reliance necessary to give rise to a legitimate expectation.

In *Furey v. Conception Bay Centre Roman Catholic School Board*,¹⁸⁶ parents of the school had been advised of its possible closure and were involved in a consultative and voting process. The Board subsequently decided to leave the school open. Thereafter, the issue of school closure arose again and a motion to that effect was put at a public board meeting. The parents were not given notice, prior to the meeting, that closure was being proposed and while they could attend the meeting, they were not entitled to participate. Furthermore, the Board had not adhered to the notice and consultation guidelines issued by the Minister with respect to school closures. The applicants sought an order of *certiorari*. At trial the judge held the board had raised a legitimate expectation that guidelines would be followed but had subsequently failed to do so.

¹⁸⁶(1994), 17 Admin. L.R. (2d) 46.

The Court of Appeal held that while the implementation of policy was a legislative function, a decision made in accordance with that policy, was an administrative act. As a result, the doctrine of legitimate expectation was potentially applicable and the conduct of the board in relation to the guidelines was capable of giving rise to a legitimate expectation they would be followed. However, as there was no evidence the applicants had any belief the board intended to follow the guidelines, they could not be considered to have a legitimate expectation that it would.

To succeed in their submissions respecting legitimate expectation the respondents had to establish both conduct (past actions or assurances) capable of giving rise to an expectation of certain procedures being followed and knowledge by the respondents giving rise to a legitimate expectation. There was no evidence upon which the trial judge could conclude that the conduct of the board, though capable of doing so, in fact gave rise to a legitimate expectation that the guidelines or the spirit of the guidelines would be followed in future.¹⁸⁷

It is submitted the imposition of a knowledge requirement on the part of those affected by policy, or the necessity of an express representation by the public authority that the policy will be adhered to, ignores the foundation of the doctrine in fairness. The existence of the policy, in and of itself, would seem sufficient to establish a legitimate expectation that it will be applied to all concerned in an even-handed and consistent manner. Such a contention is based on the premise that a public authority, in exercising its discretionary decision-making power, is required

¹⁸⁷*Ibid.*, at p. 61.

to do so in a fair and impartial manner.

If the contrary view is taken, a public authority could avoid having to apply its administrative guidelines in a particular case if an individual is not aware of its existence, or is told outright that the policy will not be followed. Professor Mullan makes the following observations on the reasoning used in *Sunshine Coast and Furey*.

Earlier . . . I criticized the judgment of the British Columbia Supreme Court in *Sunshine Coast Parents for French v. Sunshine Coast School District No. 46* to the extent that Spencer J. held that there could not be a legitimate expectation in situations where the applicants did not know of the past practice of consultation until after the relevant decision had been taken. My argument was that finding out about the practice of consultation after the event was just as likely to generate a feeling of injustice and lack of fairness as knowing about it beforehand. Nevertheless, it seems to me that criticism pales into insignificance in light of the possible ramifications of what the Newfoundland Court of Appeal is saying in *Furey*.

One interpretation of the court's judgment is that, for a legitimate expectation to count, an applicant not only has to have reason to hold such an expectation but also a belief (as opposed to knowledge to the contrary or perhaps even a mere hope) that the decision-maker will in fact follow past practices. Here, because the applicants apparently realized that the board was not going to follow the ministry's guidelines, there was no room for the doctrine to operate, notwithstanding the reasonableness of any expectation that it should do so. Such an application of the rule is no more than an invitation to a decision-maker to make sure that all those affected have knowledge prior to the decision that past practices of consultation will not be followed.¹⁸⁸

The decisions examined in this section illustrate the doctrine of legitimate expectation can be employed by individuals to

¹⁸⁸(1993), 17 Admin. L.R. (2d) 46 at p. 48.

establish a legal presumption that a public authority will observe its own policy statements. It is also apparent however, the courts will be circumspect in their application of the doctrine in cases of that nature. In striking the balance between protecting the interests of citizens affected by policies, and the necessity of empowering public bodies to develop them unimpeded, the judicial trend seems to favour the latter. Although the cases are limited in number, certain principles concerning the doctrine's application in the context of policy have emerged.

The starting point will always be whether there is in fact a policy in place, or whether the statement which allegedly forms the basis of the legitimate expectation is merely some informal response by the public authority to a question posed or advice sought. This determination involves an appreciation of the variety of definitions and forms which policy can take. Cases involving conventional versions of policy, such as regulations, rules and precedents, will be straightforward. The majority of the cases discussed above fall into this category, the existence of the policy not being in contention.

At the other end of the scale, are cases involving less formal statements, for example, those made by a public authority during the course of a telephone conversation in response to a general inquiry, or those made for the purpose of disseminating information. *MFK Underwriters* is clear that an authority will not

be bound by statements made in such a context, unless it is apparent that "a fully considered ruling is sought" and the statement relied on is "clear, unambiguous and devoid of relevant qualification".

Further, an overriding public interest can frustrate an otherwise validly held legitimate expectation that policy will be adhered to. This recognizes that there may be solid and compelling reasons for not wanting to apply policy to a particular fact situation, but the onus of substantiating that claim rests squarely on the public authority. While it will not necessarily be precluded from engaging in an inconsistent application of its policy, it will be held accountable for the deviation.

Applying legitimate expectation to policy in this manner, recognizes that the environment in which it is formulated and developed, requires that it be reassessed and modified on a continuing basis. Policy undergoes change because diverse factual situations, not contemplated at the time it was put in place, necessitate a rethinking of the original position. Whether it takes the form of rule, regulation, administrative guidance or precedent, there are sound reasons for judicial deference to its unhindered evolution.

. . . a tribunal may have no clearly defined policy in mind when it comes to decide the first few cases in any specific area. At such an early stage in its efforts there may be lacking a sufficiently clear appreciation of what exactly are the problems; only time and observation give an opportunity for acquiring the experience and sensitivity necessary for a more general

understanding of what is at stake. Policy formulation can then begin to become a more reasoned, inductive exercise that permits a tribunal to develop the line of precedent most representative of the way it perceives that it and members of the public should conduct themselves in future. . . .¹⁸⁹

But this development can have the effect of disappointing a legitimate expectation that the policy in place would be adhered to. That raises the question of whether the public authority is engaging in an unfair and inconsistent use of its policy; a matter which falls within the ambit of the courts' judicial review function.

If the law is prepared to countenance a rule to the effect that a reasonable apprehension of bias will affect the validity of a decision in order to safeguard the reputation of the law, there is also clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions from which the law's reputation will suffer as much. . . .

Thus, if the courts are sensitive to the various legitimate reasons for acting inconsistently and changing policies, there is no particular reason to believe that statutory authorities will be deterred from their implied statutory mandate to constantly reassess the policies and principles upon which they decide particular cases. In particular, it should not have the effect of causing them to pursue consistency at the expense of all else. . . .

. . . The argument for review for inconsistency is based on the reasonably precise principle underlying much of our legal thinking that like cases be treated alike.¹⁹⁰

The employment of legitimate expectation in the context of

¹⁸⁹Molot, *op. cit.*, footnote 141 at p. 335.

¹⁹⁰Mullan, "Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill L.J. 250 at p. 286.

policy is truly an exercise in balancing the right of individuals to expect administrative guidance to be applied in a consistent and fair manner, against the necessity of allowing public authorities the freedom to reassess it on an ongoing basis. The narrow reasoning engaged in by the courts on some occasions, which has excluded legitimate expectation from the realm of policy due to its legislative nature, needlessly serves to undermine the doctrine's value.

V. CONCLUSION

There are four principal sources of legitimate expectation: (i) an interest, the nature of which, gives rise to an expectation it will not be interfered with or denied without the benefit of a hearing; (ii) an expectation arising from an express representation or undertaking given by a public authority some form of procedural protection will be granted; (iii) an expectation certain procedures will be followed based on past conduct or practice; and, (iv) an expectation that administrative policy will be adhered to.

Regardless of its source, an expectation, in order to be legitimate, must be one a reasonable person in the position of the applicant would have formed, given all the circumstances of a particular case. The expectation must be based on rational grounds, and it must be objective in the sense of transcending a mere subjective hope or anticipation. A test of that nature is appropriate.

The word "legitimate" must be given some meaning. It is submitted that it should be interpreted to connote reasonableness. That is - what is required is an expectation based on objectively justifiable criteria. It was seen above that the courts are tending to adopt such a definition even if not always explicitly or universally. . . . What is objectively justifiable in particular circumstances is not too vague a test for the courts to apply. They have applied a reasonableness test in negligence for half a century and it has not failed.¹⁹¹

It should not be more arduous therefore, to establish the existence of a legitimate expectation that a public authority will adhere to its policy, than to establish an expectation of being granted a hearing. The essence of the courts' inquiry should be the same regardless of the source of the expectation. However, judicial deference to the progressive development of administrative policy, means an expectation arising from that source is more vulnerable to frustration. Fulfilment depends upon whether the exercise of statutory discretion under which the policy arose, will be jeopardized by holding the authority to its original position.

This is why there is no justifiable reason to preclude the doctrine's application to policy on the basis of some classification of function. The jurisprudence demonstrates it is capable of operating on a spectrum with expectations of procedural fairness at one end, and expectations that a discretionary power will be exercised in a particular manner, at the other. The former are more readily fulfilled simply on the basis of fairness. Those

¹⁹¹Johnson, *op. cit.*, footnote 86 at p. 72.

arising in the context of policy on the other hand, are subject to an overriding public interest which may well excuse the authority's refusal to adhere to stated criteria.

Indeed, it is in the context of policy where legitimate expectation has proven to be a viable alternative to the doctrine of estoppel in public law. Estoppel cannot prevent an authority from exercising a statutory discretion. The legitimate expectation doctrine however, can preclude a public authority from using its discretion in an arbitrary or inconsistent manner. This interpretation will permit the doctrine to mature into a useful device for ensuring a reasonable measure of fairness in the exercise of discretionary decision-making powers.

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