

RETHINKING THE DOCTRINE OF LEGITIMATE EXPECTATIONS IN CANADIAN ADMINISTRATIVE LAW[©]

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The author examines recent cases that have transplanted the doctrine of legitimate expectations from British into Canadian law. He concludes that the doctrine has been applied in a confused way in this country, without proper consideration of its “fit” with the Canadian duty of fairness. He argues that the place of the doctrine should be to determine what fairness requires when statements or actions of a decisionmaker have led to a legitimate expectation. The suggestion that it should be an exception to the rule that legislative decisions do not attract the duty of fairness is rejected in favour of a broader concept that focuses on the nature of the interest and political power of the person or group affected.

L'auteur examine les décisions récentes ayant transplanté la doctrine britannique de l'attente légitime en droit canadien. Il conclut que cette doctrine fut appliquée de manière confuse dans ce pays, sans considérer si elle pouvait cadrer avec l'obligation d'équité au Canada. Il soutient que le rôle de cette doctrine est de déterminer les exigences de l'équité lorsque des déclarations ou des actes posés par un décideur ont mené à l'attente légitime. La suggestion que cette doctrine constitue une exception à la règle voulant que les décisions législatives n'attirent pas l'obligation d'équité est rejetée en faveur d'un concept plus large se concentrant sur la nature de l'intérêt et le pouvoir politique d'une personne ou d'un groupe affecté.

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I. INTRODUCTION

The doctrine of legitimate expectations has been a much-discussed topic in Canadian administrative law in recent years. In the late 1980s and the 1990s, in particular, the doctrine was raised by plaintiffs in many cases, which emerged in a variety of different legal and social contexts. Applicants argued that this British concept, which, in that country, extends the situations in which the duty of fairness is owed, should also apply in Canada. The Supreme Court has accepted this argument and transplanted the doctrine to Canada, although its judgments have also considerably restricted the situations in which it

applies.¹ Commentators, too, have strongly supported the importation of legitimate expectations, and have argued that the courts should use the doctrine to expand the Canadian concept of fairness.²

This article will critically examine the Canadian cases in which the doctrine has been raised, and will suggest that a broadened concept of legitimate expectations would be an inappropriate way to build on the duty of fairness. Legitimate expectations is a British concept, designed for British administrative law, and its confused application in Canada has shown that it cannot be easily transplanted here.³ It has been applied without much consideration for the Canadian context, leading to ambiguity about the role of the doctrine and its legal effects. For these reasons, I believe, legitimate expectations should not simply be imported from British cases without changes or used as a tool to expand upon the duty of fairness. Rather, its place in Canadian administrative law should be clearly defined, distinguished from the British concept, and limited. Focusing on legitimate expectations will, in my opinion, restrict the development of the concept of fairness rather than expand it.

Nevertheless, the legitimate expectation cases do point to the need for a broader vision of the duty of fairness. It is appropriate to give legal effects to decisionmakers' promises about the procedures they will follow or the decisions they will make. Many of the cases also show that the exclusion of "legislative" decisions from the duty of fairness is too restrictive, and ignores the fact that certain groups of people may have a special interest in such decisions analogous to that of an individual. Some commentators have argued that legitimate expectations should be developed in Canada as the exception, or one of the exceptions, to the rule that legislative decisions do not attract a duty of fairness.⁴ I will

¹ *Old St. Boniface Residents Assn. Winnipeg (City)* [1990] 3 S.C.R. 1170 [hereinafter *Old St. Boniface*]; and *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525 [hereinafter *CAP*].

² See D.J. Mullan, "Canada Assistance Plan—Denying Legitimate Expectation a Fair Start?" (1993) 7 *Admin. L.R.* (2d) 269 [hereinafter "Fair Start"]; J.G. Small, "Legitimate Expectations, Fairness and Delegated Legislation" (1994-95) 8 *Can. J. Admin. L. & P.* 129; G. Cartier, "La théorie des attentes légitimes en droit administratif" (1992) 23 *R.D.U.S.* 75; D. Shapiro, "Legitimate Expectations and its Application to Canadian Immigration Law" (1992) 8 *J. L. & Soc. Pol'y* 282; and P.A. MacPherson, "The Legitimate Expectation Doctrine and its Application to Administrative Policy" (1995-96) 9 *Can. J. Admin. L. & P.* 141.

³ But see Cartier, *supra* note 2 at 109-10. She suggests, at 109, that the Canadian concept of procedural fairness is similar, as it now stands, to the concept of fairness in British law in 1969, when the doctrine of legitimate expectations was introduced and concludes, at 110, "nous sommes d'avis que cette doctrine peut aisément s'intégrer aux règles existantes en ce domaine [l'équité procédurale]."

⁴ See Small, *supra* note 2; "Fair Start," *supra* note 2; and MacPherson, *supra* note 2.

argue that this would not be appropriate. Given the narrow definition of the concept of legitimate expectations and the structure of the doctrine of fairness in Canada, using legitimate expectations to expand fairness into delegated policy decisions would set in place a restrictive rule that would lead to few legislative decisions being reviewable. Instead, I believe, a broader, more flexible view should promote the participation of and consultation with groups and individuals particularly affected by such decisions, who may not be represented through the democratic process.⁵ This would require looking at the nature of the plaintiffs' interest in the decision and their relation to the decisionmaker. There is no reason to rely on the outdated and complicated British concept of legitimate expectations, especially at a time when some in Britain are suggesting that the legitimate expectations doctrine is too restrictive.⁶ Other doctrines can better and more flexibly respond to the needs of Canada in the 1990s, though these doctrines may be based on some of the principles that guide the concept of legitimate expectations.

This article is divided into seven parts. Part II will briefly compare and contrast the circumstances in which the duty of fairness applies in Britain and Canada. The third part will examine the development and application of the concept of legitimate expectations in Britain through an examination of the leading cases in that country. Part IV will examine various early and often conflicting judicial ideas about the place and application of the concept in Canadian law. It will then discuss the two Supreme Court decisions that have addressed the issue. In the fifth part, I will discuss the applications of the concept in recent Canadian cases. In Part VI, I will develop my argument that: (i) the doctrine needs to be clarified, restated, and its place limited; and (ii) that expanding the duty of fairness into legislative decisionmaking should be done, but not through the doctrine of legitimate expectations.

II. THE THRESHOLD FOR THE DUTY OF FAIRNESS IN BRITAIN AND CANADA

In *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*,⁷ the Supreme Court of Canada recognized the existence

⁵ See G.J. Craven, "Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing" (1988) 16 *Melb. U. L. Rev.* 569 at 592-99.

⁶ See, for example, P.P. Craig, *Administrative Law*, 3d ed. (London: Sweet & Maxwell, 1994) at 256-62 [hereinafter *Administrative Law*].

⁷ [1979] 1 S.C.R. 311 [hereinafter *Nicholson*].

of a general duty of fairness owed when administrative decisions are being made, and eliminated the distinctions between judicial, quasi-judicial, and administrative decisions. In *Cardinal v. Director of Kent Institution*⁸ the Court held that this duty lies “on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.”⁹ The fact that decisions of a legislative nature are not reviewable for procedural fairness was emphasized by the Supreme Court in *Canada (A.G.) v. Inuit Tapirisat of Canada*¹⁰ In *Board of Education of the Indian Head School Division No. 19 of Saskatchewan v. Knight*,¹¹ L’Heureux-Dubé J. held that the general duty of fairness applies when a decision is “administrative and specific” but not if it is “legislative and general.”¹² In *Knight* and *Nicholson*, it was reiterated that while the duty of fairness applies in a broad range of contexts, the precise procedures required are to be flexibly determined and depend on the circumstances of the particular case at issue.

The British equivalent to *Nicholson* was *Ridge v. Baldwin*.¹³ However, there was no general statement in Britain as there was in *Cardinal* that almost all government decisions affecting individuals are subject to the duty of fairness or natural justice. As my discussion of the cases will show, legitimate expectations developed in response to this need, but while privileges are a general concept, legitimate expectations arise in more specific circumstances. In British law, it is currently necessary to demonstrate a right, interest, or legitimate expectation in order for the duty of fairness to apply. Legitimate expectations were developed to identify the situations in which procedural protections would be accorded when legal “rights” or “interests,” traditionally defined, were not at issue.¹⁴ As one commentator has argued, the development of legitimate expectations in Britain was about giving procedural rights to holders of forms of “new property”¹⁵—licences, benefits, and other privileges, but also denying them to those who were

⁸ [1985] 2 S.C.R. 643 [hereinafter *Cardinal*].

⁹ *Ibid.* at 653.

¹⁰ [1980] 2 S.C.R. 735 [hereinafter *Inuit Tapirisat*].

¹¹ [1990] 1 S.C.R. 653 [hereinafter *Knight*].

¹² *Ibid.* at 670.

¹³ [1964] A.C. 40 (H.L.).

¹⁴ P. Elias, “Legitimate Expectations and Judicial Review” in J.L. Jowell & D. Oliver, eds., *New Directions in Judicial Review: Current Legal Problems* (London: Stevens & Sons, 1988) 37 at 37.

¹⁵ See C.A. Reich, “The New Property” (1964) 73 Yale L.J. 733.

claiming such privileges for the first time, or whose interests arose in other circumstances that did not fit the definition of legitimate expectations.¹⁶ In Canada, these would usually be defined as interests or privileges.

British courts have been somewhat more willing than their Canadian counterparts to review policy decisions, those classified in Canada as “legislative” rather than “administrative.”¹⁷ The general rule that legislative functions are not subject to the duty of fairness exists in Britain as it does in Canada.¹⁸ However, legitimate expectations are seen as an exception to this rule, and cases where the doctrine is pleaded often arise when general decisions about policy are being challenged. In Britain, whenever the plaintiff does not have a “legal right” to what the decisionmaker is awarding, the issue is whether there is a legitimate expectation. It is unimportant whether the decision is classified as legislative or administrative.¹⁹

From this summary, the following comparisons emerge. The Canadian concept of “rights, interests, or privileges” is broader than the British concept of “rights, interests, or legitimate expectations,” since there are privileges that would not be classified as legitimate expectations. However, a legislative decision that affects privileges is not subject to the duty of fairness in Canada, while a legislative decision affecting legitimate expectations is subject to review in Britain. Therefore, someone subject to an administrative decision who had a privilege but not a legitimate expectation would have procedural protection in Canada but not in Britain; someone subject to a legislative decision who had a legitimate expectation would have protection in Britain but not in Canada.

The fact that procedural protection exists in Britain but not in Canada in the latter situation illustrates why the doctrine of legitimate expectations seems desirable in Canadian administrative law. However, this contrast also illustrates the difficulty in applying the concept coherently in Canadian law, and shows one situation (the former) in which relying on legitimate expectations could represent a step backward for Canadian conceptions of the duty of fairness. This is especially true

¹⁶ R. Baldwin & D. Horne, “Expectations in a Joyless Landscape” (1986) 49 Mod. L. Rev. 685.

¹⁷ Small, *supra* note 2 at 145.

¹⁸ *Administrative Law*, *supra* note 6 at 288.

¹⁹ Small, *supra* note 2 at 145.

because the Canadian conception of a legitimate expectation, at least as it has developed to this date, is much narrower than the British one.²⁰

British courts' greater willingness to apply a duty of fairness to policy decisions comes, I believe, from their general willingness to review and overturn exercises of discretion, often on the part of the executive. David Mullan suggests that there are several reasons for British judges' interference with policy decisions. In Britain, fewer tasks have been delegated to regulatory agencies and tribunals than in Canada, so courts are more accustomed to reviewing decisions made (at least nominally) by a minister. This has also led to a vast jurisprudence overturning delegated policy decisions (often made by local councils) on grounds of unreasonableness.²¹ Often, this has played out in expressly political terms, with judges being criticized for finding decisions unreasonable simply because they did not agree with them, sometimes because of the political party that made them.²² It is understandable, then, why British courts would be less reluctant to hold that a duty of fairness applies to these decisions. This is emphasized by the fuzzy boundary between review for unreasonableness and legitimate expectations in many British decisions. The implication of a duty of fairness (although in limited circumstances) to policy decisions may have been a spillover from the interventionist conception of review for unreasonableness.

Perhaps Canadian judges' reluctance to expand fairness into policy decisions can also be partly explained by the fact that the doctrine of fairness developed as the courts were being given the power to review the content of legislative decisions under the *Canadian Charter of Rights and Freedoms*.²³ Since the courts were struggling with their new explicitly defined role in the legislative and policy process, and often were being criticized for it, they may have been more hesitant to develop, in administrative law, doctrines that would also affect (and in some people's minds, interfere with) the policy-making process.

²⁰ See Parts IV and V, below.

²¹ D.J. Mullan, "Judicial Deference to Executive Decision-Making: Evolving Concepts of Responsibility" (1993) 19 Queen's L.J. 137 at 148-49 [hereinafter "Judicial Deference"].

²² *Ibid.* at 161. See P. McAuslan, "Administrative Law, Consumption and Judicial Policy" (1983) 46 Mod. L. Rev. 1 at 14-20. See also *Administrative Law*, *supra* note 6 at 433-38 for several examples.

²³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

III. THE DEVELOPMENT OF LEGITIMATE EXPECTATIONS IN BRITAIN

Although the doctrine of legitimate expectations has been relatively recent in making its appearance in Canada, it has developed in Britain over the last thirty years. The description of the leading cases in this part will show that the following situations generate legitimate expectations and lead to the implication of a duty of procedural fairness when a decision is at the discretion of an administrative body. First, where the nature of the interest is such that the person has a right to expect that the privilege will continue (as in, for example, the case of a licence), a hearing of some sort is required before the benefit can be withdrawn. Second, if the decisionmaker has made a representation that a procedure in accordance with natural justice will be followed, this will be respected. In addition, if there is a regular practice of according a hearing or other procedure, this procedure will be accorded in the future. Finally, if a representation is made that a certain decision will be made or certain criteria will be applied, the agency will be bound to accord natural justice to a person before applying different criteria or making a different decision.²⁴ Nevertheless, the British cases have been careful to avoid specific definitions of what constitutes a legitimate expectation, so there has never been a clear, coherent judicial definition of the legal doctrine.

A. *Schmidt*

The first appearance of legitimate expectations was in the judgment of Lord Denning M.R. in *Schmidt v. Secretary of State for Home Affairs*²⁵ The Home Office, which administered the *Aliens Order 1953*,²⁶ had a policy of according aliens studying at a “recognised educational establishment”²⁷ a permit to live in Britain. The plaintiffs had been admitted to study at the Hubbard College of Scientology and were given permits to stay in the country for a certain period of time. The home secretary, because of concerns about Scientology, announced

²⁴ P.P. Craig, “Legitimate Expectations: A Conceptual Analysis” (1992) 108 L. Q. Rev. 79 at 82-85 [hereinafter “Conceptual Analysis”].

²⁵ [1969] 2 Ch. 149 (C.A.) [hereinafter *Schmidt*].

²⁶ S.I. 1953/1671, arts. 1(1), 5(1), (3).

²⁷ *Schmidt*, *supra* note 25 at 153.

that the college would no longer be considered a “recognised educational establishment.” When the plaintiffs applied for renewal of their permits, they were refused. They alleged that this constituted a denial of natural justice, since they were not given a hearing before this decision was made.

Lord Denning emphasized that, since the plaintiffs were aliens, they were only entitled to remain in the country “by licence of the Crown.”²⁸ He held that the duty to allow representations to be made “depends on whether [the plaintiff] 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.”²⁹ In this case there was no legitimate expectation because the permits were for a limited time, which had expired. However, Lord Denning stated that the plaintiffs would have been entitled to a hearing if their permits had been revoked *before* they expired. Were this the case, they would have had a legitimate expectation of being allowed to remain in the country for the time specified, which would have entitled them to a hearing.³⁰ With these *obiter* comments, the doctrine was introduced into British administrative law. Although the concept was not clearly defined, it was held that a legitimate expectation triggered the right to a hearing and to the protections of natural justice where a discretionary decision was being made. Lord Denning outlined at least one situation where an expectation was legitimate—where a permit or licence was given for a certain period and was withdrawn before its expiry.

B. *Liverpool Taxi*

The doctrine was further developed in *R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association*. Although this decision was also written by Lord Denning, the words “legitimate expectation” themselves never appear in the judgment. It has nevertheless become accepted as a leading case on the doctrine. The number of taxi licences in Liverpool had been limited by the county council to 300 for some time. When the taxicab owners’ association heard that the council was considering increasing the number of taxi

²⁸ *Ibid.* at 170.

²⁹ *Ibid.*

³⁰ *Ibid.* at 171.

³¹ [1972] 2 Q.B. 299 (C.A.) [hereinafter *Liverpool Taxi*].

licences, it expressed concern, and received letters from the town clerk assuring it that there would be opportunities for the taxicab owners to make representations and that “interested parties would be fully consulted.”³² The taxicab owners were represented by counsel before a meeting of a city council subcommittee, which did recommend an increase in the number of licences. After the city council meeting which approved these minutes, the subcommittee chair announced that the number of licences would not be increased until national legislation, then pending, to restrict “private hire cabs” was in force. This undertaking was confirmed in a letter to the association. Nevertheless, several months later, without informing the association, the committee and the city council decided to begin increasing the number of licences almost immediately. Although the owners asked for a hearing when they indirectly heard about the pending resolution, this was denied to them.

The association’s demand that the council not act on the resolution without first giving it a hearing was granted. Lord Denning held that because of their “interest” in the number of taxi licences in existence it was the duty of the council to give them a hearing before any change in the number of licences was authorized. In addition, an undertaking was given following that hearing that the number of cabs would not be increased until Parliament’s legislation was in effect. Lord Denning held that this promise gave the plaintiffs a right to another hearing if a decision was to be made contrary to it. He wrote:

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 the 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.³³

This passage establishes that if an undertaking has been given by a public body, it cannot be changed without at least giving the affected person a chance to be heard. It is important to note that the undertaking to which Lord Denning was referring was that the number of licences would not be increased until Parliament had passed its legislation. This was not a representation that a procedure would be followed, but a promise that a policy being put into place would be respected. Lord Denning held that this substantive promise could not be broken without giving the owners special procedural rights.

³² *Ibid.* at 306.

³³ *Ibid.* at 308.

Liverpool Taxi appeared to establish a broad basis for the concept of legitimate expectations. The power to increase the number of taxi licences was a decision based on public policy considerations, made by elected officials. Although those who had taxicab licences before the decision were particularly affected by it (it would affect the amount of their business, the value of their licences, etc.), it could be said that the decision also had the potential to have large effects on all the citizens of Liverpool. It would affect the availability of taxis in Liverpool, perhaps the prices of the cabs, traffic congestion, and so on. The fact that this led to judicial review on fairness grounds of this sort of polycentric decision, one that would likely be classified as legislative in modern Canadian law, was not a concern for Lord Denning. Further, he was not concerned about the fact that at least three hundred people would potentially be able to take advantage of the right to a hearing.

In addition, there is even a suggestion that the undertaking gave the taxicab owners more than just procedural rights.³⁴ The statement that the “overriding public interest” must require the change suggests that the discretion of the council to decide how many taxi licences there should be in Liverpool had been limited by the undertaking, and that because of it, the council was required to justify any change in policy with a different standard (the policy had to be in the “overriding” public interest). The impact of the application of the concepts set out in *Liverpool Taxi* had the potential to be very expansive indeed.

It is worthwhile noting that this decision came in the context of a challenge to a local council decision, since the 1970s saw British courts taking an activist role towards reviewing the substance of local councils’ discretionary decisions. It is interesting to contrast the decision in *Liverpool Taxi* with the decision several months later in *Bates v. Lord Hailsham of St. Marylebone*,³⁵ where the plaintiffs sought to challenge a decision made by a committee (made up mostly of judges) delegated by legislation with the power to set solicitors’ fees.³⁶ Megarry J. held that this decision was not subject to the duty of fairness, because it was “legislative” and was completely different from a city council’s licensing power.³⁷ The British courts appear to have been much more willing to

³⁴ See P.P. Craig, “Substantive Legitimate Expectations in Domestic and Community Law” (1996) 55 Cambridge L.J. 289 at 296 [hereinafter “Substantive Expectations”].

³⁵ [1972] 3 All E.R. 1019 (Ch.D.) [hereinafter *Bates*].

³⁶ It is interesting that one of the committee members was Lord Denning. The contrast in the approach to judicial review between a situation where a committee of lawyers and judges was under review and one where a county council’s decision was being challenged is striking.

³⁷ *Bates*, *supra* note 35 at 1023-24.

apply a duty of fairness and force consultation when there were decisions with which they disagreed, and upon bodies for whom they had less respect. However, *Liverpool Taxi*, the activist decision, has become one of the leading British legitimate expectation cases, while *Bates* has been relatively ignored there (although it still stands for the fact that legislative decisions are not generally reviewable).³⁸ It has, however, been widely accepted and cited in Canada, and was cited by Estey J. in *Inuit Tapirisat* as an authority for the exclusion of legislative decisions from the duty of fairness.³⁹ *Bates* was picked up by Canadian judges who had a Diceyan, non-interventionist conception of the role of the courts when reviewing policy decisions. Their fear of interfering with the substance of decisions led to an overcautious reluctance to require consultation with affected groups.

C. *McInnes*

In *McInnes v. Onslow Fane*,⁴⁰ another British lower court decision, a somewhat different spin was put on the concept than in Lord Denning's decisions. The plaintiff had applied to the British Boxing Board of Control for a boxing manager's licence but had been refused without reasons or an oral hearing. Megarry V.C. distinguished three types of cases involving licences or other cases where "rights" were not involved. If there were a forfeiture or revocation of a licence or membership, the plaintiff was generally entitled, it was held, to the full range of procedures of natural justice. At the other extreme, if what was at issue were merely an application for a benefit, there was no right to be heard (although the decisionmaker could not act capriciously or with bias). Megarry V.C. suggested that legitimate expectations constituted an "intermediate category."⁴¹ These arose, he suggested, where someone's licence or membership was up for renewal, or where it had been granted informally but was waiting for confirmation.⁴² Thus, following this decision, either the nature of the interest presently held (*McInnes*), or a representation or statement (*Schmidt, Liverpool Taxi*)

³⁸ Small, *supra* note 2 at 141-43; and *Administrative Law, supra* note 6 at 287-88.

³⁹ *Inuit Tapirisat, supra* note 10 at 757.

⁴⁰ [1978] 3 All E.R. 211 (Ch.D.) [hereinafter *McInnes*].

⁴¹ *Ibid.* at 218.

⁴² *Ibid.*

could give rise to an expectation.⁴³ It is important to note that these “nature of the interest” situations would certainly be classified in Canada as interests or privileges, though the British concept is more limited.

D. *Ng*

The Privy Council addressed the issue of legitimate expectations in *Attorney-General of Hong Kong v. Ng Yuen Shiu*.⁴⁴ This was the first of what was to become a common type of legitimate expectations case, where the expectation was of a hearing itself.⁴⁵ The government of Hong Kong had instituted what was known as a “reached base” policy for illegal immigrants. If an immigrant from China reached the urban areas of Hong Kong without being arrested the person was not deported. However, because of an influx of illegal immigrants, the policy was changed and it was announced that illegal immigrants from China would begin to be deported. In response to a petition from a group of illegal immigrants from Macau, an immigration official read a statement outside government house which stated that illegal immigrants from that country would “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.”⁴⁶ The plaintiff, an illegal immigrant who had entered from Macau, heard a report about this statement on television, after he had reported to an immigration office to register. However, at his interview the next day, he was only allowed to answer questions that were put to him, and was not allowed to express what he felt were the humanitarian reasons he should stay.

Lord Fraser of Tullybelton held that the statement that each case would be treated on its merits gave rise to a legitimate expectation on the part of the plaintiff, who therefore had a right to bring forward the reasons he should be allowed to stay. The government’s promise of treatment on the “merits” constituted a promise of a fair procedure, one that would give Ng the opportunity to ask the immigration official to use his or her discretion and allow him to remain in Hong Kong.

⁴³ “Conceptual Analysis,” *supra* note 24 at 82.

⁴⁴ [1983] 2 A.C. 629 [hereinafter *Ng*].

⁴⁵ “Conceptual Analysis,” *supra* note 24 at 80-81.

⁴⁶ *Ng*, *supra* note 44 at 635.

A “legitimate expectation,” Lord Fraser held, was of a benefit that went “beyond legally enforceable rights.”⁴⁷ This emphasizes the place of the doctrine in determining whether a duty of fairness is owed. Though he did not give a complete definition of the concept, he held that a representation by the responsible authority was one way of generating such an expectation. Finally, he held that if the representation “conflicted with its duty” the body would not be held to it.⁴⁸ If the representation made was *ultra vires*, the body would not be required to grant a hearing when departing from it.

Ng was also the first leading case in which the terminology used was of fairness, rather than natural justice. *Ng* was not granted a formal hearing in a case where he would have had no rights otherwise, but was held to be entitled to put certain information before the person interviewing him about his status. The court’s interpretation of the meaning of the representation that *Ng* was given both established and defined the content of the duty of fairness owed to him. This is particularly important, since it shows that the concept can have an application other than as a threshold device. As I will argue later in this article, it is in this context that the doctrine makes sense in Canada; although it should not be used to imply a duty of fairness, it can be used to define what fairness requires in a particular case.⁴⁹

It is also worth noting that there was no requirement that *Ng* had relied or taken any action on the basis of the representation that was made to him. He went to register at the immigration office before he heard the statement on the news. Representations give rise to legitimate expectations, this implies, not solely because people rely on them, but because it is an important principle that public officials should not break their promises. Anyone who has heard or knows of a representation is entitled, this suggests, to raise it as a legitimate expectation.

E. *Khan*

Ng was applied and developed in the Court of Appeal in *R. v. Secretary of State for the Home Department, ex parte Khan*.⁵⁰ In this case, the Home Office had circulated a pamphlet outlining the criteria which

⁴⁷ *Ibid.* at 636.

⁴⁸ *Ibid.* at 638.

⁴⁹ See Part VI(A), below.

⁵⁰ [1985] 1 All E.R. 40 [hereinafter *Khan*].

it would use when exercising its discretion to allow a child to come into Britain for adoption. The circular also set out a procedure for gaining approval. The plaintiff wished to adopt his relative's child, who lived in Pakistan. He followed the steps set out in the circular. However, the criteria set out in the circular were not applied, since those which the Home Office normally used were quite different. Parker L.J. held that the circular created a legitimate expectation on the part of Khan that the criteria contained in it would be the ones applied. He was entitled to a hearing at which he could argue why the stated criteria should be applied to him. There is also a suggestion that the ministry could not apply different criteria unless there was an overriding public interest that justified changing them. Like *Liverpool Taxi Khan* shows that a representation by the decision-making body that decisions will be made based on a certain policy can give rise to special procedural protections. The expectation here was not of a procedure, but of the application of a certain set of criteria, a "substantive" expectation. It is important to note that in Canada, Khan, like Ng, would likely have been classified as having an interest or a privilege, and it would not have been necessary to use legitimate expectations to establish his right to make representations. Nevertheless, a formal hearing may not have been what the duty of fairness required.

F. *GCHQ*

Perhaps the most extensive application of the doctrine came in what is now generally considered the leading case on legitimate expectations, in the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*⁵¹. The case involved employees of Government Communications Headquarters (GCHQ), which was responsible for communications and intelligence functions for the government. These functions were believed by the government to be vital to national security. The several thousand people employed in this branch of the government were represented by various national trade unions. As part of the national unions' action against the Thatcher government, several one-day strikes, work-to-rule campaigns, and overtime bans were carried out by the unions working at GCHQ. As a result of concerns about these job actions and their effect on national security, Thatcher, who was also the minister for the civil service, announced that the workers at GCHQ would no longer be entitled to

⁵¹ [1985] A.C. 374 (H.L.) [hereinafter *GCHQ*].

belong to the national unions, and could only belong to an approved staff association.⁵² This was done without any consultation with the unions, despite the fact that in the past, changes in the civil servants' conditions of employment had been the subject of consultation. The unions argued that they were entitled to a hearing before the decision was made.

The unions' demand that the decision be quashed was rejected, but on the ground that the government had demonstrated that national security was at issue. Consultation on withdrawing the unions' right to strike would, it was held, risk provoking more strikes that would affect the sensitive operations that took place at GCHQ. Nevertheless, the Law Lords stated that were it not for this, the unions would have been entitled to a hearing under the legitimate expectations doctrine. The legitimate expectation arose from the practice of consultation that had existed since the establishment of GCHQ whenever changes to "conditions of service" were made.⁵³

Lord Diplock, in a well-known passage, held that legitimate expectations arise when a government body deprives a person

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 ground 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 the opportunity of advancing reasons for contending that they should not be withdrawn.⁵⁴

Although, again, a clear definition was not given, Lord Diplock emphasized that a legitimate expectation was not simply one which a reasonable person would entertain, but required something more to be "legitimate." This analysis, though, suggested that the only types of promises that could trigger the doctrine were those of *hearings* (as in *Ng* and *GCHQ*), and minimized the possibility of promises of *substantive* benefits giving rise to procedural rights (as, for example, in *Khan*). Lord Fraser's view in the same case, however, was broader and did seem to

⁵² The new Labour government in Britain recently restored the right of the GCHQ workers to belong to the union of their choice. See R. Norton-Taylor, "Sacked GCHQ Workers Elated as Cook Decides to Right an Old Wrong" *The [London] Guardian* (16 May 1997) 6. However, the government has been criticized for imposing terms on the unions that, it is argued, are almost as restrictive as those put into place by Thatcher. See P. Beaumont, "Foreign Office Betrays GCHQ Unions" *The [London] Guardian* (17 August 1997) 1.

⁵³ *Supra* note 51 at 401, Lord Fraser, and at 419, Lord Roskill.

⁵⁴ *Ibid.* at 408.

encompass the *Khan* situation.⁵⁵ As I will show, it is Lord Diplock's narrower view, which has not been generally followed in Britain,⁵⁶ that has taken hold in Canada.

GCHQ is probably most significant for its recognition that a regular practice of consultation could give rise to a legitimate expectation. From a Canadian perspective, it is also worthwhile noting that the decision at issue was made by the executive—on policy grounds—and was almost certainly one which would not be reviewable in Canada. *Ng* and *GCHQ* illustrate well the differences between the Canadian and British approaches. While *Ng* would have been entitled to a duty of fairness in Canada even if the government statement had not been promulgated (since staying in the country would have been seen as a “privilege”), the unions in *GCHQ* would not have been entitled to fairness because the decision at issue was legislative, made by the cabinet.⁵⁷

Further, *GCHQ* shows how procedural fairness can be used to enforce a duty on the part of government bodies to consult with certain groups before policy decisions are made. Although at issue was a broad decision made for reasons of public interest and policy, the unions and their members were particularly affected by the decision. For that reason, the government had consulted with them on previous occasions. However, it seems improper that their right to consultation should depend on the existence of the government's past practice. The effect on the unions was similar to that of narrower, more individual decisions on the person concerned, since they and their members had a particular interest in the decision: it affected their very existence as representatives of these workers. Unlike broad policy decisions that affect the population at large in similar ways, where the public has the numerical power to express its displeasure through the ballot box or other political means, this decision affected a tiny group when compared to the general population. In my opinion, this consideration is much more important than the existence of the past practice.

⁵⁵ C. F. Forsyth, “The Provenance and Protection of Legitimate Expectations” (1988) 47 Cambridge L.J. 238 at 246-50.

⁵⁶ *Ibid.* at 250.

⁵⁷ Canadian courts have been much more hesitant than British ones to review any kind of executive decision, whether legislative or not. See “Judicial Deference,” *supra* note 21 at 147-53.

G. *Substantive Legitimate Expectations*

Since *GCHQ*, there have been tentative moves in British and Australian law towards the possibility of giving substantive protection to legitimate expectations.⁵⁸ Under this concept, not only will a representation such as that in *Khan* or *Liverpool Taxi* give rise to a duty of fairness or natural justice, it will also prevent the public body from going back on its representation. Authority for this possibility comes indirectly from the statements in those two cases that the representation could not be reneged upon unless there was a hearing *and* it was also in the overriding public interest. While an extensive discussion of the merits of substantive legitimate expectations is beyond the scope of this article, it is important to note that according substantive protection to expectations is a much discussed issue in Britain, often through the concept of public law estoppel. Although giving substantive effects to legitimate expectations seems a natural evolution from giving procedural effect to this kind of promise, this raises very different issues about the use and fettering of discretion, and the extent to which public authorities should be bound by their declarations of policy. In my opinion, it is much more closely related to ideas about discretion than fairness, and will therefore not be dealt with in detail here.

IV. BRINGING THE DOCTRINE TO CANADA

In this part, I will discuss the cases in which legitimate expectations was first applied in Canada, examining the various approaches courts took to the question. I will trace its application in Canadian cases up to and including the two Supreme Court decisions dealing with the issue. This discussion will show the confusion that developed early in the application of the doctrine, and the many different ways the phrase itself was used. I will emphasize that, in many legitimate expectations cases, the doctrine was simply not necessary, and argue that the focus on it often caused judges to ignore the flexible character of the doctrine of fairness.

⁵⁸ See, for example, "Substantive Expectations," *supra* note 34; "Conceptual Analysis," *supra* note 24 at 87-97; and C. Lewis, Note, "Fairness, Legitimate Expectations and Estoppel" (1986) 49 *Mod. L. Rev.* 251.

A. Early Uses of “Legitimate Expectations”

Although legitimate expectations is generally considered to have begun its development in Canada in the late 1980s and early 1990s, the phrase itself appeared in some earlier decisions. In my view, the approach in several of these judgments, where the focus was kept on the general characteristics of the duty of fairness, was the appropriate one, and it is unfortunate that some of these early cases were not more closely followed in later decisions.

Several cases considered the application of the doctrine in the sense in which it was originally developed in the British cases, as a device for determining whether a duty of fairness was owed. In *Re Webb and Ontario Housing Corporation*,⁵⁹ MacKinnon A.C.J.O. addressed the issue of whether a tenant facing eviction from public housing was entitled to be treated by the housing corporation in accordance with the duty of fairness. In framing the issues, he stated that the plaintiff had argued that: “even if the Board of Directors was performing an administrative function, on the facts of this case there was a ‘duty to act fairly,’ and the appellant had a ‘legitimate expectation’ she would be treated fairly and this expectation was not met.”⁶⁰

In dealing with this argument, however, the decision did not refer to the English legitimate expectation cases, nor was the phrase itself used again. Although MacKinnon A.C.J.O. held that there was a duty of fairness, he did so by looking at the nature of the plaintiff’s interest under the then newly developing general duty of fairness. By implication, *Webb* rejected the notion that a legitimate expectation was necessary to establish a duty of fairness.⁶¹

⁵⁹ (1978), 22 O.R. (2d) 257 (C.A.) [hereinafter *Webb*], aff’g (1977), 18 O.R. (2d) 427 (Div. Ct.).

⁶⁰ *Ibid.* at 260.

⁶¹ Some other cases in the 1970s addressed the issue. In *Hardayal v. Minister of Manpower and Immigration*, [1976] 2 F.C. 746 (C.A.), the court held, on the basis of the doctrine, that someone who had been given a minister’s permit to remain in Canada for a certain period of time could not have the permit withdrawn before its expiry without a hearing. This decision was overturned on appeal on the basis that the application had been brought under s. 28 of the *Federal Court Act* R.S.C. 1970 (2d Supp.), c. 10, instead of s. 18(a): *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470. In *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49 at 64-66 (C.A.) [hereinafter *Multi-Malls*], the court referred to *Liverpool Taxi*, *supra* note 31, in holding the ministry to its promise that a township’s official plan would be submitted to the Ontario Municipal Board for a public hearing before it was approved. For a review of these and other early cases dealing with “legitimate expectation fact patterns” see MacPherson, *supra* note 2 at 149-50.

The same issue, and the same result, arose in *Hutfield v. Board of Fort Saskatchewan Hospital District No. 98*⁶² Hutfield had requested, but was denied hospital privileges by the defendant hospital board without being given an oral hearing or reasons for the decision. The board argued that Hutfield was not owed a duty of fairness, since he had no “right” to the benefit he was seeking. He had to demonstrate a legitimate expectation, which he could not do. McDonald J. rejected these submissions, holding that the duty of fairness is a general one that applies to privileges and interests whether or not there is a legitimate expectation of receiving them. He pointed out that the board’s submissions showed:

the artificiality of the distinction drawn in the recent English cases cited, that have pushed the frontiers of judicial review and procedural fairness outward but have limited them on grounds (“legitimate expectation” and “slur”) that do not reflect a principle that can withstand scrutiny in the light of the object of judicial review by certiorari.⁶³

McDonald J.’s judgment emphasized that the doctrine of legitimate expectations is unnecessary at the stage of establishing whether a duty of fairness is owed, and showed that it would restrict the concept of judicial review if it were used in the way the British cases had applied it.⁶⁴ This decision was affirmed on different grounds in the Court of Appeal,⁶⁵ although McDonald J.’s comments on the doctrine were not discussed. However, they explain why the doctrine is, in most situations, unnecessary in Canada and may limit the extent of the duty of fairness. It is unfortunate that McDonald J.’s warnings were not heeded in subsequent cases. As the above quotation suggests, the ways in which the doctrine of legitimate expectations *limits* judicial review, even though it expands it in other ways, are not consistent with the principles behind the duty of fairness, particularly in Canadian law.

In another early case, *Québec (Sous-Ministre du Revenu) v. Transport Lessard (1976) Limitée*,⁶⁶ the Quebec Court of Appeal used the concept to imply substantive rights into the duty of fairness, in order to hold the minister to a “promise.” The plaintiff company had received an assurance, based on an internal directive issued by the ministry, that

⁶² (1986), 74 A.R. 180 (Q.B.) [hereinafter *Hutfield*].

⁶³ *Ibid.* at 188.

⁶⁴ See D.P. Jones, “A Comment on ‘Legitimate Expectations’ and the Duty to Give Reasons in Administrative Law” (1987) 25 Alta. L. Rev. 512. For a somewhat different interpretation of *Hutfield* than mine, see “Fair Start,” *supra* note 2 at 277.

⁶⁵ (1988), 89 A.R. 274.

⁶⁶ [1985] R.D.J. 502 [hereinafter *Transport Lessard*].

sales tax would not be charged on the trucks owned by another company whose assets it was about to purchase. The ministry later changed its interpretation of the legislation, and sales tax was charged. Relying on *Khan*, the court held that the duty to act fairly could lead to substantive results as well as procedural protections. Since the interpretation of the law in the directive was reasonable, “un contribuable qui se fonde sur cette directive pour régler sa conduite peut nourrir l’espoir légitime qu’un changement postérieur ne viendra pas perturber les décisions prises en fonction d’une telle directive.”⁶⁷ The legislation had to be interpreted consistently with the earlier promise.

This use of the concept to hold the ministry to its promise about how its discretion would be exercised was a very different use of the doctrine than in the two previous cases. Giving substantive effects to the legitimate expectations of the plaintiff constituted a major expansion of the duty of fairness outside the procedural realm. Fairness, the Court of Appeal held, could require the ministry of revenue to exercise its discretion in a certain way. A Canadian concept of legitimate expectations built on this principle would have dramatically expanded the duty of fairness.⁶⁸ It seems unclear, though, why the concept of fairness, which is focused on giving procedural rights and the right to be heard, should be used to do something very different, preventing the government from changing its mind about the interpretation of a tax statute. The danger of using the same doctrine to do too many different things is that it may not be properly adapted or specific enough to accomplish any of them successfully. This is arguably a major problem with legitimate expectations as it is applied in Britain. As I will argue later, the decision to reject the idea that legitimate expectations can require substantive results was appropriate.⁶⁹

In *Gaw v. Canada (Commissioner of Corrections)*⁷⁰ the British legitimate expectations cases were cited when the commissioner was held to a representation that set out the procedure that would be

⁶⁷ *Ibid.* at 508.

⁶⁸ The only other decisions I have found in which legitimate expectations were given substantive effects are *Gingras v. Canada*, [1990] 2 F.C. 68 (T.D.), varied on different grounds (1994), 113 D.L.R. (4th) 295 (F.C.A.); and *Bloomfield v. Saskatchewan (Minister of Health)* [1986] S.J. No. 675 (QL) (Q.B.). These decisions are anomalies, however, and there was no significant move towards protecting substantive legitimate expectations in Canada. In *Sturdy Truck Body (1972) Ltd. v. M.N.R. (Customs and Excise)* (1995), 95 F.T.R. 270 (F.C.T.D.), the use of legitimate expectations to hold the government to representations it made about the application of a tax statute was rejected; the facts of this case were very similar to those in *Transport Lessard*

⁶⁹ See Part VI(C), below.

⁷⁰ (1986), 2 F.T.R. 122 (F.C.T.D.) [hereinafter *Gaw*].

followed during an investigation of the conduct of Gaw, the district director of the Victoria Parole Office. In response to concerns from his lawyer, Gaw was assured that although he would not be heard at the preliminary inquiry, if the process proceeded he would be given a formal hearing during the second stage of the investigation. This second stage, however, was abandoned by the Deputy Commissioner without the formal hearing having occurred, although he agreed to meet with Gaw before a final decision was made. Gaw argued that he was entitled to a formal hearing. Dubé J. concluded that “a public authority is bound by its undertakings as to the procedure it will follow, provided this procedure does not conflict with its duty.”⁷¹ Although he took the general principle from the leading British cases, it is important to note that he did not find it necessary to determine whether the representations came under the formal rubric of a “legitimate expectation.” The content of the duty of fairness that was otherwise owed to Gaw was determined by holding the commissioner to his representations. Dubé J.’s judgment shows that the principle of holding a body to its statements about procedure can be easily accommodated within Canadian administrative law, without the need to determine if the complicated conditions for legitimate expectations are fulfilled. In my opinion, while *Hutfield* shows that legitimate expectations is largely unnecessary, and could possibly have regressive effects, *Gaw* shows that a wholesale importation of the doctrine is not necessary to ensure that a body is held to its representations about the procedure it will follow. Subsequent cases have, unfortunately, failed to recognize this.

In *Penikett v. R.*,⁷² an unsuccessful attempt was made to use legitimate expectations to enforce past practices of consultation by the federal government. The Yukon Government Leader, Tony Penikett, sought to challenge the *Meech Lake Accord*⁷³ agreed to by the prime minister and the provincial premiers on the basis that the Yukon government had not been consulted during the negotiations.⁷⁴ Relying on *GCHQ*, Penikett argued that the past practice of including the

⁷¹ *Ibid.* at 124, citing *Liverpool Taxi* *supra* note 31; *Khan*, *supra* note 50; *Ng*, *supra* note 44; and *Multi-Malls*, *supra* note 61.

⁷² [1988] N.W.T.R. 18 (Y.T.C.A.) [hereinafter *Penikett*], rev’g (1987), 2 Y.R. 262 (C.A.).

⁷³ See *Constitution Amendment, 1987* (Ottawa: Government of Canada, 1987). The package of amendments, known popularly as the *Meech Lake Accord*, failed to secure the required unanimous approval of the provinces in 1990.

⁷⁴ Ironically, counsel for Penikett was John Sopinka, who was shortly to rule on this question as a Supreme Court justice. It is interesting that his judgment in *CAP*, *supra* note 1, rejected arguments similar to those made on behalf of Penikett.

territorial governments in constitutional negotiations led to a legitimate expectation, and therefore, fairness required that the Yukon be included in the negotiations. The Court of Appeal held that the issues were not justiciable, since the making of constitutional accords was part of the process of legislation leading to the amendment of the Constitution, and was therefore not subject to the duty of fairness.⁷⁵ It did not address whether, in this case, a legitimate expectation had arisen, although in *obiter*, it suggested that executive powers were ordinarily reviewable by the courts on the basis of fairness.⁷⁶ The court in *Penikett* did not exclude the application of legitimate expectations in all cases where decisions of a legislative nature were being made, only where they arose in the process of making *legislation*. Nevertheless, this conclusion was later to be drawn from the case by the Supreme Court of Canada.

B. *Early Influential Cases*

The most important and most often cited early Canadian case is *Bendahmane v. Canada (Minister of Employment and Immigration)*.⁷⁷ Bendahmane had come to Canada on a visitor's visa, but was denied entry to Canada by an immigration officer who believed he was not a "genuine visitor." An inquiry confirmed this finding, which Bendahmane appealed. As he was waiting for the appeal to be heard, a program was announced to clear the backlog of refugee claimants, under which special criteria would be used to consider their applications. Bendahmane obtained a form letter stating that those waiting for an inquiry could apply for refugee status before a certain date and be considered under this program. Although these criteria did not apply to the plaintiff (since an inquiry had already been held in his case), he applied for refugee status. He was then sent a letter stating that he did not qualify for the backlog reduction program, but that his "claim for refugee status will continue to be considered in the usual way."⁷⁸ The minister later refused to consider his application, however, since under the statute refugee claims could normally only be made before the inquiry was held. The last sentence of the letter did not in fact apply to his case, and the information in it was wrong. However, Bendahmane

⁷⁵ *Penikett*, *supra* note 72 at 30-31.

⁷⁶ *Ibid.* at 27-29.

⁷⁷ [1989] 3 F.C. 16 (C.A.) [hereinafter *Bendahmane*].

⁷⁸ *Ibid.* at 22.

argued that this representation created a legitimate expectation that his application would be handled as other applications were, and that he was therefore entitled to the full hearing that other claimants (who had made the request at the proper time) received.

The Federal Court of Appeal, in large part, accepted this argument. Hugessen J.A., writing for the majority, held that the minister had not fulfilled the duty to act fairly. He pointed out that although the statute set out the procedure for the hearing of refugee claims (including the fact that they had to be filed before the inquiry was held), the minister retained a discretion to hear them at other times.⁷⁹ However, he held that the more general question of whether the duty of fairness applied to someone who claimed refugee status outside the normal time limit did not arise in this case.⁸⁰ He held, after citing *Ng*, that the minister was obliged to consider Bendahmane's application, since the representations in the letter gave rise to an expectation that his application would be considered. Since the representation did not conflict with the minister's statutory duty, it had to be honoured, and an order was made that the minister consider the case "in accordance with the rules of fairness and the principles of fundamental justice."⁸¹

Marceau J.A. dissented. He held that this was not a proper case for legitimate expectations, since the applicant, in trying to force the minister to uphold his promise, was asking the court for substantive, rather than procedural relief. He disagreed with the majority's interpretation of the statute, and held that the minister was not "entirely free" to disregard the procedure set out in it. He also held that Bendahmane should have realized that the letter did not apply to someone in his position, so no legitimate expectation arose.⁸²

This case shows several important issues that recur in the Canadian application of legitimate expectations. The majority, in my view, used the concept to avoid deciding whether a duty of fairness was owed in ordinary circumstances to someone who made an application for refugee status outside the statutory procedure. Were legitimate expectations not applied, the court would have had to decide whether, given that the statute permitted the minister to make a decision on a refugee application outside the regular time frame, this exercise of discretion attracted the principles of fairness. It would have been

⁷⁹ *Ibid.* at 31-32.

⁸⁰ *Ibid.* at 30.

⁸¹ *Ibid.* at 33.

⁸² *Ibid.* at 26.

difficult for the court to hold that such a decision was not a determination of a right, interest, or privilege, so fairness should have applied in any case. The doctrine enabled the court to avoid making a decision that would have required the minister to consider all applications made outside the statutory procedure. Although the concept is supposed to lead to an expansion of the duty of fairness, this decision was used to avoid a broad interpretation of the duty. A subsequent plaintiff in Bendahmane's position who makes an application outside the time frame may well be required to show a legitimate expectation. Legitimate expectations was used to find that a duty existed, but this was unnecessary. As would occur in many later cases, the dispute between the majority and dissent over issues such as whether the expectation was substantive or procedural, and whether the expectation was "legitimate" obscured the real issues about when fairness applies to exercises of discretion, and how the existence of another procedure affects this. What the letter should have been used for, I believe, is to determine what the content of the duty should be—perhaps fairness would normally only require minimal procedures if an application was made outside the normal time frame, but the letter meant that Bendahmane was entitled to the same procedure as someone who applied within this period.

Legitimate expectations arose in yet another context in *Sunshine Coast Parents for French v. School District No. 46*⁸³ In this case, a group of parents challenged the school board's decision to eliminate its French immersion program, which began at grade one, and replace it with one beginning in grade four. The parents were not consulted prior to the decision, and argued that the duty of fairness had not been complied with, since the board had a policy requiring that they be consulted. Spencer J. acknowledged that legitimate expectations formed part of Canadian law, but implied that a legitimate expectation could only arise from a promise or practice of consultation. However, he went on to hold that the school board was making a legislative decision, and that under the principles in *Inuit Tapirisat*, fairness did not apply to legislative functions. He rejected the plaintiffs' argument that legitimate expectations constituted a general exception to the rule preventing judicial review of legislative functions. The plaintiffs' proper course of action, he held, "was to vote [the board's] members out of office at the first opportunity."⁸⁴

⁸³ (1990), 49 B.C.L.R. (2d) 252 (S.C.) [hereinafter *Sunshine Coast*].

⁸⁴ *Ibid.* at 258.

Nevertheless, he went on to consider the fact that the board had previously passed a policy which included among its provisions a responsibility to invite comment from those particularly affected by a proposal. He held that legitimate expectations would force a body exercising a legislative function to follow its own procedures *while they were in effect*.⁸⁵ Although the board could have avoided this requirement by suspending the policy and then passing the motion, it was bound by the policy while it was in effect. However, the plaintiffs did not know of the policy, so they could not have relied on it and therefore, in the judge's view, had no legitimate expectation. The plaintiffs' motion was therefore dismissed.

Again, the focus on legitimate expectations and on the board's policy obscured what, in my view, should have been the important issues. The parents of children attending the French immersion classes had a special interest in the question of the grade levels at which they would be offered. Even if the decision was properly classified as legislative (which is debatable), it is the nature of the parents' interest that should have given them rights to participate in the decision. While a broader conception of legitimate expectations that focused on "nature of the interest" claims might have taken this into account, Spencer J.'s narrow conception of legitimate expectations and the exclusion of judicial review of legislative functions prevented this.⁸⁶ The doctrine of legitimate expectations simply does not seem an appropriate way to determine whether these parents had a right to be heard. The fact is that the group of parents who had children in French immersion classes would probably not have the political power to "vote the board members out of office" as suggested by Spencer J. The majority of voters in the school district, if their children were not in French immersion, would likely not be much concerned about this decision. In my view, it is this fact, rather than the existence of some form of promise, that should be at the centre of the debate. Consultation with the parents was necessary to ensure that their views were at least taken into account. Focusing on the current definition of legitimate expectations obscured the real reasons consultation was needed.

⁸⁵ *Ibid.* at 260.

⁸⁶ For a somewhat different view of this case, see D.J. Mullan, "Confining the Reach of Legitimate Expectations—Case Comment: *Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast)*" (1991) 44 Admin. L.R. 245 [hereinafter "Confining the Reach"].

C. Supreme Court Decisions

In 1990, the Supreme Court first ruled on the issue of legitimate expectations in *Old St. Boniface*,⁸⁷ but only in a brief paragraph at the end of the judgment. The plaintiffs were opposed to the rezoning of an area of Winnipeg. Among several other arguments, the association submitted that city councillors had promised that it would be consulted as part of the process of developing a plan for the area, and that this would occur before the redevelopment to which the group was opposed. This, it argued, created a legitimate expectation, preventing the city from approving the rezoning without the consultation taking place.

Although this was the first time the Court had addressed this emerging issue, Sopinka J.'s judgment did not refer to many of the leading British cases (he referred only to *GCHQ* and *Ng*), nor did it review any of the above Canadian cases other than *Gaw*. Nevertheless, Sopinka J., in *obiter*, confirmed the doctrine's place in Canadian law and proceeded to give a basic definition of it. He held:

The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances where there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.⁸⁸

Sopinka J. went on to hold, however, that since the *City of Winnipeg Act*⁸⁹ set out a procedure for consultation in the planning and zoning process, it was not appropriate for the Court to apply the doctrine even if the councillors' statements had given rise to legitimate expectations on the part of the residents' association. The residents had their chance under the procedure set out in the statute, he argued, to make representations to a committee before the rezoning decision was made (although this admittedly fell short of what they were promised). The legitimate expectations doctrine, he held, "would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation."⁹⁰

Although this judgment purported to apply the British and Canadian cases, it in fact severely restricted the doctrine, and, in my

⁸⁷ *Supra* note 1.

⁸⁸ *Ibid.* at 1204.

⁸⁹ S.M. 1971, c. 105.

⁹⁰ *Old St. Boniface, supra* note 1 at 1204.

opinion, led to even more confusion. This decision imported the doctrine but without even considering its place in the different Canadian context. Especially perplexing was Sopinka J.'s statement that legitimate expectations is an extension of the duty of fairness and that it gives the right to "make representations" where there would otherwise be no right. This implies that legitimate expectations is a threshold device, that it leads to the implication of a duty of fairness. However, the judgment does not say how the duty of fairness is extended, or in what situations legitimate expectations leads to a duty of fairness where there would otherwise be none. Though the doctrine triggers the duty of fairness in Britain, and Sopinka J.'s statement would be correct there, the broad conception of fairness in Canada makes it unnecessary to extend the duty to situations not covering rights or interests. The only significant possibility for extension of the duty is into review of decisions that would otherwise be considered legislative.⁹¹ Because Sopinka J. talked about an opportunity to make representations in circumstances "where otherwise there would be no such opportunity,"⁹² he also seemed to rule out the possibility that legitimate expectations could be used to define the content of the duty of fairness in cases where the duty would exist under the general test.

The statement that the effect of the doctrine is an opportunity to "make representations" seemed to confirm that in Canada there are no substantive effects to the doctrine. Presumably, then, the use of the doctrine to give a "substantive content" to the duty of fairness in *Transport Lessard* was not appropriate. Canada was not to follow Britain down the road to using the doctrine as a device to hold governments to the substantive elements of their promises.⁹³

Sopinka J.'s wording suggests that legitimate expectations only arise from *conduct* giving rise to an expectation of *consultation*. This rules out two of the categories which in Britain can give rise to a legitimate expectation—those arising from the nature of the interest itself, as in *McInnes*, and the promise of a substantive benefit, as in *Khan*. Although the expectation was of consultation in the two cases referred to by Sopinka J., the doctrine itself protects other, broader conceptions of expectations. Lord Diplock's erroneous restriction of the

⁹¹ J.M. Evans *et al.*, *Administrative Law: Cases, Text, and Materials* 4th ed. (Toronto: Emond Montgomery, 1995) at 134-35.

⁹² *Ibid.*

⁹³ Mullan, however, believes that this judgment did leave open the possibility of a substantive dimension to legitimate expectations: see "Fair Start," *supra* note 2 at 273.

concept to promises of procedure in *GCHQ*,⁹⁴ which has not been followed in Britain, was nevertheless picked up by Sopinka J. because of the limited sources upon which he relied.

Although the residents were heard in accordance with the procedure in the statute, Sopinka J. failed to address directly the issues that had arisen in a slightly different context in *Bendahmane*. In that judgment, it was held that as long as the undertaking is not *contrary* to what is provided for in the statute, the body will be held to it, even if the statute itself sets out a different procedure. The judgment in *Old St. Boniface* suggested, instead, that if there is any consultation provided for in the statute, a judge has the option to decline to protect the legitimate expectation. This seems to contradict one of the principles behind the legitimate expectations doctrine—that public officials should be held to their promises, even if what is promised is not required by legislation. Unless the statute specifically prohibits the body from carrying out consultations in addition to what the statute requires, there appears to me no reason to go against this principle. Again, the doctrine was restricted, but without real reasons being given for that decision.

Old St. Boniface left a seriously limited doctrine of legitimate expectations in place in Canada, and Sopinka J.'s description of the doctrine did not take into account the differences in Canadian and British administrative law. It was difficult to see from this case how the doctrine would apply in Canadian law, unless it constituted an exception to the rule that legislative decisions do not attract a duty of fairness.

However, this possibility was eliminated, and the doctrine was even further limited eight months later with the Court's decision in the *CAP* case.⁹⁵ This case reached the Supreme Court after the British Columbia Court of Appeal had delivered a judgment⁹⁶ which expanded the reach of the doctrine considerably. Under the *Canada Assistance Plan*,⁹⁷ the minister of national health and welfare was authorized to enter into agreements with the provinces under which the federal government would pay fifty per cent of the costs of social assistance in the province. Another section of the legislation provided that the agreement was in effect until it was terminated by mutual agreement or with one year's notice by either party.⁹⁸ The notice provisions were also

⁹⁴ See *supra* notes 54-56 and accompanying text.

⁹⁵ *Supra* note 1.

⁹⁶ *Reference Re Constitutional Question Act (British Columbia)* (1990), 71 D.L.R. (4th) 99.

⁹⁷ R.S.C. 1985, c. C-1.

⁹⁸ *Ibid.*, s. 8(2).

included in the agreement. British Columbia entered into an agreement under the Plan, as did all other provinces. In its budget speech, the federal government announced that contributions to British Columbia, Alberta, and Ontario would be reduced and determined under a different formula. This change was to take place right away, and was implemented through a change in the legislation.⁹⁹

The government of British Columbia argued, and it was accepted by the Court of Appeal, that the agreement gave the provincial government a legitimate expectation that it would be consulted and its consent would be obtained before changes were made to the agreement, unless the one year's notice was given. Although the Court of Appeal recognized that parliamentary sovereignty prevented the court from sanctioning Parliament's action, it held that the doctrine of legitimate expectations prevented the executive from introducing the legislation into Parliament without the required consent from the British Columbia government. Thus, while interference in the legislative process was not permissible, the executive was constrained by its undertaking from introducing legislation that went against the expectation.

The Court of Appeal decision was overturned by a unanimous Supreme Court, in a decision also written by Sopinka J. First, he held that the Court of Appeal's holding that introducing the legislation required the consent of British Columbia was an improper use of the legitimate expectation doctrine to create substantive rights. The judgment confirmed that the duty of fairness cannot impose constraints on decision-making bodies except in the procedures they follow. He wrote:

It was held by the majority of the court below ... that the federal government acted illegally in invoking the power of Parliament to amend the plan without obtaining the *consent* of British Columbia. ... This must be contrasted with a claim that there was a legitimate expectation that the federal government would not act without *consulting* British Columbia. 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.¹⁰⁰

Again, Sopinka J. did not seem to recognize the possibility that a legitimate expectation of a substantive result might lead to procedural protection. He did not address the possibility that, as in *Khan*, British Columbia's legitimate expectation of its consent being required (a substantive expectation) could give rise to the right to be consulted before the commitment to obtain that consent was reneged upon (a

⁹⁹ *Government Expenditures Restraint Act*, S.C. 1991, c. 9, s. 2.

¹⁰⁰ *CAP*, *supra* note 1 at 557 [emphasis in original].

procedural protection). His judgment here, as in *Old St. Boniface*, does seem to imply that only a legitimate expectation that a certain procedure will be followed gives rise to procedural protection.¹⁰¹ This seems counter-intuitive. A promise that a certain result will follow is stronger and more reassuring than a promise that a certain procedure will be accorded. However, under Sopinka J.'s approach the former would lead to no protection under the doctrine of legitimate expectations, while the latter would.

Sopinka J. went on to hold that the doctrine was also not applicable because of the nature of the Minister's decision that was being challenged—the introduction of a bill into Parliament. The introduction of legislation, he held, was a fundamental part of the legislative process, and using the doctrine of legitimate expectations to restrict it would interfere with Parliamentary sovereignty. Sopinka J. went further, however, and also held that “the rules governing procedural fairness do not apply to a body exercising purely legislative functions.”¹⁰²

Citing *Inuit Tapirisat, Martineau. Matsqui Disciplinary Board*¹⁰³ and *Penikett*, the judgment seemed to reject the argument (as put forward, for example, by the plaintiffs in *Sunshine Coast*) that legitimate expectations constituted an exception to the rule that legislative functions were not reviewable. However, this is not entirely clear, since Sopinka J. was dealing with a case in which part of the Parliamentary legislative process was being challenged. He directed most of his discussion to this question, although the citations suggest that this analysis also applied to legislative functions as defined in *Inuit Tapirisat* and *Knight*, and this is how subsequent cases have interpreted the decision. Although in the particular context of this decision the formal legislative process was at issue, Sopinka J.'s judgment appeared to close the door on the possibility of legitimate expectations being the exception to the rule that legislative decisions lead to no duty of fairness.¹⁰⁴ His holding that the doctrine applies only to administrative, not legislative functions and his reference to cases like *Inuit Tapirisat* that define when a general duty of fairness exists, seem to directly contradict his holding in *Old St. Boniface* that the purpose of legitimate expectations is to expand the duty of fairness to situations where it would otherwise not be

¹⁰¹ Cartier, *supra* note 2 at 108-09.

¹⁰² *CAP*, *supra* note 1 at 558.

¹⁰³ [1980] 1 S.C.R. 602 [hereinafter *Martineau*].

¹⁰⁴ “Fair Start,” *supra* note 2 at 281-83.

applicable. Sopinka J. did not even consider whether applying the duty of fairness to legislative functions might be a possible “extension” of the duty of fairness.

Most striking about this further restriction to the application of legitimate expectations is that it means that *GCHQ*, and perhaps *Liverpool Taxi* would have been decided differently in Canada under the principles set out in the two Supreme Court decisions.¹⁰⁵ *GCHQ* was a case where the decision was “purely ministerial,” made “on broad grounds of public policy,” two of the criteria cited by Sopinka J. as indicators that a decision is legislative and therefore not reviewable.¹⁰⁶ Similarly, *Liverpool Taxi* was a case where the city council was making broad decisions about the appropriate number of licences in the city, rather than about the licence of an individual taxi owner or taxi company. Although Lord Denning classified this decision as “administrative,”¹⁰⁷ he was referring to it as administrative in the sense of not being judicial or quasi-judicial. In *Old St. Boniface*, Sopinka J. had held that conduct on the part of the authority that led the plaintiff to expect a certain procedure was necessary to trigger the doctrine, thereby eliminating the *McInnes* and *Khan* situations. It appears that the only leading British case that would fall under the Canadian doctrine of legitimate expectations would be *Ng*. While these Supreme Court cases purported to apply the British doctrine, their description of its scope severely restricted it.

The two Supreme Court decisions confirmed the application of the British doctrine in Canadian cases but limited it and left several confusions in its application by not addressing its role in Canadian law. It seemed apparent that a legitimate expectation would not be protected if the function being carried out was a legislative one as defined in *Inuit Tapirisat*. If the function was an administrative one, the plaintiff had to show conduct of the body which gave rise to an expectation that a certain procedure would be followed; an expectation of substantive results would not give rise to special procedural protection. Finally, there was no explanation of how legitimate expectations related to the general duty of fairness or what its effects were.

¹⁰⁵ See “Confining the Reach,” *supra* note 86 at 250-51.

¹⁰⁶ *CAP*, *supra* note 1 at 558-59, citing *Martineau*, *supra* note 103 at 628, Dickson J. (as he then was).

¹⁰⁷ *Liverpool Taxi*, *supra* note 31 at 308.

V. THE DOCTRINE OF LEGITIMATE EXPECTATIONS SINCE *CAP*

Having reviewed the pioneering and leading cases, this part will examine the explosion of legitimate expectation cases that have arisen since the Supreme Court addressed the issue. I will show that these decisions have given rise to further confusion, and that the application of this doctrine by the courts is far from uniform. These cases also show the kinds of problems to which administrative law must adjust itself in reformulating the doctrine and giving it a clear definition. The discussion will be organized around the issues that arise at different stages of the analysis.

A. *The Place of the Doctrine Relative to the Duty of Fairness*

Because of the lack of clarity in the Supreme Court decisions about exactly what its technical function was, there is a good deal of confusion about the effect and place of the doctrine. In general, two approaches have been taken to this question: some judgments seem to presume that legitimate expectations defines the content of the duty of fairness; others treat legitimate expectations as a separate ground of review, in addition to fairness.

1. Defining the duty of fairness

In many cases, courts have recognized that the doctrine applies in situations where the duty of fairness exists anyway, and have used the doctrine to define the content of that duty, despite the confusion in the Supreme Court judgments. In my opinion, this use of legitimate expectations to hold bodies to the procedure that they have stated they would follow is the best approach. In *Qi v. Canada (Minister of Citizenship and Immigration)*,¹⁰⁸ for example, the applicants were called to an interview with an immigration officer to determine whether they were unlawfully in Canada, after they neglected to renew their visitors' visas. In a letter advising them of the interview, they were told they could have counsel present. However, their representative, although allowed to attend, was not permitted to speak or make representations at the interview. The court held that implicit in the statement that

¹⁰⁸ (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.) [hereinafter *Qi*].

counsel could be present was a promise that the representative could participate in the interview. Since the minister's letter gave rise to a legitimate expectation that counsel could participate, the duty of fairness required that the promise be acted upon. "After issuing the invitation to have counsel present, to then deny the applicants' representative the right to take part in the interview is a breach of natural justice," Reed J. held.¹⁰⁹ This case emphasizes why using the doctrine to define the content of the duty of fairness should lead to more than just a right to make "representations" as stated by Sopinka J. in *Old St. Boniface*; here it was a right to counsel that was at issue.

A similar result was reached in *Mercier-Néron v. Canada (Minister of National Health and Welfare)*,¹¹⁰ where the applicant had applied for compensation under a government program for Thalidomide victims. The documentation and application form indicated that she had the right to a hearing to determine her eligibility. She was denied a hearing, and the minister's office said that the hearing was offered only to determine the level of assistance, not eligibility for the program, and that the information it had promulgated was wrong. It was held, however, that having been promised a hearing in the documentation, she had to be given one. These two cases outline clearly, I believe, that a representation stating that certain procedures will be followed can be used in a straightforward manner to determine exactly what fairness requires in particular cases.¹¹¹ A complicated doctrine of legitimate expectations is unnecessary, and applying the principle as these cases did would simplify it and avoid the possible regressive effects on the duty of fairness.

It is worth noting one other case where the doctrine was applied in a similar way when the promise was of a substantive result. In *Canada (A.G.) v. Canada (Human Rights Tribunal)*,¹¹² the content of the duty of fairness was strengthened because of substantive promises made to the plaintiff. This case arose after the Canada Human Rights Commission had received several complaints that the *Family Allowances Act*¹¹³ and

¹⁰⁹ *Ibid.* at 61.

¹¹⁰ [1995] F.C.J. No. 1024 (QL) (T.D.) [hereinafter *Mercier-Néron*].

¹¹¹ See also *Demirtas v. Canada*, [1991] 3 F.C. 489 (T.D.). The approach I am advocating here was explicitly rejected in *Bow Valley Naturalists' Society v. Alberta (Minister of Environmental Protection)* (1995), 177 A.R. 161 (Q.B.), where, relying on *Old St. Boniface*, *supra* note 1, it was held that the doctrine could only be used as a threshold device, not to define what fairness required.

¹¹² (1994), 76 F.T.R. 1 (F.C.T.D.) [hereinafter *Family Allowance*].

¹¹³ R.S.C. 1985, c. F-1.

*Family Allowances Regulation*¹¹⁴ discriminated on the basis of sex because they were payable only to the female parent (unless the male parent had sole custody or in exceptional circumstances). As part of a settlement of one of the early complaints, the commission and the department agreed that changes would be made to the program to allow the male parent to receive the family allowance cheque in more situations, and the complaint was not sent to a tribunal. Nevertheless, the commission later referred several similar complaints to a human rights tribunal.

Reed J. held that the earlier settlement had created a legitimate expectation that later complaints about the same legislation would not proceed.¹¹⁵ The minister responsible for the legislation was entitled to be consulted and given reasons why the earlier settlement was being rejected before the complaints were sent to the tribunal. This, it is important to note, is notwithstanding the fact that full trial-type procedures would have been accorded when the merits of the case were decided at the tribunal level.

This case shows that it is also possible to use the existence of a legitimate expectation of *substantive* criteria or a substantive result to determine the content of the duty of fairness, even though this possibility has not found favour with the Supreme Court. Although in this case the commission was not held to its representation, the settlement was an important factor in determining what fairness required. Again, I think Reed J.'s reasoning makes sense. The commission's representation to the minister that the complaint was settled was as important as if it had been a promise that the minister would be consulted or given reasons before a subsequent complaint was sent to a tribunal. Although Reed J. did not give substantive effects to the representation (the commission could refer the complaints to the tribunal), she did hold that it meant that fairness required certain procedures that would not otherwise have been necessary (giving reasons and consulting before it was referred there). This approach combines well the principle that promises made by public bodies are important and should not be broken with the broad and flexible characteristics of the duty of fairness and its focus on procedural rights and protections.

¹¹⁴ C.R.C. 1978, c. 642

¹¹⁵ *Family Allowance*, *supra* note 112 at 12.

2. A separate ground of review

Other cases seem to see legitimate expectations as something independent from the general conception of fairness, that can also lead to judicial review. This is similar to the vision of legitimate expectations in *Bendahmane*; legitimate expectations can trigger procedural rights just as the existence of a right, privilege, or interest can. Under this approach, whether fairness has been met is considered separately from whether a legitimate expectation claim has been made out.¹¹⁶ Although, essentially, legitimate expectations as used in these cases would have the same effect as using them to determine the content of the duty of fairness, it seems to me that this approach ignores the flexible, circumstance-based determination of the content of the duty of fairness, and the broad conditions in which the threshold for the duty is met. Legitimate expectations should be seen as a part of fairness, rather than as an “add-on” to it. When, as in these cases, it is used as a threshold concept, the danger arises that the general duty of fairness will be restricted and that interests and privileges will be defined more narrowly.

This approach does, however, lead to the possibility that there may be situations in which review could take place even if there are no rights, interests, or privileges at stake, and the doctrine could expand the duty of fairness as suggested in *Old St. Boniface*. In *Pharmaceutical Manufacturers' Association of Canada v. British Columbia (A.G.)*¹¹⁷ the plaintiff objected to the fact that pharmaceutical companies were not consulted prior to the British Columbia government's announcement of a change in the percentage of drug costs that would be covered by the government-funded Pharmacare program. The plaintiffs argued that they were entitled to be consulted either because they had an interest in the decision (it would affect their sales and profits in the province) or because they had a legitimate expectation of consultation. The legitimate expectation was based on the fact that the province's practice in the past had been to consult manufacturers before the province added or removed their products from the list of drugs covered under the programme. Edwards J. determined that the applicants did not have a sufficient interest, or as he called it, “substantive right,” to be entitled to

¹¹⁶ See, for example, *Trofimenkoff v. Saskatchewan (Minister of Education)* (1991), 92 Sask R. 229 (Q.B.), aff'd (1991), 97 Sask. R. 161 (C.A.); and *Saskatchewan Government Employees Union v. Saskatchewan* (1991), 96 Sask R. 22 (Q.B.) [hereinafter *SGEU*].

¹¹⁷ (1996), 25 B.C.L.R. (3d) 82 (S.C.) [hereinafter *Pharmaceutical Manufacturer*].

a duty of fairness, because the manufacturers were gaining only an indirect benefit by having their products subsidized under the program.¹¹⁸ He then went on to consider whether the manufacturers could nevertheless be entitled to fairness since they had a legitimate expectation of being consulted. He held that legitimate expectations could not apply in this case since the decisions about the amount of the subsidy under the Pharmacare program were legislative ones, and since the practice of consultation over listing or delisting of individual drugs did not give rise to a legitimate expectation of consultation when broader decisions about the level of benefits were being made.¹¹⁹

Nevertheless, Edwards J.'s decision raises the possibility that the doctrine's function in Canada is to lead to procedural protections even when no rights, privileges, or interests of the applicant are at issue. Under this conception, in the right circumstances, a legitimate expectation can give someone the right to be heard before a decision is made, even if it has only tangential effects on them.¹²⁰ I think that applying legitimate expectations as in *Pharmaceutical Manufacturers* would lead to a narrow application of legitimate expectations, only in exceptional and inappropriate circumstances. If there were no interest or privilege at issue, why should the companies have been heard, even if there had been a practice of consulting them or the decision was not legislative? Giving someone a right to be heard in situations where their own interests are not at stake, but those of others are, is inconsistent with the notion that the purpose of the duty of fairness is to give citizens a right to be consulted before decisions affecting *them* are made. If Edwards J.'s holding that the plaintiff had no interest in the decision was the correct one, I believe the analysis should have stopped there. Adding legitimate expectations to the list of rights, interests, and privileges would lead either to a narrowing of the definition of these concepts, or to judicial review in inappropriate situations. These problems add to the reasons why it is desirable to see the function of

¹¹⁸ *Ibid.* at 120.

¹¹⁹ *Ibid.* at 120-21.

¹²⁰ In another case, *Richmond Cabs Ltd. v. British Columbia (Motor Carrier Commission)* (1992), 69 B.C.L.R. (2d) 149 (S.C.) [hereinafter *Richmond Cabs*], a broader conception of "interests" was used. In this case, the plaintiffs were given assurances that they would be heard before the licence conditions of another cab company were extended. Shaw J. held, at 159-63, that Richmond Cabs had a sufficient interest in the licensing, since its profits and the value of its licences would be affected by the other company's licence, and the extension would lead to competition for Richmond Cabs. Using this conception of "interests," it seems unlikely that there are many situations where someone could have a legitimate expectation but would not be accorded a duty of fairness under the general doctrine as having an interest or privilege.

legitimate expectations as a doctrine that defines what fairness requires in a particular case, rather than one that triggers a duty where none would otherwise exist.

B. The Threshold: Administrative and Not Legislative

All the cases that I have found have accepted that Sopinka J.'s judgment in *CAP* excluded review of legislative decisions under the legitimate expectations doctrine. Therefore, a preliminary question that must be asked in legitimate expectations cases, as in other fairness cases, is whether the function being exercised is legislative or administrative. The legitimate expectations argument is often rejected because the function at issue is held to be legislative. This is frequently because the legitimate expectations doctrine has been used by plaintiffs to try to ensure that groups or individuals with a special interest in policy decisions are consulted. Although these cases show the need to promote consultation and participation of groups in these decisions, I think they also show that the legitimate expectations doctrine is not the best way to do so.

In some cases, plaintiffs have attempted to use the concept to challenge cabinet decisions that are quite clearly policy-based, but where the plaintiffs had a special interest in the outcome of the decision. For example, in *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)*,¹²¹ the municipality challenged a decision of the provincial government to withdraw funding for a section of new expressway. The funding had been promised by the previous government (although only on an "annual review basis"), but the new New Democratic Party government felt the expressway would be destructive to the environment. The municipality had made plans and spent money in the belief that it would get funding. The Divisional Court, however, held that as this was a legislative decision made on policy grounds, fairness did not apply. Nevertheless, I think that it is important to consider whether the municipal government was providing funding, and it had made spending and other decisions on the basis of the representation, the provincial government should have been obliged to consult it in some way before making the decision to withdraw its support. At the very least, perhaps the municipality should have been able to point out to the provincial government how the change in plans (as opposed to an original spending or policy decision) would affect it,

¹²¹ (1991), 2 O.R. (3d) 716 (Div. Ct.) [hereinafter *Hamilton-Wentworth*].

despite the fact that this was a policy decision. It is the municipality's special interest, not the existence of the representation, that should be most important in deciding its right to be heard. Although in this case the special interest arose *because* of the representation, this will not always be the case.

Other cases which seem to be clearly legislative, and where the application of the doctrine was rejected, include decisions of municipal councils to raise taxes¹²² and privatize a municipally-owned utility.¹²³ These two cases show another reason why piggybacking onto legitimate expectations is an inappropriate way to expand the duty of fairness into legislative decisions. The above decisions affected all citizens in the city of Edmonton. As a group, they did have the power in a municipal election to vote the councillors out of office. Using legitimate expectations as the threshold when legislative decisions were at issue would give these citizens a right to be consulted (if it were held there was a representation). However, those who were more politically powerless, but who had not been given a representation, would have no consultation rights. In my view, it is in the latter situation where the law should step in to enforce consultation.

In other cases, however, the question of whether a decision is legislative is not so clear. In *British Columbia and Yukon Hotels' Assn. v. British Columbia (Liquor Distribution Branch)*¹²⁴ the hotel association challenged the failure of the liquor distribution branch to consult it or its members before the decision to order a mandatory "keg deposit system" on containers of draught beer. This system was implemented at the request of the province's brewers. This decision was classified as legislative because of its broad effects, and the fact that, according to the judge, it was made on the basis of the "public interest." Some courts have been more generous to plaintiffs in their interpretation of what is administrative, particularly in the case of policy decisions to cut back or withdraw benefits. While it was held in *Sunshine Coast*¹²⁵ that the cancellation of a French immersion program was a legislative decision, in *Furey v. Conception Bay Centre Roman Catholic School Board*¹²⁶ the

¹²² *Lehdorff United Properties (Canada) v. Edmonton (City of)* (1994), 157 A.R. 169 (C.A.), aff'd (1993), 146 A.R. 37 (Q.B.).

¹²³ *Edmonton Telephones Corp. v. Stephenson* (1994), 160 A.R. 352 (Q.B.) [hereinafter *Edmonton Telephone*], aff'd on different grounds (1994), 162 A.R. 139 (C.A.).

¹²⁴ [1997] B.C.J. No. 305 (QL) (S.C.) [hereinafter *B.C. and Yukon Hotels' Association*].

¹²⁵ *Supra* note 83.

¹²⁶ (1993), 104 D.L.R. (4th) 455 at 465-66 (Nfld. C.A.) [hereinafter *Furey*].

Newfoundland Court of Appeal held that the closing of a school was an administrative function. Most cases appear to be more consistent with the latter approach. The closing of a hospital,¹²⁷ the decision to revoke the granting of bilingual status to a Quebec town,¹²⁸ and the closing of a rural post office¹²⁹ have all been held to be administrative decisions reviewable under the legitimate expectations doctrine. A relatively broad conception of what is administrative is leading, in general, to a wide range of situations in which the doctrine can apply.¹³⁰ This expansion, however, should often make the doctrine of legitimate expectations unnecessary for the implication of a duty of fairness.¹³¹ If these are administrative decisions, people must be consulted whether or not there is a representation.

Furey demonstrates, though, that relying on the doctrine of legitimate expectations, even if the power at issue is classified as administrative, may cause the general duty of fairness to be ignored. The board voted to close the school in question in 1991. Although discussions and consultation with the parents had taken place during earlier discussions about a school closing and consolidation two years earlier, there was no notice to or consultation with parents before the 1991 decision was made. The applicants argued that board statements had given rise to a legitimate expectation that the board would follow suggested ministry of education guidelines that required notice to and consultation of parents before schools were closed. This was rejected by Cameron J.A., writing for the court, on the basis that the applicants did not believe the guidelines were binding on the board.¹³² However, there was no discussion about whether the general duty of fairness required consultation with the parents in these circumstances. If the school closing was truly an administrative decision, affecting the interests or privileges of the parents (or children), the court should have determined

¹²⁷ *Hôpital Reine Élisabeth v. Québec (ministre de la Santé et des Services sociaux)*, [1996] A.Q. No. 3406 (Q.L.) (C.A.).

¹²⁸ *Alliance for Language Communities in Quebec/Alliance pour les Communautés Québécoises (A.G.)* (1990), 49 Admin. L.R. 243 (Que. Sup. Ct.) [hereinafter *Alliance for Language*].

¹²⁹ *Rural Dignity of Canada v. Canada Post Corporation* (1991), 40 F.T.R. 255 (F.C.T.D.) [hereinafter *Rural Dignity*], aff'd (1992), 139 N.R. 203 (F.C.A.).

¹³⁰ However, *Alliance for Language* is the only one of the above cases where it was held that the conditions for the doctrine were met.

¹³¹ As outlined in Part VI, below, I believe that the administrative/legislative distinction should become unimportant in many cases, but if this does not happen, a more generous definition of "administrative" would be a positive development.

¹³² See my discussion of this aspect of the case below, text accompanying note 138, *infra*.

the content of the duty of fairness owed to the parents, even in the absence of any guidelines. Surely they were at least entitled to notice of the motion which was coming before the board and the opportunity to make submissions of some kind. The focus on legitimate expectations obscured the principal question, which was what procedures the duty of fairness required in the circumstances. The representation should have been an important factor in determining this, but not, as it was used here, in deciding whether a duty of fairness was owed.

C. Generating Legitimate Expectations

1. Express promise of a procedure

It is clear that promises that a certain procedure will be followed give rise to legitimate expectations in Canada, as they do in Britain,¹³³ and this is the most accepted manner in which expectations arise. These can be in the form of statements made to the plaintiff, or representations contained in pamphlets, policy documents, or resolutions.¹³⁴ Many courts have held that the promise must be very clearly set out: if there is doubt that there is a promise being made, it is sometimes held that there is no expectation.¹³⁵ These are, in my view, overcautious attempts to restrict the doctrine—the statements in *Ng* and *Bendahmane*,¹³⁶ for example, were far from unambiguous promises.

¹³³ An express promise of a certain procedure was the situation in *Ng*, *supra* note 44.

¹³⁴ In *Qi*, *supra* note 108, and *Gaw*, *supra* note 70, the promise was contained in a letter to the plaintiff. In *Mercier-Néron*, *supra* note 110, the promise was contained in documentation about the programme enclosed with a letter to the plaintiff. In *Pulp, Paper and Woodworkers of Canada Local 8 v. Canada (Minister of Agriculture)* [1992] 1 F.C. 372 (T.D.) [hereinafter *Local 8*], *aff'd* (1994), 74 N.R. 37 (F.C.A.), it was contained in a publicly distributed pamphlet.

¹³⁵ For example, in *Thin Ice v. Winnipeg (City of)* (1995), 105 Man. R. (2d) 297 (Q.B.) [hereinafter *Thin Ice*], it was held, at 301-02, that a city council resolution that said “It is important ... that there be full opportunity for public review prior to council considering any required approvals” was not a promise. In *SGEU*, *supra* note 116, a letter saying the government would “liase with your union officials with respect to these matters” (at 25), a memorandum stating that “the Public Service Commission will discuss employee options with departments, employees, and union” (at 28), and a letter saying “a direct dialogue with the Public Service Commission would be a useful vehicle for the provision of information as it becomes available” (at 28), were not accepted as a promise of consultation.

¹³⁶ *Supra* note 77.

Some cases have also suggested that knowledge or reliance on the promise by the plaintiff is necessary.¹³⁷ In *Furey*, the court went one step further and suggested that the plaintiff must also have a belief that the policy was binding on the agency.¹³⁸ These requirements, in my view, are simply more attempts to find ways to further restrict the doctrine in ways that do not fit with the purposes behind it. First, it should be noted that reliance is not a requirement in Britain; as outlined above, there was no reliance on the promise in *Ng*.¹³⁹ More importantly, however, one of the fundamental principles behind the doctrine is that fairness requires public agencies to keep their word and follow their stated policies about procedure. Whether the particular plaintiff knew about the statement at the time or took action based on it, the body has still refused to do what it said it would do, and this creates a feeling and a reality of unfairness.¹⁴⁰ Finally, it is important to note that in Canada, as in Britain, the person making the promise must have authority to do so, and the promise made must not conflict with a statutory duty; otherwise the legitimate expectation will not be protected.¹⁴¹

2. Regular practice

The cases also generally recognize that a regular practice of a certain procedure being followed can give rise to a legitimate expectation.¹⁴² Few cases have dealt explicitly with this possibility. However, in *Brink's Canada Ltd. v. Canada Council of Teamsters*¹⁴³ the Federal Court of Appeal held that a practice must be regularly followed over an extended period of time in order to trigger the doctrine. Other

¹³⁷ See *Sunshine Coast*, *supra* note 83 at 262-63; and *Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)*, [1992] 3 F.C. 316 (C.A.).

¹³⁸ *Furey*, *supra* note 126 at 467-68. See also *Haughton v. Heffley Creek (Waterworks District)* [1995] B.C.J. No. 2711 (QL) (S.C.), *aff'd* [1997] B.C.J. No. 771 (QL) (C.A.).

¹³⁹ See Part III(D), above.

¹⁴⁰ See "Fair Start," *supra* note 2 at 280-81; MacPherson, *supra* note 2 at 173-74; and D. Mullan, "Annotation to *Furey v. Conception Bay Centre Roman Catholic School Board*" (1993) 17 Admin. L.R. (2d) 47 at 47-49.

¹⁴¹ See, for example, *Lidder v. Canada (Minister of Employment and Immigration)* [1992] 2 F.C. 621 (C.A.); and *Crommer v. Workers' Compensation Board (Sask.)* (1992), 98 Sask. R. 213 at 220 (Q.B.).

¹⁴² This is the situation typified by *GCHQ*, *supra* note 51.

¹⁴³ [1995] F.C.J. No. 1114 (QL) (C.A.).

cases have held only that the practice must be “established.”¹⁴⁴ In an early case, *Alliance for Language*¹⁴⁵ the Quebec Superior Court held that a hearing given on one prior occasion was sufficient. It appears likely that the Federal Court of Appeal’s interpretation will be the guiding one, and that legitimate expectations based on an established practice will be difficult to establish. Although it may appear at first that this is an unfortunate restriction of the doctrine, it is appropriate, in my view, to require consistent evidence of an established practice. Otherwise, there may be hesitancy on the part of administrative agencies to accord hearings or other procedures when it is not necessary, for fear they will be held to these procedures in the future. It would be unfortunate if the doctrine of legitimate expectations were to discourage bodies from developing their own guidelines that would provide for consultation or give other procedural rights.

3. Substantive promises

Few plaintiffs in Canadian legitimate expectation cases have argued for enhanced procedural protections based on an express promise of a substantive result.¹⁴⁶ In most decisions, the doctrine has been approached as one that deals with expectations of procedure, rather than substantive results. The focus on the fact that substantive legitimate expectations are not protected in this country has obscured the possibility that the promise of a substantive result could give rise to procedural protections. However, in the *Family Allowance*¹⁴⁷ case, it was held that the federal Human Rights Commission’s agreement to settle a complaint about the federal family allowance program created a legitimate expectation on the part of the attorney general that it would be consulted and given reasons before a similar complaint was sent to a tribunal. However, other cases have not developed this possibility, and given Sopinka J.’s comments in *Old St. Boniface* and *CAP* it seems unlikely.

It seems inconsistent, however, to hold that a promise or representation about procedure will be protected, while not doing the same for a representation that a certain result will occur or certain

¹⁴⁴ *Rural Dignity* *supra* note 129; and *SGEU*, *supra* note 116 .

¹⁴⁵ *Supra* note 128.

¹⁴⁶ This is the situation typified by *Khan*, *supra* note 50.

¹⁴⁷ *Supra* note 112.

criteria will be applied. The reluctance to do so arises, in my opinion, only from concern that this would give rise to protecting substantive legitimate expectations. However, holding that expectations can be *generated* by a substantive promise does not mean that the government will be *held* to this promise. A principle could easily be established that substantive promises give rise to enhanced procedural protections.

The problem is clearly illustrated through the example of a hypothetical school closing. If a letter were sent to the parents stating that the school would not be closed without giving the parents' association an opportunity to speak before a board meeting, this would likely be protected under the existing doctrine, and a decision by the board made without the parents' association's representations would be quashed. However, if the letter stated that the school would not be closed in the next two years—a substantive promise—there would, it appears, be no protection. However, it only makes sense that this stronger, substantive promise should give rise to enhanced procedural rights, such as a hearing before the board. I would hope that as the doctrine is developed it will be clarified that this sort of promise, too, can have procedural effects.

D. *Procedural or Substantive?*

As indicated in section A of this part, most cases have held that the legal result of a legitimate expectation is to force a body to keep a promise it has made as to the procedure it will follow, or, presumably, to continue following a practice it has already followed. The decision in *CAP* makes it clear that a body cannot be forced to hold its promise about a substantive result.¹⁴⁸ However it is not always clear what the difference is between “procedural” and “substantive.” It seems clear, for example, that requests that the court order expenditure of public funds,¹⁴⁹ order a person reinstated in his or her job,¹⁵⁰ or be allowed to

¹⁴⁸ Many legitimate expectations claims have been rejected for this reason. See, for example, *Canada (A.G.) v. Canada (Commissioner of the Inquiry on the Blood System)* [1996] 3 F.C. 259 (T.D.), *aff'd* (1997), 207 N.R. 1 (F.C.A.), leave to appeal to Supreme Court of Canada granted 27 March 1997; appeal heard and reserved 25 June 1997: [1997] S.C.C.A. No. 59 (QL); *Libbey Canada Inc. v. Ontario (Ministry of Labour)* (1995), 26 O.R. (3d) 125 (Div. Ct.); and *Apotex Inc. v. Canada (A.G.)* (1993), 68 F.T.R. 86 (F.C.T.D.).

¹⁴⁹ *Hamilton-Wentworth* *supra* note 121.

¹⁵⁰ *Girard v. Canada (Minister of Agriculture)* (1994), 79 F.T.R. 219 (F.C.T.D.).

immigrate to Canada,¹⁵¹ constitute impermissible substantive findings. However, other cases are more ambiguous. One situation is that where consultation with someone other than the decisionmaker is demanded. In *Local 8*,¹⁵² the union challenged the decision by Agriculture Canada to permit the use of a pesticide with which the Woodworkers' members were to work. The union argued that a statement in an Agriculture Canada pamphlet that "Health and Welfare Canada, Environment Canada, Fisheries and Oceans Canada and their provincial counterparts all participate in the decision making"¹⁵³ created a legitimate expectation that these other ministries would be consulted before the pesticide was registered. Martin J. accepted this argument, and held that the representations created an expectation of a *procedure* being followed. However, another court held that a promise to consult someone else was substantive, not procedural.¹⁵⁴ The latter, I believe, is the better decision. Consultation with someone *else* does not seem to fit into the principles of fairness, since its purpose is to ensure consultation with those who are particularly affected by a decision.

Another example of the difficulty in determining whether something is procedural or substantive is *Edmonton Telephones*.¹⁵⁵ In this case, the city of Edmonton had previously passed a by-law that its municipal telephone company could not be sold without first holding a referendum on the subject. When this by-law was amended and the company sold, the applicants argued that there was a legitimate expectation that a referendum would be held. The court rejected this argument, holding that the right to vote on the question was a substantive matter, not a procedural one.¹⁵⁶ However, the referendum could certainly have been seen as a consultation mechanism which could have been incorporated into the duty of fairness, although making its results binding would have been a substantive result. With the exception of *Local 8*, the courts have generally been quite restrictive in their definition of "procedural": for the most part, the only legitimate

¹⁵¹ *Lok v. Canada (Solicitor General)*(1993), 69 F.T.R. 129 (F.C.T.D.).

¹⁵² *Supra* note 134.

¹⁵³ *Ibid.* at 399, citing Agriculture Canada, *Pesticides in Perspective* Doc. No. 5206/E. (1985)

¹⁵⁴ *Morlacci v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* [1995] B.C.J. No. 53, especially para. 63 (QL) (S.C.).

¹⁵⁵ *Supra* note 123.

¹⁵⁶ It was also held that legitimate expectations did not apply since the power in question was a legislative one. I outlined above why I believe this is not the kind of legislative decision that should be subject to a duty of fairness. See text following note 123, *supra*.

expectations that are classified as “procedural” are those that would otherwise come under the duty of fairness.¹⁵⁷ This is appropriate, since having different definitions of “procedural” for the general duty of fairness and for legitimate expectations will separate the doctrine from the general duty of fairness, and make for a confusing test to determine what is “procedural.”

E. Conclusion

Currently, a plaintiff trying to take advantage of the doctrine of legitimate expectations must pass several hurdles.¹⁵⁸ It must be demonstrated that the function being exercised is administrative, not legislative. The plaintiff must show a continuous, established procedural practice, or an undertaking to follow a certain procedure. It must be shown that what is being requested is relief that would otherwise fall under the doctrine of fairness, and is procedural, not substantive. The result of the legitimate expectation is that the body will be held to its undertaking in the limited circumstances in which it is held to be applicable.

¹⁵⁷ See the comments of Proudfoot J.A. in *Pollard v. Surrey (District of)*(1993), 76 B.C.L.R. (2d) 292 at 301 (C.A.). An example of the confusion that can develop when this is not the approach occurred in *Baker v. Canada (Citizenship and Immigration)*(1996), 142 D.L.R. (4th) 554 (F.C.A.). Here, the plaintiff argued that the international *Convention on the Rights of the Child (with Reservations and Statement of Understandings)* 20 November 1989, Can. T.S. 1992 No. 3, arts. 3, 9, 12, created the legitimate expectation that the best interests of her children would be paramount in determining the status of her immigration application. Strayer J. held, at 567-58, that taking the children’s best interests into account was a procedural right, but that making their interests the “primary consideration” would be a substantive right. This definition of “procedural” is very different from what would generally be included within the duty of fairness. Fairness may require that the decision maker *hear* the person’s views about the interests of her children but not that these be taken into account.

¹⁵⁸ In addition, the fact that the definition of a legitimate expectation is so unclear has given some judges the opportunity to create more exceptions to the doctrine. For example, in *Thin Ice*, *supra* note 135 at 302, it was held that a resolution of city council which stated that public consultations would occur about a change in zoning could not be protected under the legitimate expectations doctrine because it gave general directions, not a promise, and because “[t]ime was of the essence.” In *Central Kootenay (Regional District of) Canada (Minister of Transport)*(1991), 39 F.T.R. 60 (F.C.T.D.), it was held that there had to be bad faith on the part of the public body for the doctrine to apply.

VI. CLARIFICATION OF THE DOCTRINE AND FUTURE DIRECTIONS

As Part V shows, the process of establishing a legitimate expectation claim is a difficult one, and claims are not often successful. Several authors have argued that legitimate expectations should be expanded, that it should be used as an exception to the principle that legislative functions are not subject to procedural fairness, and that it should be expanded to include substantive protection of legitimate expectations. While cases where the doctrine has been argued point out the importance of addressing these issues, I believe that simply “latching onto” legitimate expectations is not the most appropriate way to protect the needs demonstrated by these cases. This part will be divided into three sections—in the first I will suggest the appropriate ways to clarify and “Canadianize” the doctrine; the second will deal with the possibility of using legitimate expectations as an exception to the rule that legislative functions are not subject to the duty of fairness; and the third will address briefly the question of how “substantive legitimate expectations” should be given protection.

A. Clarifying Legitimate Expectations

As the last part demonstrates, one of the largest problems with the legitimate expectations doctrine is that its place relative to fairness is not clearly defined. This has occurred because it has been applied in a very different context than that in which it was developed. First, the use of legitimate expectations as part of the threshold to determine whether a duty of fairness exists should be emphatically rejected. A heavier reliance on legitimate expectations as a threshold question can only lead to a narrowing of the definition of “rights, privileges, and interests” in the Canadian context. This would then lead to the denial of procedural fairness to those who would qualify under the broader test, but who had not been given representations by the body that a certain procedure would be followed. Using legitimate expectations as a threshold device can only lead, over the long term, to a restriction of the circumstances in which a general duty of fairness is owed.¹⁵⁹

¹⁵⁹ See M. Paterson, “Legitimate Expectations and Fairness: New Directions in Australian Law” (1992) 18 Monash U. L. Rev. 70. See also the reasons of Brennan J. in *Kioa v. West* (1985), 159 C.L.R. 550 at 616-22 (Aust. H.C.).

In most of the cases where the doctrine has been used successfully, a legitimate expectation has defined the content of the duty of fairness. The representation of the decisionmaker about the procedure that will be followed, or the regular use of a certain procedure, defines what fairness requires. This, it seems to me, can and should be done without a complicated doctrine of legitimate expectations. As L'Heureux-Dubé J. held in *Knight*, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case."¹⁶⁰ Legitimate expectations as it is currently being applied in Canadian courts could, in my opinion, be summed up in a single statement of principle—if a decisionmaker has stated that a certain procedure will be followed, or a procedure has been continually followed over a period of time, the doctrine of fairness will require that procedure. The concept could be simplified and incorporated into the general flexible character of the doctrine of fairness if it were seen in this way.¹⁶¹

A similar result could arise from a representation of a substantive nature, to which protection should be extended. If someone is given a representation by a decisionmaker that they will receive a certain benefit or that certain criteria will be used for a decision, a revised doctrine of legitimate expectations should lead to the result that the duty to act fairly requires more than it otherwise would if the body wishes to apply different criteria or break its promise. For example, if in a certain situation the duty of fairness would have required only the right to make written representations, there may be a requirement of an oral hearing if a decisionmaker intends to break a promise. This use of the doctrine would constitute a recognition that backtracking on a promise is more serious than making a decision where the person has no expectations, and gives rise to the right to more "trial-like" procedures than the decision would have otherwise required.

Defining legitimate expectations as part of the process of determining the content of the duty of fairness has several advantages. First, it would reinforce the fact, as Sopinka J. stated in *Old St. Boniface*, that legitimate expectations is part of the duty of fairness rather than separate from it. Keeping fairness as a unified but flexible concept, which applies in most situations but where the content varies depending on the circumstances, is consistent with the spirit of cases such as *Nicholson* and *Knight*. Relying on specific categories and doctrines

¹⁶⁰ *Knight*, *supra* note 11 at 682.

¹⁶¹ Mullan accepts that if legitimate expectations is not to be used to review legislative decisions, this is its proper application: see "Fair Start," *supra* note 2 at 282.

seems a step backward into complicated and inflexible classifications and categorizations.¹⁶²

As I have pointed out throughout this analysis, one danger of the present use of the concept of legitimate expectations is that it may restrict or hold back the growth of the general concept of fairness. A concept of legitimate expectations that applied only at the stage of determining the content of the duty, and was seen as *one* of the factors to be taken into account in determining that content would help avoid this result. Decisions such as that of the Newfoundland Court of Appeal in *Furey*, where the court ignored the possibility that the parents might have rights under the general duty of fairness, would hopefully be avoided.

I believe it is particularly important that legitimate expectations be seen as a concept that *adds* to what would otherwise be required by the duty to act fairly, rather than simply *defining* it. It is important to keep in mind that fairness may require more than the expectations generated by the representation or the practice. The danger of allowing legitimate expectations to *define* rather than *increase* the content of the duty of fairness is shown in *Bawolak Ltd. v. Exroy Resources*¹⁶³ where it was held that since a certain procedure had been regularly followed, the plaintiff had a legitimate expectation of *that* procedure and the duty of fairness could not require more. The legitimate expectations argument was raised by the decision-making body to justify the procedure it followed. This is not an appropriate use of the concept, since it allows the decisionmaker to define for itself what procedural protections it owes, and assumes that a procedure that no one challenges for a long period of time is fair. Legitimate expectations should be seen as a doctrine that increases the procedural duties owed by the decisionmaker, rather than as a justification for procedures that might not otherwise meet the standards of fairness.

For the above reasons, however, it would be inappropriate in this context to extend legitimate expectations to “nature of the interest” claims. While these claims are important in the British context, where the concept is used as a threshold device, the nature of the interest is already taken into account in both the threshold test of “rights, interests, or privileges,” and in the flexible determination of the content of the

¹⁶² For the opposite view, see Small, *supra* note 2 at 155-56.

¹⁶³ (1992), 11 Admin. L.R. (2d) 137 (Que. C.A.), leave to appeal to Supreme Court of Canada refused: [1993] 2 S.C.R. vi.

duty of fairness in Canada. There is no need here for nature of the interest legitimate expectation claims.¹⁶⁴

Since *Nicholson*, the duty of fairness has developed as a broad and flexible concept: while the threshold to give rise to the duty is relatively easy to meet, the procedures required by the duty are determined by the circumstances. Legitimate expectations can best fit into this paradigm as a recognition that representations or practices of a decision-making body do have a legal effect, and are important, if not paramount considerations in determining what fairness requires. This will recognize the principle, expressed in many of the leading British legitimate expectation cases, that people should be able to rely on representations made to them by government agencies, and that it is a serious matter giving rise to enhanced procedural protections when they do not.

B. *Legislative Functions*

The Supreme Court has been heavily criticized for its holding in *CAP* that legislative functions are not reviewable under the doctrine of legitimate expectations. Joan Small, for example, argues that legitimate expectation cases should be seen as exceptions to the rule that legislative decisions do not attract the duty of fairness, although she also argues that there are other situations in which review of legislative functions should occur.¹⁶⁵ In this section, I will expand on my argument that while the legitimate expectation cases point out the need for broader review of functions that have been considered “legislative,” expansion of the duty of fairness should not be done through this doctrine.

Legislative functions have been excluded from the duty of fairness on the grounds, among others, that they are broad decisions, affecting many people, based on policy and analogous to parliamentary decisions.¹⁶⁶ How, it is argued, could the large number of people affected by such a decision be given a right to be heard or consulted? Why should anyone have any special rights when the decision is based on policy and therefore affects the population at large? Requiring a hearing in these circumstances, it is argued, would radically extend the courts’ power of review to many new situations, and the courts are

¹⁶⁴ See “Fair Start,” *supra* note 2 at 276-79.

¹⁶⁵ Small, *supra* note 2 at 153-58. See also “Fair Start,” *supra* note 2 at 281-83.

¹⁶⁶ Craven, *supra* note 5 at 582.

ill-equipped to deal with matters of policy, or the procedures applicable to those matters. As one answer to these arguments, legitimate expectations is suggested as an appropriate way to restrict the number of situations in which the duty of fairness would apply to legislative functions. Only where there was a promise or representation to the plaintiff that a certain course of conduct would be followed would the decision be reviewable on fairness grounds.¹⁶⁷

The facts of many legitimate expectations cases show a justification for reviewing legislative functions, and for this reason, too, legitimate expectations may seem like the appropriate response to the blanket exclusion of legislative functions. For example, the *CAP* and *Hamilton-Wentworth* cases suggest situations in which it would be proper to at least require some consultation before a government makes a policy change which goes against people's expectations. In *Hamilton-Wentworth* given the fact that the municipality had spent money and made plans on the basis of the assurances of the provincial government, it seems that the least that could be done is to give the municipality a chance to make representations about why the policy should not be implemented. The province of British Columbia in *CAP* had taken similar steps based on the existence of the agreement.

Another reason for the enthusiasm is, of course, the fact that, in Britain and Australia, legitimate expectations constitute the exception to the exclusion of legislative functions. Litigants relying on jurisprudence from these countries have picked up on the doctrine as a way to win their case, and the common administrative law background has made it appear appropriate to follow them in Canadian decisions. However, the fact that authors in these countries are calling for a broader basis on which consultation will be imposed should give Canadians reason to pause before enthusiastically embracing such a narrow concept.¹⁶⁸

I agree that it is essential that the duty of fairness be applied more broadly to the making of decisions now classified as "legislative." When the power to make decisions that are "legislative and general" is delegated to the executive or other bodies, the procedural processes of Parliament do not apply. Decisionmaking in these contexts requires the participation of and consultation with those specifically affected by a decision, in order to ensure that a democratic decision is made which also takes into account the interests of those with a greater interest in its outcome than the average citizen. Using the Canadian version of

¹⁶⁷ Small, *supra* note 2 at 155.

¹⁶⁸ Craven, *supra* note 5 at 586-602; and *Administrative Law supra* note 6 at 256-62.

legitimate expectations as the vehicle to expand the concept of the duty of fairness into legislative decisionmaking, however, would leave this concept far too restrictive. A dynamic concept of fairness in the review of legislative decisions could not be built on legitimate expectations.

First, this would entail a return to the use of legitimate expectations as a threshold device. Presumably, what Mullan and Small would advocate is that if a decision were held to be legislative, the duty of fairness would apply only if there were a legitimate expectation at issue. This would mean that the doctrine was fulfilling two very different functions—as a principle for determination of the content of the duty of fairness in cases where the decision was administrative, and as a definition of the threshold (and presumably also the content) for the duty of fairness when the decision was legislative. It seems improper and unworkable that the same set of principles and the same conditions would apply in these different circumstances, and restricting or expanding the conditions for one use of the concept might confuse or lead to inappropriate results in its other uses. Arguably, this has been one of the difficulties in the application of the doctrine in Britain.

However, a more important issue is whether it is desirable to give procedural rights when delegated policy is being made only in the limited situations where there is a legitimate expectation. “Nature of the interest” legitimate expectations have been rejected in Canada (rightly, in my view, given the context) and legitimate expectations can only be based on a practice or a representation. However, in my view, the interests which review of legislative decisions should protect are different and much broader than these situations. I accept that a potential problem with extending the duty of fairness to legislative functions is that then the duty could be conceivably owed to *everyone* (because everyone is potentially affected by a policy decision). However, restricting the concept of the duty to those with legitimate expectations generated by an express representation or regular practice would be going too far in restricting the duty.

In my opinion, a duty to act fairly in the context of legislative decisionmaking should require the body to act fairly towards all those who are particularly affected by the decision being made.¹⁶⁹ Those to

¹⁶⁹ The arguments in the following paragraphs are heavily influenced by the ideas expressed in I.M. Young, “Justice and Communicative Democracy” in R.S. Gottlieb, ed., *Radical Philosophy: Tradition, Counter-Tradition, Politics* (Philadelphia: Temple University Press, 1993) 123; P.J. Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987) 21 U.B.C. L. Rev. 87; and C.R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990). Small, *supra* note 2 at 153-58 expresses some of the same concerns.

whom the duty is owed, in my view, should have a particular interest, something more than the average citizen. This will ensure that review for fairness in the case of delegated legislation reflects the same goals of the duty of fairness for administrative functions—to ensure that those whose lives or activities are affected by a decision have the opportunity to be consulted. An individual is entitled to be heard in accordance with the principles of fairness, in part, because the decision has a particular impact on that person, and they will have no other way to attempt to influence the decisionmaker. Delegated “policy” decisions often affect groups or individuals in a similar way, and their effects on them are much more like “administrative and specific” decisions than broad choices made by legislatures. The electoral process will not take their concerns into account because, although there may be more than one person affected, the group still represents a small part of the population. Because of this, they have no real power to influence elections. Extending the duty of fairness to these decisions would ensure that the voices of these specially affected groups are heard when the legislature delegates policy decisions. Of course, this duty may well be different than that which would be required if the decision were “individual and specific,” but a general requirement to seek out and allow consultation and input is essential.

Consider, for example, the *B.C. and Yukon Hotels’ Association*¹⁷⁰ case. It was the members of the association and those in their position who were required to pay the deposits on the kegs. Although the decision to implement the system was a general, policy decision, they had a special interest in the question of whether it would be implemented. An implication into the statutory mandate of the liquor commission that it must consult with those who must pay the price of the regulations seems an appropriate way to ensure that the special needs of those whom a decision will particularly affect are taken into account as well as the broader needs of the public, and, as may have been the case here, other groups with more access to the commission.

A similar argument would apply where a group enjoyed a certain benefit that was to be modified or removed. An example is *Sunshine Coast*.¹⁷¹ If the decision about the grade levels at which French immersion will be provided was a legislative one (although this is of course debatable), it seems to me that the parents should have had a right to be treated fairly (whether or not the board members made

¹⁷⁰ *Supra* note 124.

¹⁷¹ *Supra* note 83.

representations to them), because they had children attending French immersion classes. Although the board's decision may have been a policy decision, these parents had likely made plans for their children's schooling on the basis of the existence of the French immersion program, and their children had benefitted from its existence. These facts should be most important in deciding whether the board should have to consult them.

The need to imply participation rights becomes even more clear when executive decisions are considered. Determinations such as the amount of welfare payments or tuition fees are often delegated to the executive to be set by regulation. While large benefit cuts or fee increases may be considered to be in the broad "public interest," certain people bear the brunt of these decisions, and it is crucial to require some consultation with them when the decisions are being made. At the very least, this is because people have planned their lives based on the existing state of affairs. Welfare recipients, for example, have signed leases and made budgeting decisions on the basis of the amount of assistance being provided. Students may have entered academic programs or planned their finances on the basis of being able to afford fees at a certain level. Without consultation, these special needs may be ignored by the delegated decisionmaker. Although there may have been no clear representations to these groups that their benefits or fees would remain at a certain level for a certain time, the special needs of people in these situations are at least as important as those to whom representations have been made. They would not be taken into account, however, if review of legislative decisions was based on legitimate expectations.

The criteria I am suggesting are not unrelated to legitimate expectations: "nature of the interest" claims form part of the doctrine of legitimate expectations in Britain, although they are used in a somewhat different way. Building on the Canadian concept of legitimate expectations would make the nature of the interest a secondary consideration, whereas I think it must be front and centre when extending the duty of fairness to legislative functions. For this reason, I reject the argument that legitimate expectations could be used as a starting point, and nature of the interest claims could be also added as triggers for the duty of fairness in reviewing legislative decisions.¹⁷² Focusing on promises would distract the courts, as it often already has, from the centrality of the applicant's stake in the decision.

¹⁷² Small, *supra* note 2 at 155.

This fits with broader conceptions of democracy.¹⁷³ Policy decisions will presumably take account, in some measure, of the broader needs of the public. However, those who are particularly affected may not have the power at the ballot box, or the strength of voice in public debate, to make their views heard or have a real influence on decisionmakers. Delegated policymakers should have the obligation to consider, or at least hear, the views of who will face particular consequences because of their decisions. Because of the particular effects of decisions on them, those groups who do not have the ability to influence or change democratic decisions should at least have the right to explain their needs and the potential repercussions of the decisions for them. Legitimate expectations would not reflect these principles.

C. Substantive Legitimate Expectations

It is not my intention in this article to discuss the merits of protecting the substance of legitimate expectations. The considerations involved in this issue are quite different from those regarding the doctrine of fairness.¹⁷⁴ Protecting substantive legitimate expectations raises questions about whether the representatives of one government can bind those of another, how much decisionmakers can fetter their discretion, and whether agencies and the executive should be encouraged to promulgate, or discouraged from promulgating, general policies and criteria upon which they will make their decisions. These are very different from the considerations involved in determining the content of the duty of fairness. For the same reasons I set out in the last section, it seems inappropriate and impossible for one doctrine to fulfil such different functions and respond well to the needs of different areas of administrative law. I believe, therefore, that substantive enforcement of promises should be done independently, on the basis of a concept of public law estoppel¹⁷⁵ or another doctrine. Legitimate expectations should remain exclusively a concept for determination of the content of the duty of fairness.

¹⁷³ For a discussion about legitimate expectations and democracy, see D. Dyzenhaus, "Developments in Administrative Law: The 1991-92 Term" (1993) 4 *Supreme Court L.R.* (2d) 177 at 189-95.

¹⁷⁴ For discussions of the desirability of recognizing substantive legitimate expectations or the doctrine of public law estoppel in Canada, see Cartier, *supra* note 2 at 110-15; and "Fair Start," *supra* note 2 at 283-90.

¹⁷⁵ See "Fair Start," *supra* note 2 at 286-90.

VII. CONCLUSION

The doctrine of legitimate expectations has had a confused development in Canada, owing to its importation from Britain without proper concern for the differences in this country's administrative law. The doctrine has been severely restricted, but applied without proper regard for its place in Canadian law. I have demonstrated throughout this article how too much reliance on the concept may lead to a restriction rather than an expansion of the duty of fairness. In applying legitimate expectations, courts have focused on the particular conditions for this narrow doctrine, rather than looking at the broad purposes of the doctrine of fairness and the principles behind it. It is for these reasons that I reject the use of this concept as a device to expand judicial review into the area of legislative decisionmaking or into the protection of promises of substantive results made by decisionmakers. It is much more advisable to find Canadian responses to these problems that better reflect the substantive values behind the duty of fairness and that are more consistent with the broad, flexible, and adaptive duty which has developed since *Nicholson*. Legitimate expectations is best seen as a doctrine whose function is to increase the content of the duty of fairness where a certain procedure has been regularly followed, or a representation has been made to the plaintiff. However, a redefinition of the concept of the "nature of the interest" should be front and centre in determining when legislative decisions are subject to a duty of fairness, as Canadian administrative law moves, I hope, towards a conception of the duty that better reflects the values of participatory democracy.