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Debra Shapiro

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LEGITIMATE EXPECTATION AND ITS APPLICATION TO CANADIAN IMMIGRATION LAW

Debra Shapiro*

RÉSUMÉ

Une nouvelle doctrine juridique s'appliquant aux hauts-fonctionnaires qui exercent des pouvoirs discrétionnaires est en train d'émerger. Selon cette doctrine dite d'attente légitime, le fonctionnaire qui, de par ses paroles ou sa conduite, crée dans l'esprit de ceux qui seront affectés par son pouvoir discrétionnaire une attente légitime quant à la façon dont ce pouvoir sera exercé, ne peut pas agir à l'encontre de cette attente. Si tel est le cas, un tribunal a le droit d'émettre un avis et de demander une audience.

L'article examine la jurisprudence du Canada et de tout le Commonwealth en la matière et en particulier dans le domaine du droit de l'immigration. Il analyse ensuite le degré et les possibilités d'application de cette doctrine au droit canadien de l'immigration.

INTRODUCTION

Legitimate expectation is an emerging legal doctrine which has developed out of English law. The concept can be explained as follows:

"... where a public authority or an official exercising a power involving discretion creates by words or conduct a legitimate expectation in the minds of person capable of being prejudicially affected by the power ..., a court may at the very least require reasonable notice and an opportunity to be heard or respond before the power is exercised contrary to the legitimate expectation induced."¹

Legitimate expectation is generally invoked as a ground giving rise to procedural protection. While it is used in many areas of law, including licensing, employment and local government finance, the courts have

* Copyright © 1992 Debra Shapiro. Ms. Shapiro has a Civil Law degree from Laval University in Quebec City and a Common Law degree from the University of Ottawa. She is currently articling with the firm of McDougall, Caron in Montreal. This paper was written in the spring of 1992.

1. Raymond E. Young, "Legitimate Expectations: Judicial Review of Administrative Policy Action" (1986) 44 *The Advocate* 814.

increasingly been faced with this doctrine in immigration matters. As Mackie points out, this is probably because deportation powers are generally not seen as requiring natural justice in the ordinary case.² The finding of a legitimate expectation in the situation of where an immigrant is confronted with a sudden deportation order, or when a Minister's permit is prematurely revoked, may give rise to the entitlement of a hearing. Has natural justice found its way into immigration law?

Legitimate expectation has only recently been clarified by the courts. It has developed extensively in Australia, the United Kingdom, and is currently finding application in Canada as well. The Canadian courts, a little way off the concept, are presently trying to define it. They struggle with the following questions: Is legitimate expectation synonymous with a right; is it a substantive or procedural concept; what kind of remedy or protection does it offer; is this doctrine a form of administrative estoppel which binds public authorities; does this principle attempt to fetter the discretion of immigration authorities? In this paper, I will examine these issues through an analysis of the case law which has developed in this area. After discussing significant English and Australian decisions, I will explore how the Canadian courts have dealt with the topic.

ENGLISH, AUSTRALIAN AND NEW ZEALAND JURISPRUDENCE

Remedies in law have always been connected with rights being at stake. The duty to act judicially, as put by De Smith, arises only when a decision is rendered which affects an individual's rights.³ But Lord Denning challenged this customary belief, in *Schmidt v. Secretary for Home Affairs*⁴, when he introduced the concept of legitimate expectation into English law. It would appear that with the following sentence, Lord Denning sought to extend the parameters of natural justice when he described the elements to impose an obligation of fairness:

"It all depends on whether he has some right or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."⁵

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2. Ken Mackie, "Expectations and Natural Justice" (1985) 59 *Australian Law Journal* 40.
 3. S.A. Re Smith, *Judicial Review of Administrative Action*, fourth ed. by J.M. Evans (London: Stevens, 1980).
 4. [1969] 2 Ch. 149.

It was recognized, in this case, that the possession of a 'legitimate expectation' could give rise to the entitlement to a hearing in order to ensure fairness and justice. Schmidt, an alien student, was given permission to enter the United Kingdom for a limited period of time. When the period was over, Schmidt made an application to the Home Secretary for an extension, but was refused and was not given a hearing. In the following passage, Lord Denning explained the type of situation in which legitimate expectation could arise. He stated that an immigrant:

"... has no right to enter this country except by leave; and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit expires, he ought, I think to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right and, I would add, no legitimate expectation—of being allowed to stay. He can be refused without reasons given and without a hearing. Once his time has expired, he has to go."⁶

In one sense, as Wade points out, it was for the purpose of restricting the right to be heard that legitimate expectation was first introduced into the law.⁷ Nonetheless, Lord Denning's statement illustrates that an immigrant may legitimately expect to be able to stay for the duration of his or her permit.

A highly noted Australian decision which adopted a narrow approach to the legitimate expectation doctrine was *Salemi v. Minister of Immigration and Ethnic Affairs (No. 2)*.⁸ This was the first decision by the Australian High Court to consider the application of the legitimate expectation doctrine in the context of an immigration matter. Salemi was a prohibited immigrant. The government had publicly declared a general amnesty for illegal immigrants. The plaintiff applied to the Department of Immigration for the grant of resident status but was refused on the basis that there were exceptions to the amnesty. Faced with a deportation order, Salemi argued that any decision concerning deportation had to be made in accordance with the principles of natural justice. The High Court held that the Minister was not bound to comply with the rules of natural justice prior to exercising his power of

5. *Ibid.*, at 170.

6. *Ibid.*, at 171.

7. E.W.R. Wade, *Administrative Law*, (Oxford: Clarendon Press, 1988) at 522.

8. [1977] 137 C.L.R. 396.

deportation. Barwick C.J. equated legitimate expectation to the concept of a legal right:

“It is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of lawyer to the word “legitimate” than meaning which expresses the concept of entitlement of recognition by law. Understood, the expression probably adds little, if anything to the concept of a right.”⁹

Although there may exist some ambiguities in the concept of legitimate expectation, one element is clear: the expectation need not be an enforceable right.

Barwick C.J.’s statement was expressly criticized by the Privy Council in *Attorney General of Hong Kong v. Ng Yuen Shiu*¹⁰, a noteworthy immigration decision. Lord Fraser stated:

“With great respect to the learned Chief Justice, their Lordships considered the word “legitimate” in that expression falls to be read as meaning “reasonable”. Accordingly “legitimate expectations” in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.”¹¹

In this case, Ng was one of a thousand illegal immigrants. The government made a public announcement that each illegal immigrant would be interviewed and dealt with on his or her merits. Ng was ordered to be deported without having the right to be heard. The Privy Council held that in so acting, Ng’s reasonable expectations were denied, namely expectations which were based upon the government’s own statements. This was viewed as unfair by Lord Fraser, who justified the application of the doctrine, while also limiting its scope, in the following often quoted passage:

“When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.”¹²

The *Ng Yuen Shiu* case illustrates the possibility of natural justice being applied within an immigration setting. Nonetheless, the courts have been

9. *Ibid*, at 404.

10. [1983] 2 ALL ER 346 (P.C.).

11. *Ibid*, at 350.

12. *Ibid*, at 351.

reluctant to accord natural justice in certain areas, notably in cases involving revocation of temporary entry permits. In the New Zealand case of *Tobias v. May*¹³, an immigrant was granted a permit to remain in New Zealand for one month. Prior to the expiry of the permit, an application was made and granted for an extension. Before the expiry of the extension, an agent of the Minister of Immigration revoked the applicant's permit, with no reasons provided. Quilliam J. held that the Minister of Immigration did not owe the alien a right to be heard. After consideration of the statement of Lord Denning in the *Schmidt* case, he dismissed it as obiter and distinguished that case on the facts. As pointed out by Hodgson:

"The decision in *Tobias* seems to have turned on the treatment of aliens in a special category and on a rather wide statutory power of revocation, evidencing in the opinion of Quilliam J., a legislative intention to confer upon the Minister freedom of action with regard to aliens."¹⁴

Quilliam J. inferred, that if the Minister was bound by the *audi alteram partem* rule in such a circumstance, his discretion would be severely limited.

The courts have also been hesitant to find a legitimate expectation in situations involving the renewal or expiration of temporary entry permits. In the case of *R. v. Minister of Immigration and Ethnic Affairs: ex parte Ratu*¹⁵, two applicants were given temporary entry permits to enter Australia. They obtained employment, contrary to their signed undertakings, so once their permit expired they became prohibited immigrants. Deportation orders were issued against them, but no reasons were provided. The court decided that the Minister's actions were lawful and that he or she had no obligation to give advance notice of the reasons for making the orders. The order was not depriving the prohibited immigrant of a right or legitimate expectation to remain, as such right or legitimate expectation did not exist in the first place. As in the *Tobias* case, the court concluded that the discretion conferred on the Minister by the Act in question, was not qualified by an obligation to observe the rules of natural justice. Further, the court held that it had no jurisdiction to review the exercise of discretion.

The case of *Haj-Ismail (H. and M.) v. Minister for Immigration and Ethnic Affairs*¹⁶ involved a renewal of temporary entry permits. The male applicant

13. [1976] 1 N.S.L.R. 509.

14. D.C. Nodgson, "The Current Status of the Legitimate Expectation in Administrative Law." (1984) 14 *Melbourne University Law Review* 706.

15. [1977] 137 C.L.R. 461.

and his wife entered Australia pursuant to temporary entry permits and continued to reside there on the authority of further permits. The male applicant was approved subsequently as a private overseas student and then he and his wife made an application for resident status pursuant to a letter written by the Minister recommending that Haj-Ismael lodge a formal application. The letter also stated "provided they are able to meet normal immigration health and character requirements, they will then be granted change of status to residents."¹⁷ The applicants contended that by virtue of this letter, they had a legitimate expectation that they would be granted resident status, which entitled them to an opportunity to be heard in the event that the Minister did not honour the expectation. In the alternative, the male applicant argued that he possessed a legitimate expectation of being allowed to remain in Australia until the completion of his studies. At the trial level, the first contention was dismissed by the judge, as the letter only referred to what would happen if the applicants were able to meet all the requirements:

"Nothing in the letter, created in favour of the applicants in this case, any entitlement to resident status or any expectation that resident status would, as a certainty be granted. It therefore in my view, remained open to an officer considering the applications to refuse them without hearing the applicants and without giving them reasons. Nothing they had been given was being taken away."¹⁸

With respect to the second contention, the judge ruled that there was a right to be heard arising from the male applicant's legitimate expectation of being able to complete his studies in Australia. On appeal, the full Federal Court agreed with the trial judge's first ruling. Davies J. agreed in principle with the second holding, but dismissed it on the facts, as the male applicant could not have acquired a legitimate expectation concerning completion of his studies, since he had failed to produce any positive results after five years of research. Once again, it was made clear that there was no obligation on the Minister to observe the rules of natural justice before refusing resident status or ordering deportations. As noted by Mackie, it will require exceptional circumstances to create an expectation in situations where there is an otherwise unfettered discretion to act vested in the administrative authority. He states:

16. [1981] 36 A.L.R. 516.

17. *Ibid*, at 520.

18. *Ibid*, at 533.

"The circumstances must be such that it can be predicted with some certainty that an undertaking is given to act in that particular manner and that this has been relied upon by the person affected by the subsequent exercise of the power."¹⁹

CANADIAN JURISPRUDENCE

The doctrine of legitimate expectation has not been confined to English and Australian jurisdictions. It has been invoked in the Canadian courts as well, where there has been more hesitancy to embrace the doctrine. While some judges have considered it, others will avoid addressing legitimate expectation, if at all possible. Yet the reasons for this seem to lie in a Canadian unfamiliarity with the subject rather than a downright rejection of the concept. In the case of *Minister of Manpower and Immigration v. Hardaya*²⁰ the applicant had a Minister's permit authorizing him to remain in Canada and to engage in employment. It was cancelled and he was not given a hearing or a reason for cancellation. The applicant sought judicial review under section 28(1) of the *Federal Court Act*.²¹ He invoked the *Schmidt* case to support the proposition that if a permit is revoked before the time limit expires, a holder should be allowed to make submissions, as it was his or her legitimate expectation of being allowed to stay for the permitted time. The Federal Court of Appeal accepted this argument and concluded that the applicant ought to be given the opportunity to make submissions so as not to be denied the benefit of the principles of natural justice. The Minister of Immigration appealed to the Supreme Court of Canada. The court expressed the view that section 37(1) of the *Immigration Act*²² gave the Minister a discretionary power that is very broad to grant, extend or cancel a permit, but did not otherwise address the legitimate expectation argument. The court decided the case on jurisdictional grounds. It was pointed out that the remedy of section 28 of the *Federal Court Act* has a limitation to the jurisdiction of the court when dealing with "... a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis ..."²³ The technical nature of the provisions provided the answer. It was concluded that

19. *Supra*, note 2 at 42.

20. [1978] 1 S.C.R. 470.

21. *Federal Court Act*, R.S.C. 1985, c. F-7, s. 28(1).

22. *Immigration Act*, R.S.C. 1985, c. 1-2, s. 37(1).

23. *Supra*, note 21.

since a Minister's decision to cancel a permit was of an administrative nature, it fell within the limitation and was not subject to such review.

The case of *Minister of Employment and Immigration v. Moktar Bendahmane*²⁴, illustrates another instance where the Federal Court of Appeal was willing to consider the legitimate expectation doctrine. In this case, an Algerian citizen came to Canada with a visa that he obtained by inaccurate representation. An exclusion order was issued against him. He appealed, and before a decision was rendered, he received an official letter stating that he might be eligible for administrative review as the status of a refugee. Unfortunately the letter did not indicate the correct procedure to follow. Bendahmane filed a refugee claim, but learned that the Minister was going to refuse the claim without further consideration. The court decided that since the Minister had previously considered claims that were not in accordance with the statutory procedure, the doctrine of fairness required the Minister to consider Bendahmane's claim. The principle of legitimate expectation was applied as in the *Ng Yuen Shiu* case. Hugessen J.A. stated that as the Minister had promised to give considerations to Bendahmane's claim for refugee status, and since this procedure did not conflict with his statutory duty, then he should act fairly by implementing the promise.

There are a number of Canadian immigration cases involving backlog procedures for refugees. In some situations it is advantageous for an immigrant's status to be determined according to the specific backlog criteria. In other cases, such as in *Yhap v. Minister of Employment and Immigration*²⁵, such criteria might prove to be disadvantageous. In this case, the applicant intended to claim refugee status in Canada. He and twenty-four others were part of a refugee Backlog Clearance Programme, and were to be interviewed by immigration officers to determine whether there were sufficient humanitarian or compassionate grounds, pursuant to section 114(2) of the *Immigration Act*, to exempt them from the requirements of section 9 of the Act. The sections read as follows:

"9(1) Except in such cases as are prescribed, every immigrant and visitor shall make an application for and obtain a visa before that person appears at a port of entry.

114(2) The Governor in Council may by regulation exempt any person from any regulation made under subsection (1) or otherwise facilitate the admis-

24. [1989] 3 F.C. 16 (C.A.).

25. [1990] 1 F.C. 722.

sion of any person where the Governor in Council is satisfied that the person should be exempted from that regulation or the person's admission should be facilitated for reasons of public policy or due to the existence of compassionate or humanitarian grounds."²⁶

Instead of being questioned on humanitarian or compassionate issues, the immigration officer applied policy directives and guidelines pertaining to the humanitarian and compassionate review portion of the Backlog Clearance Programme. The document only applied to a small part of the backlog population. The guidelines were rigid and inflexible, as opposed to the wide discretion accorded to the Governor in Council by section 114(2). The applicant submitted that the Minister had failed to fulfil his legitimate expectation of a section 114(2) review, which was promised to persons in the Refugee Backlog. The legitimate expectation was based on his contention that the Minister had made public statements indicating that persons claiming refugee status before a certain date would have humanitarian or compassionate considerations taken into account. The court avoided the legitimate expectation argument and concluded that regardless of what promises were made by the Minister, the applicant was entitled to a review under section 114(2) of the *Immigration Act*, in order to determine whether there were humanitarian or compassionate considerations which might warrant an exemption from section 9(1) of the Act. The court stated that the discretion contained in section 114(2) was not to be limited by inflexible policies. These policy guidelines did in fact constitute a fetter on the power of the Governor in Council to exempt a person from section 9 requirements.

In the case of *Naredo v. Canada (Minister of Employment and Immigration)*²⁷, the applicants were denied refugee status. After several unsuccessful proceedings, members of parliament made a plea to the Minister of Immigration to exercise his humanitarian and compassionate discretion, pursuant to section 114(2) of the *Immigration Act*. The applicants were successful and were permitted to be landed from within Canada. They were granted Minister's permits, which were extended periodically. After two years, they were advised that their permits would not be extended, on the motion of the Minister's successor, and they were requested to depart Canada. The applicants raised an estoppel argument. They asserted that the current immigration officer was estopped by the temporary relaxation of refusal effected by her predecessor, in his words "as exceptions to current legislative practice"²⁸.

26. *Supra*, note 22, ss. 9(1), 114(2).

27. (1990), 11 Imm. L.R. (2d) 12 (F.C.T.D.).

The court's response was that the previous Minister had no legal authority to promise the applicants that they would be landed from within Canada. It is section 114(2) which accords a discretion to exempt individuals from regulations. As Muldoon J. stated:

"The body upon whom or which Parliament has conferred not a duty, but a power, of deciding or determining any question of exemption or facilitation by regulation is the Governor in Council. If one went so far as to consider the exercise of that power to be a duty, which it is not according to subsection 114(2), then it appears to have been discharged by not passing any such regulation, since the responsible Minister did not recommend it and, apparently neither did any of her cabinet colleagues".²⁹

As for the contention that the applicants relied on the Minister's short-lived intention to their detriment, the court asserted that there was no evidence of any irreversible harm suffered by the applicants by what ought to have been their short-lived reliance. Any proceeding which had been withdrawn could have been re-opened.

The applicants claimed that they had a legitimate expectation of having their application for permanent residence allowed. They relied on the *Bendahmane* case, to support their position that the Minister should have implemented the promise as this would not have interfered with the statutory duty. In the words of the court "it is clear that, since the Court has no authority to dictate the outcome of the exercise of the Minister's discretion, it is certain that no previous Minister can do that either."³⁰ The court characterized the promise to exercise discretion in recommending an exemption from the requirements of section 9(1) of the *Immigration Act* as a substantive promise and concluded that legitimate expectation only binds authorities with respect to procedural premises. (This issue shall be dealt with in greater detail further on). The only promise that the Minister was bound by was to accord careful consideration to the applicant's request for permanent residence. The *Hardayal* case was invoked to illustrate that decisions such as issuing, extending or cancelling a permit, pursuant to section 37 of the *Immigration Act* are not subject to the right to a hearing. The court was careful to point out that the benefit of section 114(2) of the Act is not a right which can be invoked by the applicants. No measure lies to force the Minister or the Governor in Council to come to a specific conclusion.

28. *Ibid.* at 18.

29. *Ibid.* at 20-21.

30. *Ibid.* at 22.

Three Canadian cases where it was advantageous for immigrants to be dealt with according to the new backlog procedure were: *Husequin Zeybekoglu et. al. v. Minister of Employment*³¹, *Bikker Singh Gill v. Minister of Employment and Immigration*³², and *Dermitas v. Canada (Minister of Employment and Immigration)*³³. In these cases, expectations arose from promises by the Minister that measures would be taken to deal with the existing backlog of refugees. The applicants applied for refugee status but all of their claims were rejected. In each case, the applicants went through various proceedings, including unsuccessful applications for redetermination before the Immigration Appeal Board. The applicants contended that they had the right to credible basis hearings before an adjudicator and a member of the Refugee Division in order to determine whether their claims had any valid basis. If decisions were granted in their favour, their files would be dealt with according to new backlog guidelines.

The *Zeybekoglu* case set a precedent for the later cases by establishing that there was no legitimate expectation on the part of the applicants, as their status had already been determined by the Immigration Appeal Board which denied their application for redetermination. Joyal J. stated that the program specially set up to deal with the backlog did not in any way relate to the applicants as they were not part of this group. Thus they could no longer reasonably expect to be dealt with under the backlog system.

In the *Gill* and *Dermitas* cases, the applicants wanted their files to be dealt with pursuant to certain refugee regulations which allowed some individuals to make applications for landing from within Canada, and provided an exemption from all but health and security requirements. Teitlebaum J. presided on both of these cases. With respect to the legitimate expectations argument, he developed a two-step test. Two questions must be answered:

“1. Whether the Minister’s ... declaration or ‘promise’ and the subsequent publications and Regulations create a “legitimate or reasonable expectation” and

2. Whether the applicants must establish that enabling legislation allows the Minister to fulfil this expectation, (respondent’s position) or, whether the respondent must rather establish a statutory bar preventing the Minister from complying (applicant’s position).”³⁴

31. (8 May 1991), T-2894-90 (F.C.T.D.) [unreported].

32. (30 July 1991), T-2061-90 (F.C.T.D.) [unreported].

33. (30 July 1991), T-2845-90 (F.C.T.D.) [unreported].

With respect to the *Gill* case, the same reasoning and facts were applied as in *Zeybekoglu*, and the court found there was no legitimate expectation. In light of this finding, it was not necessary to deal with the second question. In the *Dermitas* case, Teitlebaum J. distinguished *Zeybekoglu*, as the applicant's claims had not been dealt with, for the Immigration Appeal Board had not denied the redetermination applications. He concluded that it was reasonable for the applicant to expect that his claim would be dealt with under the backlog system for he was still part of the backlog. As the answer to the first question in the test was affirmative, then it was necessary to proceed to the second question. The *Bendahmane* case was cited to illustrate that the Minister should have fulfilled his promise to consider the applicant's refugee claim as long as it did not conflict with her statutory duty. Since the Minister had not pleaded a statutory bar, then there was nothing preventing the applicant from having a credible basis hearing.

The case *Terge Bakkeskaug v. Minister of Employment and Immigration and Minister of State for External Affairs*³⁵ dealt with the refusal to grant a family application for immigration to Canada. During the family medical examination, it was discovered that the applicant's son had cancer, but they were informed by the doctor that this cancer was curable, and the disease should pose no problem for immigration as all the treatment would be received out of Canada. Nonetheless, the applicant was rejected pursuant to section 19(1)(a)(ii) of the *Immigration Act*³⁶, and Regulation 2 of the *Immigration Regulation*.³⁷ In his appeal, the applicant invoked the doctrine of legitimate expectations, and cited the *Ng Yuen Shiu* case. He claimed that the doctor, as an agent of the Minister, had told them that their application would not be refused until after the completion of their son's medical treatment and that the Minister was estopped from refusing the application as a result. In light of the representations, the applicant claimed he had a "legitimate right of expectation"³⁸ to be able to come into the country, or at least be heard with respect to the medical decision. In its rejection of the legitimate expectation argument, the court held that the doctor was not acting as an agent of the Minister's office, as he was an independent doctor. The estoppel argument

34. *Supra*, note 32 at page 9.

35. (25 September 1991), T-1837-90 (F.C.T.D.) [unreported].

36. *Supra*, note 22, s. 19(1)(a)(ii).

37. *Immigration Regulation*, 1978 SOR/78-172.

38. *Supra*, note 35 at 5.

was rejected because, in addition to the fact that the doctor had no authority to make representations or promises on behalf of the department, the words of the doctor could not constitute a 'promise', intended to be relied on, but rather "comments holding out hope".³⁹

ANALYSIS

As a starting point, it is useful to consider the statement of Rouleau J. from the *Bakkeskaug* case: "the doctrine of legitimate expectation cannot be applied outside a procedural context."⁴⁰ There are two aspects to the substantive or procedural nature of a legitimate expectation. There is the actual expectation, and then there is the protection that it can provide. In terms of the expectation itself, it can be procedural in the sense that it relates solely to being granted, for example, an unbiased hearing before a decision is made, or substantive, in that the expectation relates to the granting of a benefit or privilege such as the renewal of a license or permit. As noted by Elias, a substantive expectation is more extensive since an actual benefit or other advantage will be conferred or continued. The procedural concept offers a more limited expectation, mainly, that the decision affecting the individual will not be taken until he or she has had the chance to make representations. In that situation, the expectation is not that the benefit itself will be conferred.⁴¹

The next aspect to consider is the protection, or judicial remedy offered by the legitimate expectation. Are the remedies procedural, substantive or both? The protection is procedural in the sense, as Forsyth illustrates, that the decision maker is not bound to exercise the discretion in a particular way, he or she is only bound to grant a hearing to the person affected. But he argues that:

"In addition to procedural protection legitimate expectations are, or ought to be, substantively protected, i.e. that in order to protect a legitimate expectation a public body would be bound, save in exceptional circumstances, to exercise its discretion in a particular way."⁴²

39. *Ibid.*

40. *Ibid.* at 6.

41. P. Elias, "Legitimate Expectation and Judicial Review," *New Directions in Judicial Review, Current Legal Problems*. 1988, at 39.

42. C.F. Forsyth, "The Provenance and Protection of Legitimate Expectations", (1988) 47 *Cambridge Law Journal* 240.

He admits, nonetheless, that most decisions do not accord substantive protection. By requiring a decision—make to act only in accordance with an assurance or undertaking, its discretion may become fettered.⁴³

It would be fair to conclude that whether the individual expects a substantive benefit or a procedural one, the judicial remedy, if any, is procedural. Thus, if someone has a substantive legitimate expectation, such as the renewal of a license or permit, the most that he or she is entitled to is a hearing before a renewal is refused.⁴⁴ While there might have been a substantive aspect in the *Ng Yuen Shiu* case, in that the court did order the government to implement its promise, Mackie carefully points out that the promise was in fact to give a hearing.⁴⁵

It appears that the applicant in the *Bakkeskaug* case phrased his argument incorrectly. He claimed to have a “legitimate right of expectation” to come into the country. As noted by Rouleau J., the position of the Supreme Court of Canada is clearly illustrated in their recent decision, *Reference re Canada Assistance Plan (B.C.)*:

“there is no support in Canadian or English cases for the position that the doctrine of legitimate expectation can create substantive rights. It is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make a representation or be consulted. It does not fetter the decision following the representations or consultation.”⁴⁶

Thus, legitimate expectation does not offer a substantive right. The only right that the holder of a legitimate expectation is entitled to is the “ubstantial right to be accorded natural justice.”⁴⁷

It is clear that some litigators invoke estoppel as part of their legitimate expectation argument. Parallels have been made between the two doctrines. In the *Bendahmane* case, Marceau J.A. stated in his dissent:

“One can conceive of a sort of application of common law estoppel in administrative matters, given the representation on the one hand and the reaction of trust and reliance on the other, as a means of ensuring fairness.”⁴⁸

43. *Supra*, note 41 at 46.

44. R. Baldwin and D. Horne, “Expectations in a Joyless Landscape”, (1986) 49 *The Modern Law Review* 692.

45. *Supra*, note 2 at 35.

46. [1991] 2 S.C.R. 525 at 557.

47. *Supra*, note 14 at 719.

At first this analogy might seem inaccurate as legitimate expectation appears to found an action, as opposed to estoppel which functions as a defence. Yet it must be noted that legitimate expectation is invoked generally to respond, for example, to the exercise of the right of deportation of an immigration official. In a sense, legitimate expectation is similar to estoppel, in that an individual who has had his or her expectation disappointed, will invoke it to prevent the authority from going back on its word to his or her detriment. Whether these doctrines are synonymous remains unclear. Nevertheless, immigration law is a difficult area to prove estoppel because of the extensive discretionary powers which are often involved.

The issue of discretion becomes significant when the estoppel and legitimate expectation arguments are invoked. If these doctrines are found to exist, a power which involves discretion may become fettered. The case of *Dee v. Canada (Ministry of Employment and Immigration)*⁴⁹ addressed this issue. The appellant, after being granted refugee status, applied for a Minister's permit, pursuant to section 37 of the *Immigration Act*. He was unsuccessful, and no reasons were given for the refusal. The appellant claimed that it was the Minister's policy, as stated in a manual prepared for the guidance of the immigration officers, to give a Minister's permit to all those who had been determined to be Convention refugees. The appellant asserted that he had a legitimate expectation that the policy would be applied in his case. He furtherly submitted, that once the Minister had chosen not to follow the policy, fairness required that he be given a chance to be heard. The court dismissed the legitimate expectation argument. Pratte J. said, "the policy, whatever its effect, did not change the law which gave the Minister the discretionary power to issue permits."⁵⁰ He cited the *Maple Lodge Farms* case⁵¹ to illustrate that the discretion given by a statute cannot be confined by general policy guidelines. To enforce such guidelines, such as in the present case, would fetter the Minister in the exercise of his discretion. Pratte J. agreed with the trial judge that the appellant had not been treated unfairly because he could have made representations concerning the Minister's objections to the issuance of the permit. The appeal was dismissed. Thus, what appear as "pre-determined policies", which may create expectations, will not

48. *Supra*, note 24 at 25.

49. (26 June 1991), A-4-89 (F.C.A.) [unreported].

50. *Ibid.* at 3.

51. *Ibid.* at 3.

have the effect of requiring officials to exercise their discretion in such a way as to achieve a specific result. Young states that the "expectation goes to the manner of the exercise of the power, but not its result."⁵² The legitimate expectation doctrine does not have as its purpose to fetter discretionary powers or to control the form or substance of policy, rather "the focus is not on the policy but on the conduct of officials and the manner in which they make policy."⁵³

CONCLUSION

The doctrine of legitimate expectation suggests the possibilities of natural justice applying within the context of immigration law. The Canadian courts, although slightly unfamiliar at first with the doctrine, have begun to accord legitimate expectation the careful consideration it deserves. Through an analysis of the case law, it is clear that in Canada, the expectation need not be an enforceable right and it does not serve to create substantive rights. What the expectation can create, if reasonable, is the right to natural justice. While the expectation itself may be substantive or procedural, the protection it offers is clearly procedural. Generally, it will entitle the individual to a hearing. Legitimate expectation may be similar to administrative estoppel, but it remains doubtful whether these doctrines are actually synonymous. Finally, it has been made clear by the Canadian courts that the legitimate expectation cannot function to fetter the discretion of administrative bodies.

Legitimate expectation is highly significant in the area of immigration law, as the concept was created with an immigration matter in mind. It is immigrants, often treated unfairly, who need to benefit from the protection that the doctrine can offer. These individuals should be able to rely on the words or conduct of immigration authorities. If these authorities do their job correctly, the issue of legitimate expectation should not come up. Yet, if officials do not keep their words, then in certain instances, the rules of natural justice should apply to guarantee fairness to a system which is not always fair.

52. Raymond E. Young, "Emerging Issues-Legitimate Expectations" Paper prepared for *Continuing Legal Education of the Canadian Bar Association*. British Columbia, 1989, at 4.

53. *Supra*, note 1 at 814.

