

**Estoppel (principles?) in public law:
the substantive protection of legitimate expectations**

by

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Abstract

This thesis examines the doctrine of public law estoppel and similar doctrines, such as substantive legitimate expectation, which seek to give substantive protection to people's expectations arising from their dealings with public bodies and officials. The substantive protection of expectations in public law is controversial and this thesis considers whether the concerns raised about its application have any sound basis.

I review the case-law in which the courts have considered whether to apply estoppel in public law or otherwise extend the doctrine of legitimate expectation to substantive outcomes. Particular attention is paid to the "spill-over" of estoppel from private law into public law. I discuss whether there is any real difference between the doctrines which seek to give substantive protection to expectations. I conclude there is no material difference between the approaches or their inherent ability to respond to the concerns raised by the opponents of substantive protection.

I then consider the notion of legal certainty in the law – the conceptual principle on which the doctrines of estoppel and legitimate expectation are based. I conclude that this principle has a strong foundation and creates a powerful argument for protecting expectations. I then examine the apparent concerns that arise from achieving legal certainty in public law and draw out the specific objections to applying public law estoppel and substantive legitimate expectation. I critique each of these objections and conclude that none of them present an insurmountable hurdle to the application of estoppel or substantive legitimate expectation in public law.

I conclude by setting out a number of "touchstones" to assist in the case-by-case assessment of whether expectations should be protected. The touchstones attempt to place a greater emphasis on the underlying theoretical justification for protecting expectations and to ensure the assessment deals with the concerns that were raised about bringing the concept of legal certainty into public law.

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Chapter 1 Introduction

It is relatively common for public bodies or officials to give assurances that a certain course of conduct will be followed or a certain decision will be made by them. Sometimes they will assure a person that certain actions or activities have been approved or are otherwise authorised. Occasionally, for various reasons, those public bodies or officials seek to renege on such assurances. Likewise, public bodies may publish a policy on how they will apply certain powers in particular cases. Sometimes they later seek to change these policies or depart from them in specific cases.

Traditional administrative law principles suggest, at best, an aggrieved party may be entitled to certain *procedural* rights prior to any decision being made to renege on such an assurance. The assurance creates a legitimate expectation and requires the principles of procedural fairness be applied before that expectation is defeated. However, under traditional administrative law theory, the assurance does not create any enforceable *substantive* right or expectation – to do so would be to fetter the public body's or official's ultimate discretion and undermines their ability to govern in the public interest.

As the divide between private and public law has become more blurred, the courts have been invited to treat this situation as engaging the doctrine of estoppel – a doctrine readily applied in the private law context. Borrowing the simple criteria from private law – an assurance, reliance on the assurance, and loss or prejudice – the courts have occasionally said that public bodies or officials are estopped from reneging on certain assurances. Viewed from a different perspective, the courts have extended the doctrine of legitimate expectation, from its strictly procedural origins, to the substantive protection of expectations. When doing so, arguably the courts are applying estoppel *principles*, even though they may not be explicitly applying the doctrine itself.¹

On the one hand, some people contend the incursion of the estoppel doctrine into public law undermines the traditionally procedural nature of administrative law. The application of public law estoppel – or its sibling, substantive legitimate expectation – by the courts usurps the ultimate decision-making power of public bodies and unduly fetters the ability of public bodies to govern.

¹ It is on this basis that the title of my thesis refers estoppel “principles?” in parentheses. My examination is not confined to estoppel in a formal sense but includes situations in which estoppel-type principles are applied under different rubrics, such as substantive legitimate expectation or “abuse of power” *etc.*

On the other hand, others argue estoppel and substantive legitimate expectation uphold the principle of legal certainty. This principle is derived from the Rule of Law which, amongst other things, suggests people should be able to plan their lives secure in the knowledge of the legal consequences that flow. They argue that public bodies violate that principle when they renege on assurances or change policies without accommodating the expectations they have previously induced in people.

I contend the protection of expectations is an important and essential task for the courts – otherwise the Rule of Law is a meaningless concept. My central argument is that the conceptual objections to the estoppel and substantive legitimate expectation are significantly overstated. While many of the principles underlying the objections are undoubtedly important, the objections themselves are not as impregnable as made out and the expectations can still be protected in a public law setting in a manner sensitive to those underlying principles.

In addition, I argue the particular doctrinal framework applied to protect expectations generally makes no difference to the outcome or degree to which these concerns are met. The various doctrines are broad and do not in themselves provide a method which is either acceptable or not. Instead, it is the overlying principles or “touchstones” applied within those frameworks on which the success or otherwise of the substantive protection of expectations rests. Likewise, I suggest the assessment of whether the expectation is worthy of protection is presently too blunt and needs to better reflect the conceptual basis for protecting expectations.

In this thesis, I begin in Chapters 2 and 3 by analysing the emergence of the doctrine of public law estoppel and its “spill-over” from private law, along with the extension of public law’s own doctrine of legitimate expectation from procedural to substantive protection. I deal with the treatment of public law estoppel and substantive legitimate expectation in the United Kingdom (where the development has been most dramatic) and across the other key common law jurisdictions (Canada, Australia, and New Zealand). I identify the circumstances in which the courts have been prepared to apply the doctrine and when they have declined to do so. I then compare the different doctrines and the degree to which they have a material effect on the protection of expectations or the compatibility of the protection of expectation with the countervailing factors in play in a public law environment. I argue that none of the doctrines is inherently superior and their commonalities are stronger than their differences.

Against that backdrop, I consider the conceptual basis for the recognition of estoppel and substantive legitimate expectation in Chapters 4 and 5. I seek to place estoppel and substantive

legitimate expectation within the public law framework and identify the competing interests which arise from the unique nature of public law and the principles that come into play. I argue that these unique aspects of public law do not present insurmountable hurdles to the substantive protection of expectations. I conclude by outlining a range of “touchstones” to refine the manner in which expectations are protected to ensure the protection responds to the conceptual basis on which it is grounded and deals with the compatibility concerns raised.

The starting point of my analysis is to consider public law estoppel and substantive legitimate expectation from an internal, legal perspective – to consider and critique the existing rules surrounding these doctrines. The sources for this thesis are essentially two-fold: first, case-law from the United Kingdom, Canada, Australia and New Zealand; and secondly, commentary and academic writing on the purpose, principles, and concepts underlying administrative law and judicial review. I will primarily use the case-law to identify the different ways estoppel and substantive legitimate expectation are presently treated in public law, the problems that have arisen through their recognition, and some of the principles and solutions which have been employed to deal with these issues. From the commentary and academic writing, I will explore the underlying conceptual issues that arise in administrative law as they apply to the doctrines of estoppel and expectations.

The sources of law I rely on are drawn from different common law jurisdictions. This means there is also a inter-jurisdictional or comparative law aspect to my analysis. However, the body of administrative law in these Commonwealth jurisdictions and its conceptual basis is relatively similar; it is derived from and, in many cases, echoes English law.² To that extent, the emphasis of the comparative approach is on identifying the varying problems and/or solutions adopted to estoppel issues, rather than examining any unique differences in the legal institutions, or cultures of these countries. That said, there is a range of treatment of public law estoppel and substantive legitimate expectation in these jurisdictions and I will seek to identify some of the factors within the administrative rules of these systems that have lead to the different treatment.

There is a strong conceptual component to this thesis because I focus on the theoretical underpinnings of estoppel and substantive legitimate expectation, the conceptual differences between judicial intervention in public and private law, and the conflicting interests that arise. I consider

² For a comparative examination of the treatment of legitimate expectations in English, French, and E.C. law, see Søren J. Schønberg, *Legitimate Expectations in Administrative Law* (New York: Oxford University Press, 2000).

whether they can be reconciled or balanced on a conceptual, as well as practical, level. To the extent that I critique the existing approach to estoppel and include suggestions to improve the framework for the protection of expectation interests, my approach also contains a practical component.

The legal perspective I have adopted is largely doctrinal, rather than a broader sociological or inter-disciplinary approach. However, I seek to address both the academic and professional communities. First, I attempt to stand back from the legal rules and to critically evaluate those rules from a theoretical perspective – in the theme of legal theory and the “world of ideas”. Secondly, my work proposes practical solutions to problems that arise with public law estoppel – therefore also attempting law reform outcomes of interest to a professional constituency.³

The approach I intend to adopt in this thesis differs from, but is complementary to, the present literature. Unlike much of the material grounded in legitimate expectation theory, I intend to start from the perspective of private law estoppel and its “spill-over” into public law. This involves a robust assessment of the unique conceptual basis for judicial intervention in public law and the implications of this on the compatibility of estoppel with public law. One of the key differences between my work and the existing literature on the substantive protection of legitimate expectation is my focus on whether public law estoppel is the appropriate vehicle or rubric for the recognition of substantive interests created by assurances from public bodies. In my comparative analysis I seek to expand the examination of estoppel beyond its treatment in English (and to a lesser degree, Australian) law. I draw from other Commonwealth jurisdictions, in particular: Canada, where a more limited role is afforded to (strictly procedural) legitimate expectation;⁴ and New Zealand, where there is a strong movement for simplicity in administrative law⁵ and the embryonic

³ The characterization is borrowed from the Arthurs’ report; Harry W. Arthurs, *Law and Learning: Report to the Social Services and Humanities Research Council of Canada by the Consultative Group on Research and Humanities and Education in Law* (Ottawa: Minister of Supply and Services Canada, 1983) at 65-70. The report suggests legal method can be described along two intersecting continuums. The first, a “continuum of legal perspective” with traditional doctrinal research (“research “in” law”) at one end and interdisciplinary research (“research “on” law”) at the other end. Intersecting this continuum is a “continuum of constituency or desired area of influence”. At the two extremes, the academic or scientific constituency (“the world of ideas”) and the professional constituency (“the world of action”).

⁴ See David Wright, “Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law” (1997) 35 Osgoode Hall L.J. 139.

⁵ See Sir Robin Cooke, “The Struggle for Simplicity in Administrative Law” in Michael Taggart, *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Auckland: Oxford University Press, 1986) [Cooke, “Simplicity”].

“substantive fairness” ground of review.⁶ Further, I aim to fill some of the lacuna in the existing literature on public law estoppel, by taking a more conceptual, rather than simply practical, approach.⁷ I draw on the body of conceptual work on the recognition of substantive interests through legitimate expectation and other doctrines to take the analysis of public law estoppel beyond the merely doctrinal.

Throughout this thesis, I refer to decisions or actions of “public bodies” or “public officials”. These terms are intended to include those exercising public powers or otherwise exercising administrative functions. Consistent with present usage, I use the term “legitimate expectation” when referring to the doctrine.⁸ Further, I adopt the same approach as Mullan, who notes that there seems to be no significance between the use of the singular and plural use of “legitimate expectation”.⁹ When referring to the doctrine, I will use the singular.

⁶ See discussion in Melissa Poole, “Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety” [1995] N.Z. Law Rev. 426 and Chapter 3, Section B, Part II below.

⁷ Cf. Joshua Thomson, “Estoppel by Representation in Administrative Law” (1998) Federal L. Rev. 83.

⁸ See Schønberg, *supra* note 2 at 6 and *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All E.R. 935 [C.C.S.U]. Cf. my suggested return to the use of the term “reasonable expectations” (see text accompanying note 594 below).

⁹ See D.J. Mullan, *Administrative Law*, 4th ed. (Toronto: Irwin Law, 2001) at 519, n. 2 [Mullan, *Administrative Law*].

Chapter 2 Estoppel (and estoppel principles) – an introduction

In this chapter, I review the way in which the courts have dealt with estoppel-type cases and their view on public law estoppel and substantive legitimate expectation. Before doing so, however, I introduce some key concepts and developments: private law estoppel and the genesis of public law estoppel and legitimate expectation. I then move to the endorsement (or otherwise) of estoppel and substantive legitimate expectation by the courts. I pay particular attention to the “spill-over” of estoppel from private law and its undulating treatment over time.

The purpose of this analysis is two-fold. First, the development of the doctrine demonstrates the “spill-over” of estoppel principles from private law into public law and the difficulties that arise due to public law’s different theoretical framework. The rise and fall public law estoppel and the intertwined development of the doctrine of (substantive) legitimate expectation also highlight the ongoing struggle of the courts with tensions within the public law environment, such as the appropriate functional role of the courts and the procedural-substance divide. Secondly, the examination of these key cases provides real-life examples of theoretical difficulties which estoppel creates and provides a factual context for the consideration of these issues. In the chapters that follow, I consider the conceptual issues in more detail and the degree to which the doctrinal framework influences the outcome.

A Estoppel in private law

What is “estoppel”? Over 375 years ago, Sir Edward Coke wrote:¹⁰

‘*Estoppe*’, commeth for the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.

More recently, Cooke describes estoppel in slightly more simple and modern terms:¹¹

Estoppel is a mechanism for enforcing consistency; when I have said or done something that leads you to believe in a particular state of affairs, I may be obliged to stand by what I have said or done, even though I am not contractually bound to do so.

¹⁰ Sir Edward Coke, *A commentary upon Littleton* 19th ed. corr. by Charles Butler, (London: Clarke, Saunders & Benning, Maxwell, Sweet, Butterworth, Stevens, Pheney, and Richards, 1832) at 352.

¹¹ Elizabeth Cooke, *The modern law of estoppel* (Oxford: Oxford University Press, 2000) at 1 [Cooke, *Estoppel*].

Sir Frederick Pollock said estoppel is "a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence".¹² While the flexible nature of the doctrine makes it difficult to find an all-embracing definition of the concept, Lord Denning's statement in *Moorgate Mercantile Co. Ltd v. Twitchings* is helpful.¹³

Estoppel ... is a principle of justice and equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

It is possible to identify many different "breeds" of estoppel,¹⁴ although debate continues to rage about whether the different breeds can be reconciled into one general principle or unified doctrine.¹⁵ For present purposes, it is sufficient to confine the analysis to one particular breed: promissory estoppel. It is this breed of estoppel which has driven the doctrine's incursion into public law.

Lord Denning's judgment in *Central London Property Trust Ltd v. High Trees House Ltd*¹⁶ saw the genesis of the doctrine now known as promissory estoppel. The landlord, Central London Property Trust, let a block of flats to High Trees House Ltd (its subsidiary company). High Trees then sub-let the flats. Subsequently, because of the war, High Trees had difficulty finding enough sub-tenants to pay for the rent. High Trees entered discussions with the landlord to reduce the rent. The landlord agreed to a new arrangement where the rent was halved.¹⁷ However, 5 years later –

¹² Sir Frederick Pollock, quoted by Lord Wright in *Canada and Dominion Sugar Company Ltd. v. Canadian National (West Indies) Steamships Ltd.* [1947] A.C. 46 at 55.

¹³ [1976] 1 Q.B. 225 at 241.

¹⁴ As Lord Denning said in *McIlkenney v. Chief Constable of the West Midlands* [1980] 1 Q.B. 283 at 317:

[T] here has been built up over the centuries in our law a big house with many rooms. It is the house called Estoppel. In Coke's time it was a small house with only three rooms, namely, estoppel by matter of record, by matter in writing, and by matter 'in pais'. But by our time we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatam, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else.

¹⁵ See Cooke, *Estoppel*, *supra* note 11 at c. 4. In 1981, Lord Denning was of the view that the separate breeds developed over the last 150 years could "now be seen to merge into one general principle shorn of limitations"; see *Amalgamated Investment and Property Co. Ltd. (In Liquidation) v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 at 122 [*Amalgamated Investment*].

¹⁶ (1946) [1956] 1 All E.R. 256, [*High Trees*].

¹⁷ The landlord confirmed this in writing saying:

when the flats were now fully occupied – the landlord sought to recover the difference between the full rent and reduced rent since the time. According to existing principle, the landlord was sure to succeed because *High Trees* had given no consideration for the reduction in rent.

Lord Denning ruled that the landlord was estopped from recovering the arrears during the period of the reduced rent arrangement.¹⁸ In doing so, he extended the concept of estoppel to include representations as to the future, rather than simply representations as to existing fact. At common law, the latter could form the basis of estoppel, but the former could not. Instead, he drew together threads from common law and equity to develop the concept of promissory estoppel:¹⁹

The law has not been standing still ... There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured. ... Although said by the learned judges who decided them to be cases of estoppel, all these cases are not estoppel in the strict sense. They are cases of promises which were intended to be binding, which the parties making them knew would be acted on and which the parties to whom they were made did act on. ... In each case the court held the promise to be binding on the party making it, even though under the old common law it might be said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases ... show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognised. ... At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined

We confirm the arrangement made between us by which the ground rent should be reduced as from the commencement of the lease to £1,250 per annum.

¹⁸ Lord Denning said the promise of reduced rent was a “temporary expedient” intended only to last while the war made it difficult to let the building and therefore once the flats were fully let, the arrangement no longer applied. Accordingly, as the claim was a “friendly” test case where only rent following the flats being fully let was sought, the landlord succeeded with its claim.

¹⁹ *High Trees*, *supra* note 16 at 360. Cooke says the term “promissory estoppel” has American origins. She says its first use in English reported cases appears to be in *City & Westminster Properties (1934) Ltd. v. Mudd* [1959] Ch. 129 where it was adopted from commentary in *Halsbury's Laws of England*, 4th ed., vol. 15 (London: Butterworths) at para. 175. See Cooke, *Estoppel*, *supra* note 11 at 35, n 143. The *High Trees* principle is described in *Chitty on Contract* as “the equitable doctrine sometimes (if rather misleadingly) referred to as ‘promissory’ or ‘equitable’ estoppel”; H.G. Beale, ed., *Chitty on Contract* 27th ed. (London: Sweet & Maxwell, 1994) at para. 3-065.

together now for over seventy years, and the problems have to be approached in a combined sense.

With that came the doctrine of private law (promissory) estoppel. Today, the simple doctrine remains largely unchanged from its Lord Denning origins. The elements of estoppel are not materially different throughout England, Canada, Australia, and New Zealand;²⁰ the following must be established:

- (a) a representation;
- (b) (detrimental) reliance on that representation;
- (c) reneging on the representation is unconscionable or inequitable.

First, there must be a representation. This element connotes a communication, either by words or actions (and, in some circumstances, silent inaction²¹), capable of leading the representee to believe in a state of affairs (either past, present or future).²² There is some authority which suggests the representation must have been intended to be relied on or to affect the legal relationship between the parties.²³ However, Cooke suggests any such requirements are better expressed in terms of the materiality (lack of ambiguity, relevance of action supposed to be taken, and the way in which the representation was made) of the representation, with materiality simply being a tool to assist in proof of reliance.²⁴

The requirement of communication is critical. As Cooke notes, "the principal trigger for estoppel is reliance, and there can be no reliance on something which never entered the mind of the

²⁰ Canada: *Maracle v. Travellers Indemnity Co. of Canada* [1991] 2 S.C.R. 50 [*Maracle*]; Australia: *Halsbury's Laws of Australia*, (Sydney: LexisNexis, 1991-), "Estoppel" at paras. 190-1 and *Waltons Stores (Interstate) Ltd. v. Maher* (1988) 164 CLR 387; New Zealand: *The Laws of New Zealand*, (Wellington: LexisNexis, 1993-), "Estoppel" at para. 68 and *Burberry Mortgage Finance & Savings Ltd. v Hindsbank Holdings Ltd.* [1989] 1 N.Z.L.R. 356.

²¹ See Cooke, *Estoppel*, *supra* note 11 at 76-80.

²² *Ibid.* at 63.

²³ *Braithwaite v. Winwood* [1960] 3 All E.R. 642 and *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [1970] All E.R. 871. It is clear the parties need not have a pre-existing contractual or legal relationship for estoppel to operate: see *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.* [1968] 2 Q.B. 839 and *Bank Negara Indonesia v. Philip Hoalim* [1973] 2 M.L.J. 3.

²⁴ Cooke, *Estoppel*, *supra* note 11 at 81-82.

representee”.²⁵ The communication must also be clear and unambiguous,²⁶ although arguably the communication need not achieve the same level of certainty required for contractual terms.²⁷ Of course, where the communication is based on actions, rather than words, there is a greater chance it will fail this requirement. The subject matter of the representation – the state of affairs which the representee is induced to believe in – may be an objective fact, human intention, or law, and may include a promise (because a promise indicates what is going to happen).²⁸

Moving to the second and third elements, there continues to be debate about the relationship between detrimental reliance and unconscionability in an estoppel framework. Some argue unconscionability need not be proven in cases of promissory estoppel if detrimental reliance is established.²⁹ Others prefer to treat detrimental reliance as simply one of the factors relevant to whether going back on the representation is unconscionable.³⁰ For present purposes, it is not necessary to resolve the debate about these issues. It is sufficient to note that detrimental reliance is regarded as being critical to establishing estoppel. As Cooke notes, “[i]n all cases the court looks at detrimental reliance and this is often found to be sufficient to determine the issue; but the existence of detrimental reliance will not always guarantee that there will be estoppel”.³¹ I prefer to separate the two elements because detrimental reliance is clearly a necessary or “pervasive”³² condition to establish estoppel. However, I recognise there is an unavoidable overlap between the two and, in some cases, the presence of detrimental reliance may effectively be determinative of the issue of unconscionability.

²⁵ *Ibid.* at 71.

²⁶ *Woodhouse AC Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741. The fact that the representation is capable of different interpretations is not fatal to an estoppel claim; it is sufficient that there is one reasonably understood meaning that flows from the communication. See Cooke, *Estoppel*, *supra* note 11 at 71-75.

²⁷ For a discussion of the relaxation of the certainty requirement for estoppel, see Cooke, *Estoppel*, *supra* note 11 at 75.

²⁸ *Ibid.* at 70.

²⁹ See M. Halliwell, “Estoppel: Unconscionability as a Cause of Action” (1994) 14 L.S. 15; cf. Cooke, *Estoppel*, *supra* note 11 at 85, note 6.

³⁰ Cooke, *Estoppel*, *supra* note 11 at 85-88. She notes that at times unconscionability “appears as a description of the whole process of the court’s inquiry, without specifying what it involves; sometimes it is described as one item on a checklist of factors; more usually it seems as summing up other factors, whether just detrimental reliance or a bundle involving at least detrimental reliance and other matters in addition”. *Ibid.* at 86.

³¹ *Ibid.* at 87.

³² *Ibid.* at 88.

Turning then to the second element under my framework, the representation must induce detrimental reliance. Cooke suggests reliance has two aspects:

- (d) an "inner" side or mental aspect: the statement "must have produced or strengthened a belief",³³ and
- (e) an "outer" side or practical aspect: "that belief must have caused an action".³⁴

To satisfy the first aspect, obviously the representation must have come to the notice of the person seeking to rely on the estoppel.³⁵ In addition, the person must believe the representation.³⁶ That is, where the representation communicates a particular state of affairs, the person must believe that the state of affairs exists. Alternatively, where the representation is promissory in nature, the person must believe that the promise must be kept.³⁷

The second aspect requires that the belief be manifested in action. That is, the person must (detrimentally) change their position because of the belief. Inducement of an expectation *per se* is not in itself sufficient to found estoppel; the reliance or change of position must cause some detriment.³⁸ This distinction is explained by Cooke:³⁹

The essence of detrimental reliance is change of position and the difficulty of resuming a position; this points us to the type of fairness that estoppel aims to remedy. Estoppel is about inconsistency rather than about misleading or telling lies; ... estoppel is about the effect of the inconsistency upon the representee, rather than the conduct of the representor.

³³ *Ibid.* at 89.

³⁴ *Ibid.* at 89.

³⁵ *Ibid.* at 90.

³⁶ *Ibid.* at 90.

³⁷ Cooke says this requirement rules out "cynical reliance"; that is, acting upon a promise which one knows will not be kept or acting on a statement which one knows is not true. *Ibid.* at 91.

³⁸ It is suggested that in cases of promissory estoppel, such as in *High Trees*, reliance is needed but not detriment; see *W.J. Alan v. El Nasr Export & Import Co.* [1972] 2 Q.B. 189. However, Cooke notes this approach seems to be limited to cases involving contractual concessions and, in any event, can be reconciled with the general principle requiring detrimental reliance. She suggests, in contractual concession cases a "weaker" form of detrimental reliance is sufficient: the representee need not demonstrate precisely what they would have done if they did not receive the concession; it is sufficient that there were several alternatives which could have been pursued, one or more of which are now lost. This reasoning was adopted by Mustill L.J in *Vitol S.A. v. Esso Australia Ltd.* ('*The Wise*') [1989] 2 Lloyd's Rep. 451. See Cooke, *Estoppel*, *supra* note 11 at 100-103.

³⁹ Cooke, *Estoppel*, *supra* note 11 at 97.

The change of position requirement has been interpreted broadly to include not only positive action but also inaction where the person otherwise would have taken action.⁴⁰ This aspect also encapsulates the concept of causation, although the representation need not be the sole cause of the change of position; it is sufficient that representation was one of the causes of the action or "influenced" the change of position.⁴¹

Finally, going back on the representation must be unconscionable or inequitable. This element is demonstrative of the discretionary, flexible nature of the doctrine and its origins in the law of equity. Unconscionability, at its simplest level, means "contrary to conscience" or "not right or reasonable".⁴² The definition itself provides little, if any, framework for intervention and seems to contemplate a pure value judgment.⁴³ It also seems to add little to other general, amorphous concepts like inequity, fairness, and justice. However, the courts are reluctant to concede that the open-textured nature of the term amounts to judicial licence to do what is "fair" in the circumstances of any case or to determine cases according to "the formless void of individual moral opinion".⁴⁴ Some argue that the meaning of unconscionability, in practice is defined or coloured by broader equitable principles. That is, the meaning of "unconscionability" is "revealed by the articulation of and continued reference to maxims, in particular those referring to clean hands, and the essentially *in personam* nature of equitable jurisdiction".⁴⁵ Cooke suggests it is given added content by a certain

⁴⁰ *Knights v. Wiffen* (1870) 5 Q.B. 660.

⁴¹ *Amalgamated Investment*, *supra* note 15.

⁴² *Concise Oxford Dictionary*, 10th ed., s.v. "unconscionable".

⁴³ Cooke, *Estoppel*, *supra* note 11 at 85. See also J.A. Manwaring, "Unconscionability: Contested Values, Competing Theories and Choice of Rule in Contract Law" (1993) 25 Ottawa L. Rev. 235, John-Paul F. Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997) 25 Man. L.J. 187, and Dennis R. Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001) 46 McGill L.J. 571 for a discussion of some of the conceptual and definitional difficulties with the concept of unconscionability.

⁴⁴ See, for example, *Muschiniski v. Dodds* (1985) 160 C.L.R. 583 at 616. However, Deane J. recognised that "general notions of fairness and justice ... remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity." Dillon L.J. in *Springette v. Defoe* [1992] 2 F.L.R 388 similarly cautions against equating the broad nature of unconscionability with "palm-tree justice":

The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair.

Ibid. at 393.

⁴⁵ *The Laws of New Zealand*, (Wellington: LexisNexis, 1993-), "Equity" at para. 2.

style of equitable decision-making; that is, the court's jurisdiction is "rule based, but not rule bound" and will generally – but not exclusively – be determined by reference to key touchstones.⁴⁶

Looking at these requirements in a different way, the relevant elements of estoppel can be re-expressed as follows:

- (a) a representation of a particular state of affairs or promise;
- (b) reneging on the representation is unconscionable or inequitable:
 - (i) the representee believed in the representation or the promise;
 - (ii) the representee changed their position in reliance on the representation or promise;
and
 - (iii) the representee will suffer detriment if the representation is not honoured.

This is an expansion of the simple three element approach discussed earlier.

As will be seen, this is more in line with how the courts have applied estoppel principles in public law, although sub-elements (i)-(iii) have generally replaced the discretionary nature of element (b). It is important to bear in mind that the three latter sub-elements may not be determinative in themselves of unconscionability. The ultimate test is unconscionability or inequity, although detrimental reliance will usually be the primary consideration.

B Public law estoppel

The incursion of estoppel into public law began with Lord Denning's judgment in *Robertson v. Minister of Pensions*.⁴⁷ The War Office had advised a returning soldier that it accepted that his disability – a painful and stiff neck which prevented him from continuing to serve – was attributable to military service, rather than to a previous rugby injury. Under the relevant legislation, if the cause was military service then the soldier was entitled to a disability benefit. The War Office told the soldier that it accepted the cause was military service and assured him he was entitled to a benefit. Subsequently, however, the Office of Pensions declined the soldier's application for a

⁴⁶ Cooke, *Estoppel*, *supra* note 11 at 85. She gives as an example the significance that detrimental reliance plays in estoppel cases for determining the unconscionability of a situation.

⁴⁷ [1948] 2 All E.R. 767 [*Robertson*].

benefit. The issue was whether the assurance of the War Office was binding on the Office of Pensions – the office that was formally responsible for determining such matters.

Lord Denning saw the case as falling within the *High Trees* estoppel doctrine: “The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it was given, then, once it is acted on he is bound by it.”⁴⁸ He recognised it did not fall within the doctrine of estoppel in the strict sense “because estoppel strictly only applies to representations of facts, not of law”;⁴⁹ in this case the primary facts were known to both parties and the only question was the proper conclusion to be drawn from them. In addition, the circumstances fell short of contract because no consideration was given. However, it fell within the *High Trees* principle because the War Office made an assurance that it intended be binding⁵⁰ and the soldier detrimentally relied on the assurance (by electing not to get an independent medical opinion or requesting the X-rays plates which could have supported his claim).

In his usual judicial fashion, Lord Denning rejected, with short thrift, arguments by the Crown that it could not be bound by estoppel:⁵¹

The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, *i.e.*, the doctrine that the Crown cannot bind itself so as to fetter its future executive action.

He reasoned the authorities supporting executive necessity were dubious⁵² and, in any event, he said the doctrine of executive necessity was of limited scope (only available “where there is an implied term to that effect, or that is the true meaning of the contract”).⁵³ In his view, that narrow exception did not apply because the War Office letter was clear and explicit and there was “no room for

⁴⁸ *Robertson, ibid.* at 770, citing *High Trees, supra* note 16 [1947] K.B. 130 and *Bob Guinness Ltd. v. Salomonsen* [1948] 2 K.B. 42.

⁴⁹ *Robertson, ibid.* at 770.

⁵⁰ There was no suggestion in Lord Denning’s judgment that the assurance was *ultra vires*, although its treatment as an *intra vires* representation has been doubted. See G. Ganz, “Estoppel and *Res Judicata* in Administrative Law” [1965] P.L. 237.

⁵¹ *Roberston, supra* note 47 at 770.

⁵² He suggested House of Lords’ decision in *Reilly v. R.* [1934] A.C. 176 cast doubt over the conclusion in *Rederiaktiebolaget Amphitrite v. R. (The Amphitrite)* [1921] 3 KB 500 (executive necessity meant the Crown’s promise not to impound a ship was not enforceable in contract).

⁵³ *Robertson, supra* note 47 at 770.

implying a term that the Crown is to be at liberty to revoke the decision at its pleasure and without cause".⁵⁴

Lord Denning went on to say the Minister of Pensions was bound by the assurance of the War Office. First, he reasoned that the War Office assumed authority for the matter and gave the assurance.⁵⁵ The soldier was therefore "entitled to assume" the War Office had consulted any other departments that might be concerned, such as the Minister of Pensions, before they gave him the assurance, and that the board of medical officers who examined him were recognised by the Minister of Pensions for the purpose of giving certificates as to attributability.⁵⁶ Secondly, as the War Office was "clearly bound" by its assurance, then because "it is but an agent for the Crown, it binds the Crown also".⁵⁷ It followed that "as the Crown is bound, so are the other departments, for they also are but agents of the Crown".⁵⁸

With that decision, the doctrine of public law estoppel was created. Lord Denning applied the classic estoppel elements: an assurance intended to be binding, and detrimental reliance. Notable, however, is the absence of the broad concept of unconscionability.

As will be seen, the doctrine then has an undulating history within public law. Before moving on to review the main cases which deal with public law estoppel and estoppel principles, it is necessary to touch on parallel development of the doctrine of legitimate expectation.

C Legitimate expectation

The concept of legitimate expectation was born in *Schmidt v. Secretary of State for Home Affairs*.⁵⁹ The Home Office had a policy of allowing "alien" students to study at "recognised

⁵⁴ *Ibid.* at 770.

⁵⁵ Lord Denning said:

Colonel Robertson thought, no doubt, that, as he was serving in the Army, his claim to attributability would be dealt with by or through the War Office. So he wrote to the War Office. The War Office did not refer him to the Minister of Pensions. They assumed authority over the matter and assured him that his disability had been accepted as attributable to military service.

Ibid. at 770.

⁵⁶ *Ibid.* at 770.

⁵⁷ *Ibid.* at 770.

⁵⁸ *Ibid.* at 770.

⁵⁹ [1969] 1 All E.R. 904 [*Schmidt*].

educational institutions". On that basis, a number of alien students had been granted study permits, for limited periods, to study at the Hubbard College of Scientology with other English students. Subsequently, however, the government announced a change to that policy due to concerns about Scientology ("Scientology is a pseudo-philosophical cult ... [and] is socially harmful"⁶⁰), no longer recognising the Scientology colleges as educational institutions for the foreign nationals. Consequently, applications for renewal of study permits were declined. Two American students challenged the refusal to extend the study permits, importantly without any hearing.

Ultimately their claim was unsuccessful and was struck out. The majority of the Court of Appeal concluded that their claim must fail, first, because the foreign nationals were only entitled to remain in the country by licence of the Crown and, secondly, because they could have no legitimate expectation of renewal because their study permits were granted. However, it was the first occasion on which the concept of "legitimate expectation" appeared in legal lexicon.⁶¹

Lord Denning mentioned the concept in his discussion of the notion of procedural fairness. The House of Lords in *Ridge v. Baldwin* had recently affirmed that administrative bodies may be bound to give a person who is affected by their decision an opportunity to make representations prior to the decision, such as if the decision would deprive the person of some right or interest. Lord Denning went one step further. He said the duty depended "on whether the person had 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".⁶² However, the students had neither the requisite right or expectation. The discretionary decision was otherwise lawful. If, though, the Home Office had tried to withdraw the permits prior to their expiry, Lord Denning would have been prepared to require the Home Office give the students an opportunity to make submissions on the issue. With Lord Denning's brief *obiter* comments, legitimate expectation as a public law concept was born.⁶³ At that

⁶⁰ *Ibid.* at 906.

⁶¹ Lord Denning himself claims responsibility for the creation of the term. In a letter to Forsyth, he said he was "sure it came out of my own head and not from any continental or other source", see Christopher Forsyth, "The Provenance and protection of legitimate expectations" (1988) C.L.J. 238 at 241.

⁶² *Schmidt*, *supra* note 59 at 909 [emphasis added].

⁶³ Lord Denning reiterated his embryonic comments in his dissenting judgment in *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B.175. He would have been prepared to require a trade union allow one of its members a hearing prior to the union deciding on whether to endorse – or rather, decline to endorse – his election as a shop steward.

stage, though, the concept was very narrow – limited to a right to make submissions, and perhaps only in circumstances where the permit or licence was withdrawn before expiry.

It is important to bear in mind the state of the evolution of the doctrine of procedural fairness at the time of the *Schmidt* decision. At that time, the obligation of procedural fairness only arose if a decision affected vested rights or interest, not “privileges” that had not yet vested, such as licences.⁶⁴ The extension into the protection of non-vested privileges, where they could be classified as a legitimate expectation, was therefore significant. The doctrine of legitimate expectation was developed further and matured into one of the cornerstones of judicial review; Lord Diplock endorsed legitimate expectation as an element of procedural (im)propriety in his famous tripartite test in *C.C.S.U.*⁶⁵ At the same time, the fairness doctrine continued to develop too, to some extent, taking over from legitimate expectation. As Woolf & Jowell note: “The duty to act fairly also extended the scope of the hearing to situations where a “privilege” rather than a “right” was in issue.”⁶⁶ The legitimate expectation doctrine, however, continued to grow beyond the mere right-privilege distinction and beyond the scope simply of the obligation to act fairly.

During its development though, the question of whether the doctrine protected substantive expectations was controversial. That controversy continues today. One of my central arguments is that the protection of substantive expectations through the doctrine of legitimate expectation is analogous to the doctrine of public law estoppel.⁶⁷ Although the terminology may differ, similar conceptual issues and practical considerations arise. The two doctrines have been intricately intertwined during their development. Therefore in my consideration of public law estoppel cases, I have included those legitimate expectation cases which touch on substantive expectations.

⁶⁴ See P.P Craig, *Administrative Law*, 4th ed. (London: Sweet & Maxwell, 1999) at 408 [Craig, *Administrative Law*].

⁶⁵ *C.C.S.U.*, *supra* note 8.

⁶⁶ S.A. de Smith, *Judicial Review of Administrative Action*, 5th ed. by Lord Woolf, J. Jowell & A.P. Le Sueur (London: Sweet & Maxwell, 1995) at para. 7-039 [de Smith].

⁶⁷ Stewart also argues that estoppel and substantive legitimate expectation are synonymous. See Cameron Stewart. “Substantive Unfairness: A New Species of Abuse of Power?” (2000) 28 Fed. L. Rev. 617 citing Simon Brown L.J.’s comments in *R. v. Devon County Council, ex parte Baker* [1995] 1 All E.R. 73.

Chapter 3 The application of estoppel (and estoppel principles) in public law

The most dramatic developments in this area are found in English public law. The contest has been played out in the courts and the response has ebbed and flowed as the courts have struggled to reconcile the strong competing interests in play. I return to the ways in which the other Commonwealth courts have followed the English approach or developed their own responses later.

This review of the application of estoppel and estoppel principles includes cases which are framed as “public law estoppel” cases and those that are framed on other bases, such as “legitimate expectation”, “abuse of power”, or “substantive fairness”. Following this review, I explore in more detail the similarities in these approaches and conclude that there are, in reality, two main frameworks that are being applied. Further, when responding to the concerns about the substantive protection of expectation, neither of these frameworks, in themselves, present a superior approach – the more fundamental concerns still need to be confronted by and responded to by both approaches.

In my review of the treatment of estoppel-type cases by the courts, I have divided them into three main groups, based on rough commonalities in the cases. The first cluster deals with assurances which are erroneous or *ultra vires* – either because the assurance itself was incorrect or because the official had erroneously assumed the authority to make it. The second group looks at cases where a public body or official had given an individualized assurance which they later wish to renege on. The last group of cases involves the change of, or departure from, a general policy which had been communicated to the public at large.

Separating estoppel and legitimate expectations based on *intra vires* and *ultra vires* assurances is sensible – with legality being a central aspect of public law.⁶⁸ Questions of (il)legality aside, a natural distinction becomes apparent between expectations formed or encouraged on the basis of individualized assurances or representations.⁶⁹ Arguably, the former have a stronger claim for protection and present fewer impediments to accommodation within a public law framework.

⁶⁸ See Chapter 5, Section C, Part I below.

⁶⁹ See similar, but not identical, distinctions being made by both Craig (Craig, *Administrative Law*, *supra* note 64 at 613) and Schönberg (Schönberg, *supra* note 2 at 14) and text accompanying note 409 below.

I accept there is a degree of artificiality in these groupings. While, in many respects, the first group is readily distinguishable, the cases do not necessarily fall neatly between the latter two groups. At times the distinction between an individualized assurance and a general policy change breaks down – such as when the policy in reality only affects one person or a group of people with homogenous interests. The distinction is perhaps more of degree. However, subject to that caveat, it is still convenient to explore the cases under those general groupings.

A England

I *Erroneous assurances and unlawfully assumed authority*

The earliest public law estoppel case, *Robertson*,⁷⁰ seems to be properly treated as a case involving unlawfully assumed authority. Although Lord Denning dealt with the case implicitly on the basis that the assurance of a benefit was *intra vires*, this treatment has been criticised.⁷¹ The War Office assured the soldier of his benefit. However, the Office of Pensions had the appropriate authority to do so. Relying on principles of agency though, Lord Denning translated any estoppel against the War Office to an estoppel against the Crown and then translated the estoppel against the Crown into estoppel against the Office of Pensions. At the end of the day, the cases which follow suggest Lord Denning would not have been concerned if the assurance was, strictly speaking, *ultra vires* the War Office; he would not have regarded this as an impediment to applying estoppel.

Soon after *Robertson*, the House of Lords in *Howell v. Falmouth Boat Construction Ltd.*⁷² confronted the issue of erroneous assurances. The House of Lords ruled that a licensee was not entitled to rely of a licensing officer's purported (but unlawful) authority to grant an oral licence because the statutory scheme only contemplated written licences.⁷³ One member of the House of Lords took the opportunity to criticize the proposition in *Robertson* (which had been applied by Lord Denning in the lower court decision in *Howell*) that whenever government officers take it upon themselves to assume authority in a matter, citizens are entitled to rely on them having the authority which they assume. Lord Simmonds said: "I know of no such principle in our law nor was any

⁷⁰ See earlier discussion at Chapter 2, Section B above.

⁷¹ See Ganz, *supra* note 50 and Craig, *Administrative Law*, *supra* note 64 at 642.

⁷² [1951] 2 All E.R. 278 [*Howell*].

⁷³ A licence from the Admiralty was required before a ship repairer was allowed to carry out repairs or alterations to a ship. However, the House of Lords ruled that a written licence was able to be granted retrospectively, therefore curing the defect.

authority for it cited".⁷⁴ He said the character of an act done in face of a statutory prohibition is not affected by the fact that it has been induced by a misleading assumption of authority ("illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy").⁷⁵

Lord Denning, however, was undeterred and subsequently in *Wells v. Minister of Housing and Local Government*⁷⁶ refined his articulation of the estoppel doctrine in *Robertson*. In response to informal enquiries about the need for planning permission, an officer of a local council confirmed in writing that no planning permission was required for a concrete batching plant (the officer concluding the plant was a "permitted development" within the area). After construction and public complaints, the council sought to renege on the assurance that the plant was a permitted development. The council said it was not bound by the assurance because no application was made, and therefore no such formal determination issued, under the relevant legislation. Lord Denning ruled the council was estopped from relying on the absence of a written application and formal determination.⁷⁷ Again, the simple analysis of an assurance and detrimental reliance was applied by Lord Denning. He accepted that a public body could not be estopped from "doing its public duty" but did not consider it applied to mere "technicalities", such as the need for a written application. He said: "I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid." On this basis, Lord Denning considered this preserved his ruling in *Robertson* (the "technicality" being that the relevant assurance was given independently by the War Office instead of the Ministry of Pensions) and was consistent with the position taken by the House of Lords in *Howell*.

In his dissent, Russell L.J. disagreed that the absence of a written application was a "mere defect in procedure or irregularity"⁷⁸ which could be cured; he saw it as an "an essential part of the machinery for determinations".⁷⁹ He said the council was not "a free agent to waive statutory requirements in favour of (so to speak) an adversary; it is the guardian of the planning system".⁸⁰

⁷⁴ Howell, *supra* note 72 at 280.

⁷⁵ *Ibid.* at 280.

⁷⁶ [1967] 2 All E.R. 1041 [*Wells*].

⁷⁷ Davies L.J. agreed with Lord Denning; Russell L.J. dissented.

⁷⁸ *Wells*, *supra* note 76 at 1050.

⁷⁹ *Ibid.* at 1050.

⁸⁰ *Ibid.* at 1050.

While he accepted the majority's decision "stem[med] in large measure from a natural indignation that a [long established] practice ... should operate merely as a trap for the unwary landowner",⁸¹ he did not consider the question of law should be decided by a "thoroughly bad administrative practice".⁸²

A different conclusion was reached by the full bench of the Divisional Court in *Southend-On-Sea Corporation v. Hodgson (Wickford) Ltd.*⁸³ This issue arose after a company bought premises to use as a builder's yard. The purchaser had understood the premises had been used for over 20 years as a builder's yard. However, prior to the purchase, the purchaser wrote to the local corporation to confirm that there was no impediment to the company continuing to use the premises as a builder's yard. An officer confirmed the premises had existing use rights as a builder's yard and assured that no planning permission was necessary. Subsequently, the Town Clerk sought to resile from the officer's assurance following complaints from neighbours and doubts being raised about whether the premises did in fact have existing use rights. The Corporation issued an enforcement notice requiring that the company cease using the premises as a builder's yard.

Reluctantly, Lord Parker C.J. – for a unanimous court – ruled that the corporation was justified in law and no estoppel could be raised against it based on the previous (erroneous) written assurance of its officer. He said: "... estoppel cannot operate to prevent or hinder the performance of a statutory duty or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public ... [and] cannot operate to prevent or hinder the performance of a positive statutory duty".⁸⁴ Drawing an analogy with authority holding that public bodies could not by contract fetter the exercise of their discretion, he held that estoppel could not be raised to prevent or hinder the exercise of the discretion.

Despite the setback in *Southend-On-Sea*, Lord Denning continued to apply his estoppel doctrine against planning authorities which had given erroneous advice. In *Lever (Finance) Ltd. v. Westminster Corporation*⁸⁵ a developer was granted permission to build some houses but subsequently sought to vary the proposal so that the houses were situated closer to the existing

⁸¹ *Ibid.* at 1050.

⁸² *Ibid.* at 1050.

⁸³ [1961] 2 All E.R. 46 [*Southend-On-Sea*].

⁸⁴ *Ibid.* at 48.

⁸⁵ [1970] 3 All E.R. 496 [*Lever Finance*].

houses (23 feet rather than 40 feet). Without referring to the original approved plans – which had been mislaid – the Corporation’s planning officer advised the developer’s architect over the phone that the variation was immaterial and did not need further planning approval. However, it was later found that the planning officer was mistaken and the variation was material. After work began, complaints from neighbours lead to the developer seeking formal approval for the variation. The Corporation’s planning committee, however, refused to grant permission for the variation and issued an enforcement notice prohibiting further construction. By that stage the house was in an advanced state of development.⁸⁶

Lord Denning, with Megaw L.J.,⁸⁷ said the developer was entitled to complete the house on the site where it was and held that the Corporation was bound by its earlier assurance to that effect. He rejected an argument from the Corporation that the lack of formality meant any assurances were not binding on the planning authority. He pointed to the common practice of officers assuring developers that variations were not material and said the developer was entitled to rely on the officers ostensible authority. Lord Denning said: “If the planning officer tells the developer that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it.”⁸⁸ The simplicity of his analysis is again striking.

Lord Denning recognised there were authorities which said that a public authority cannot be estopped by any representations made by its officers or cannot be estopped from doing its public duty, but he said “those statements must now be taken with considerable reserve”.⁸⁹ He favoured his previous decision in *Wells* over the *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd*; significantly, the House of Lords decision in *Howell* was not mentioned, reaching a different conclusion. The “spill-over” from private law was obvious in Lord Denning’s analysis. He noted that “if an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, *just as much as a private concern*

⁸⁶ Lord Denning noted:

“The house was up. The roof was on. But the windows were not in. It had not been glazed. They did not know whether to take it down or not.”

Ibid. at 499.

⁸⁷ Sachs L.J. dissented, taking the same approach as Russell L.J. in *Wells*.

⁸⁸ *Lever Finance*, *supra* note 85 at 500.

⁸⁹ *Ibid.* at 500.

would be".⁹⁰ In his view, this was a straight-forward decision which reflected the source of the error and reliance on the assurance made by the public body:⁹¹

I can see how the trouble has arisen. Mr Carpenter had lost the file. He made a mistake. He told Mr Rottenberg that a variation was not material, when he ought to have told him that it was material and required planning permission. He made a mistake. That is unfortunate for the neighbours. They may feel justly aggrieved. But it is not a mistake for which the developers should suffer. The developers put up this house on the faith of this representation made to them.

The ebb-and-flow with estoppel against planning authorities continued. The Court of Appeal in *Western Fish Products Ltd v. Penwith District Council*⁹² sought to confine the operation of estoppel to two narrow situations. Again, in reiterative fashion, the issue arose after an officer of a council assured a potential purchaser that the premises had "established use" rights – this time as a fishing processing factory – and that an application for an established use certificate would be a "mere formality". Despite these assurances, ultimately the council declined the application for an established use certificate, declined the application for planning permission, and insisted the company cease using the premises as a fish factory.

Unanimously, the Court of Appeal rejected the company's claim that the council was estopped by the officer's representations. It reviewed the previous authorities and said estoppel could only be raised in two situations. First, where a planning authority delegates to its officers the power to determine specific questions, any decisions they make cannot be revoked.⁹³ Secondly, where a planning authority waives a procedural requirement relating to an application, it may be estopped from relying on lack of formality.⁹⁴ The Court went on to say it did not consider the extension of the doctrine beyond those two limited situations would be justified.⁹⁵ The Court identified two key objections. First, it said further extension of the doctrine would erode the statutory rights of participation of aggrieved parties and the ultimate ability of the Minister to hear evidence of the merits of a proposal and to take into account policy considerations. The courts were

⁹⁰ *Ibid.* at 500 [emphasis added].

⁹¹ *Ibid.* at 501.

⁹² [1981] 2 All E.R. 204 [*Western Fish*]

⁹³ *Ibid.* at 219. The Court acknowledged that "[t]his kind of estoppel, if it be estoppel at all, is akin to res judicata". *Ibid.* at 219.

⁹⁴ *Ibid.* at 221.

⁹⁵ *Ibid.* at 221.

not able to do either, but applying the concept of estoppel could result in the courts ruling an authority was bound to allow a development which flouted its planning policy. Secondly, it said the consequence of the doctrine of estoppel, as applied in the *Lever Finance* case, was that potential injustice to a third party was irrelevant. It said:⁹⁶

To permit the estoppel no doubt avoided an injustice to the plaintiffs. But it also may fairly be regarded as having caused an injustice to one or more members of the public, the owners of adjacent houses who would be adversely affected by this wrong and careless decision of the planning officer that the modifications were not material. Yet they were not, and it would seem could not, be heard. How, in their absence, could the court balance the respective injustices according as the court did or did not hold that there was an estoppel in favour of the plaintiffs?

With the *Western Fish* decision, there remained only a narrow role for the doctrine of estoppel in planning law and public law generally. However, the principles underlying estoppel continued to appear from time to time in other public law cases under the rubric of substantive legitimate expectation. Following *Western Fish*, public law estoppel continued to be applied in England in cases of erroneous advice only a narrow basis.⁹⁷ Some courts continued to note its potential to act on a much broader basis – although, generally, the courts found it unnecessary to resort to either estoppel or substantive legitimate expectation because the matter could be resolved on orthodox public law grounds.

The door finally closed on public law estoppel in planning cases and public law generally in the recent House of Lords decision of *R. v. East Sussex County Council; ex parte Reprotech (Pebsham) Ltd.*⁹⁸ Their Lordships rejected public law estoppel in favour of an expanded doctrine of legitimate expectation.

Reprotech was yet another planning case where an officer had advised that planning permission was not required. The East Sussex County Council had vested its waste treatment plant in a separate company, East Sussex Enterprises Ltd, for the purposes of sale. A potential purchaser raised the question of whether generating electricity on-site from the waste was a material change of

⁹⁶ *Ibid.* at 221.

⁹⁷ See, for example, *Southwark London Borough Council v. Logan* (1995) 8 Admin L.R. 315, *R. v. Northamptonshire County Council, ex parte Commission for the New Towns* [1992] C.O.D. 123, *R. v. Secretary of State for the Home Department, ex parte Ku* [1995] 2 All E.R. 891, *R. v. Leicester City Council ex parte Powergen U.K. Ltd.* [2000] J.P.L. 629 and, more generally, *Halsbury's Laws of England*, 4th ed., vol. 1(1), "Administrative Law" (London: Butterworths, 1980-) at para. 23.

⁹⁸ [2002] 4 All E.R. 58 [*Reprotech*].

use that required planning permission. A planning officer advised the potential purchaser it was not. However, rather than making an application under the planning legislation for a formal determination to that effect, the Council company instead applied to vary the noise controls – which at that stage prevented the continuous generation of electricity on the site. In his report to the Council’s planning committee, the Council’s planning officer said he was satisfied that generation of electricity on-site did not amount to a material change of use and recommended the existing noise controls be varied. The Council’s planning committee approved in principle the variation of the existing noise controls, subject to a satisfactory noise attenuation scheme being agreed. In its resolution it recorded that the “revised planning condition relates only to the generation of electricity and all other planning conditions relating to [the existing] permissions ... shall apply”. The Council company then sold the assets to Reprotech (a different company to the potential purchaser who had enquired as to the ability to generate electricity on-site).

A year on, the variation to the noise controls had not been formalised and the Council company withdrew its application to vary the condition. The application was withdrawn without Reprotech being appraised by the Council. The Council and the Council company understood Reprotech had no immediate plans to generate electricity, but if it did, it could re-apply for the variation. Some years on, in the course of some correspondence between Reprotech and the Council as to the planning status of the site, the Council confirmed the application to vary the noise controls had been withdrawn, but could be revived if an acceptable noise attenuation scheme was submitted. The Council also advised, however, that the Council was not bound by the planning officer’s opinion that the generation of electricity on-site was not a change of use. Rather than apply for a new planning permission to generate electricity (which, in the face of local opposition, did not appear to be a straightforward matter), Reprotech applied to the Court for declarations that either Council’s planning officer’s report and/or the Council’s planning committee’s report amounted to formal determinations that the generation of electricity was not a material change of use or that the generation of electricity otherwise did not require additional planning permission.

The High Court and the Court of Appeal declared that the Council’s resolution amounted to determinations as such.⁹⁹ The House of Lords, however, disagreed because the resolution was not

⁹⁹ *Ibid.* at paras. 23-24. The High Court also declared that the planning officer’s report also amounted to such a determination.

issued in response to the statutory procedure and, due to its conditional nature, was not intended to have legal effect.¹⁰⁰

The House of Lords then needed to consider whether the Council was otherwise estopped from now taking the position that electricity could not be generated on-site. The House of Lords ruled that there was no binding representation on which estoppel could be founded but, in any event, the doctrine of estoppel should not be applied in planning law.¹⁰¹ Lord Hoffman said it was “unhelpful to introduce private law concepts of estoppel into planning law.”¹⁰² He went on to say that public law had evolved such that it was now unnecessary to resort to the private law doctrine of estoppel because of the expanded view taken of abuse of power and (substantive) legitimate expectation in *Coughlan*.¹⁰³

There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *Coughlan*. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual’s right to a home is accorded a high degree of protection (see *Coughlan*’s case) while ordinary property rights are in general far more limited by considerations of public interest: see *Alconbury*.

It is true that in early cases such as the *Wells* case and *Lever Finance*, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful. In the *Western Fish* the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the *Powergen* case. It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

The decision in *Reprotech* must therefore be taken as the end, in the foreseeable future, of the doctrine of estoppel in English public law. Instead, such matters may be better suited to

¹⁰⁰ *Ibid.* at paras.29-31.

¹⁰¹ *Ibid.* at para.32.

¹⁰² *Ibid.* at para.33.

¹⁰³ *Ibid.* at paras.33-34 [citations omitted], citing *R. v. North East Devon Health Authority, ex parte Coughlan* [2000] 3 All E.R. 850 [*Coughlan*]. I discuss the development of substantive legitimate expectation in *Coughlan* later; see text accompanying note 126.

consideration under the analogous concept of legitimate expectation – which, under *Coughlan*, in many cases, provides for the protection of substantive expectations.

In summary, the application of public law estoppel in cases involving erroneous advice has been variable. The simple analysis of an assurance and detrimental reliance becomes almost irresistible, save for its direct clash with the *ultra vires* principle and implicit conflict with the non-fetter principle. I return in more detail – on a theoretical level – to the question of whether these conflicts should oust the application of estoppel (or its modern equivalent, *Coughlan* substantive legitimate expectation) or whether Lord Denning's rejection of such issues is justifiable.¹⁰⁴ As it stands, these issues survive the move in *Reprotech* from an (apparently) rigid doctrine of public law estoppel to the legitimate expectation rubric. I also consider the House of Lords rejection of the public law estoppel framework later when I consider the most appropriate vehicle for the substantive protection of expectations.¹⁰⁵ The change perhaps should be seen more of semantics rather than substance.

II *Reneging on individualised assurances or promises*

The next set of cases look at individualised assurances or promises – but absent any question of *ultra vires per se*. That is, where the assurance or promise is properly made by the public body but later, after a change of heart, the public body or official wants to renege on that assurance or promise. As I mentioned earlier, the distinction between these and general policy statements is not always obvious. However, in this group I have sought to explain situations where the assurance has been tailored to a particular person or homogenous and identifiable group of people, rather than an abstract expression of policy, promulgated for the public at large.

One of the first such cases is *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association*.¹⁰⁶ Liverpool Corporation was responsible for licensing taxicabs. It had restricted the number of taxicabs to 300. The Corporation considered increasing the number of taxicabs. A sub-committee of the Corporation considered the proposal and heard submissions from the taxicab owners. It recommended a graduated increase in the number of taxicabs. That recommendation was subsequently approved by the City Council itself. The committee chairman

¹⁰⁴ See Chapter 5 below.

¹⁰⁵ See Chapter 5, Section C.

¹⁰⁶ [1972] 2 Q.B. 299 [*Liverpool Taxis*].

also gave an undertaking that the increases would not take effect until legislation controlling private hire cars (a Bill being promoted by the Corporation) had been enacted. However, due to apparent unease in the corporation about the legality of the undertaking, the sub-committee met and rescinded the previous resolution. It recommended graduated increases in taxicabs without any reference to the enactment of legislation controlling private hire cars. The taxicab owners were not advised that the resolution was to be revisited. This recommendation was subsequently approved by committee and full council. The taxicab owners were only formally advised of the proposal the day before the committee was to consider the recommendation and were not given a realistic opportunity to make submissions.

The taxicabs owners applied to restrain the Corporation from reneging on its previous assurance. First, Lord Denning said the Corporation was under a duty to act fairly and was under a duty to hear submissions from the taxicab owners before coming to a decision adverse to their interests.¹⁰⁷ Secondly, he said that "the corporation were not at liberty to disregard their undertaking".¹⁰⁸ He recognised the principle that a corporation cannot contract itself out of its statutory duties, but said that, in this case, the undertaking was compatible with their public duty.¹⁰⁹

But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. And I should have thought that this undertaking was so compatible. At any rate they ought not to depart from it except after 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. The public interest may be better served by honouring their undertaking than by breaking it. This is just such a case. It is better to hold the corporation to their undertaking than to allow them to break it. Just as it was in *Robertson v. Minister of Pensions and Lever Finance Ltd. v. Westminster (City) London Borough Council*.

The Court ordered the corporation not to increase the number of taxicabs without first hearing from affected parties such as the taxicab owners and after taking into account the previous undertaking which "certainly was binding unless overridden by some imperative public interest".¹¹⁰ Hence, Lord Denning recognised the doctrine of public law estoppel could be limited by some other

¹⁰⁷ *Ibid.* at 307-308.

¹⁰⁸ *Ibid.* at 308.

¹⁰⁹ *Ibid.* at 308 [citations omitted].

¹¹⁰ *Ibid.* at 309. Although the phrase "legitimate expectation" was not mentioned, Lord Denning later explained this decision in terms of the application of the legitimate expectation doctrine.

pressing public interest. This signalled a possible extension of legitimate expectation into the substantive – with an assurance being binding unless overridden by the public interest. In other words, estoppel could apply unless the public interest dictated otherwise. France described this possible development as the “Denning gloss” on legitimate expectation.¹¹¹

Liverpool Taxis is one of the case which can be seen to sit uncomfortably in the individualized representation class. On the one hand, it was an assurance made to a discrete group whose interests were essentially homogeneous. On the other hand, the assurance was of a broad policy nature. Equally, it could be treated as involving a general change of policy – again, highlighting the limitations of the distinction.

The next significant decision of this nature was *Laker Airways Ltd v. Department of Trade*.¹¹² An airline sought approval from the Civil Aviation Authority to operate a cheap passenger airline from London to New York, known as the Skytrain. The Authority granted approval and the Secretary of State confirmed the licence, despite appeals from objectors. Before the Skytrain could operate, permission from the United States was also required. The Civil Aeronautics Boards in the United States subsequently recommended the approval be granted. However, the permit first needed to be signed by the President of the United States before it came into effect. For unknown reasons, the permit sat on the President’s desk for signature for some time. By this time, Laker Airlines had spent nearly £7 million on the Skytrain. During this delay, there was a change in government in the United Kingdom. The new Secretary of State announced a reversal of the previous policy. The new policy would not permit competition on long-haul scheduled services and he advised that he would not be allowing the Skytrain service to start. He issued a Command Paper to the Civil Aviation Authority incorporating the change in policy. The Command Paper specifically advised that he had decided the Skytrain licence should be cancelled. It said under the new policy only one airline should be licensed for long-haul services. Existing licences were to be reviewed and appropriate action taken in the light of this policy. The approval of both Houses of Parliament was required before the Minister could require the Authority to follow the new policy guidance – these approvals were subsequently obtained.¹¹³

¹¹¹ Simon France, “Legitimate Expectations in New Zealand” (1990) 14 N.Z.U.L.R. 123 at 131.

¹¹² [1977] 2 All E.R. 182 [*Laker Airways*].

¹¹³ Lord Denning noted “... this approval, even by both Houses, was not the equivalent of an Act of Parliament. It could not override the law of the land”; *ibid.* at 191.

The Court of Appeal held that the Minister's decision to reverse the policy by way of a new policy guidance was *ultra vires*¹¹⁴ and the Minister misdirected himself as to his ability to unilaterally withdraw the designation.¹¹⁵ Lord Denning, in his judgment, went on to consider whether public law estoppel would apply, assuming the Minister had been properly exercising a prerogative power to withdraw the licence. Lord Denning reiterated that estoppel could be invoked against the power of authorities in some situations:¹¹⁶

The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual: see *Maritime Electric Co Ltd v. General Dairies Ltd* where the Privy Council, unfortunately, I think, reversed the Supreme Court of Canada It can, however, be estopped when it is not properly exercising its powers, but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public: see *Robertson v. Minister of Pensions, Re Liverpool Taxi Owners' Association, HTV Ltd v. Price Commission*.

However, he went on to say that this was not an appropriate case for estoppel because the Minister would have been acting for the public good: "He would be exercising the prerogative for the public good and would be entitled to do it, even though it did work injustice to some individuals. I would not, therefore, put the case on estoppel."¹¹⁷ His comments were echoed by Lawton LJ:¹¹⁸

Whatever representations the Secretary of State in office between 1972 and 1974 may have made to the plaintiffs he made them pursuant to his public duty and in good faith. If in 1976 his successor was of the opinion that the public interest required him to go back on those representations, he was in duty bound to go back on them. The fact that Laker Airways Ltd suffered loss as a result of the change is unfortunate: they have been the victims of a change of government policy. This often happens. Estoppel cannot be allowed to hinder the formation of government policy.

This decision is significant because it builds on Lord Denning's previous comments that estoppel cannot operate where the public interest or public good overrides any obligation to honour

¹¹⁴ *Ibid.* at 191. The new policy was a completed u-turn from the previous policy and cut across the statutory objectives. As the previous policy was laid down by an Act of Parliament, any change to the policy had to be undertaken by an amending bill; *ibid.* at 192.

¹¹⁵ *Ibid.* at 194. The statute provides various mechanisms for the revocation of the licence. The Minister therefore could not unilaterally revoke the licence by purporting to invoke a prerogative.

¹¹⁶ *Ibid.* at 194.

¹¹⁷ *Ibid.* at 194.

¹¹⁸ *Ibid.* at 211.

assurances previously given. *Laker Airways* – like *Liverpool Taxis* – can be treated as either a case involving an individualized assurance or one involving a change of policy. The difficulty arises from the fact that the general policy was only relevant to one party.

In *H.T.V. Ltd v. Price Commission*,¹¹⁹ Lord Denning continued to prevent public bodies from resiling on their previous positions, in this case, on previous conduct. The case was about whether certain expenses were to be included in the determination of proposed price increases by a industry regulator. Previously, the regulator had allowed these expenses to be included, but subsequently sought to exclude them arguing their previous inclusion was “an anomaly”. Unsurprisingly, Lord Denning did not let the regulator change its previous position.¹²⁰ Drawing on his previous public law estoppel cases, Lord Denning impressed on the need for fairness and consistency: “All I need to say is that the [regulator] in the past [had] treated it as properly to be included: and it would not be fair or just for it now to be treated differently.”¹²¹ In any event, he was of the view that the new approach was also erroneous as a matter of law.

In the next significant case, the House of Lords sowed the seeds for the substantive delivery of expectations in cases involving an individualised assurance. The application of estoppel and legitimate expectations principles was rather oblique, with the (potential) protection coming under the broader rubric of “abuse of power”. In *R. v. Inland Revenue Commissioners, ex parte Preston*,¹²² a tax inspector for the Inland Revenue Commissioners was investigating certain transactions of a taxpayer. The inspector advised the taxpayer that if the taxpayer withdrew certain claims for interest relief and capital loss on the transactions, he “[did] not intend to raise any further inquiries on [the taxpayer’s] tax affairs”. Relying on that assurance, the taxpayer withdrew his claims. However, following the receipt of other information, the commissioners reopened the investigation of the transactions and instigated the procedure for the cancellation of a tax advantage.

The taxpayer argued the Inland Revenue Commissioners were estopped from reneging on the promise that the inquiries would cease if his claims were withdrawn. Lord Scarman and Lord

¹¹⁹ [1976] I.C.R. 170 [*H.T.V.*].

¹²⁰ The other members of the Court of Appeal also agreed that the previous treatment should continue.

¹²¹ *H.T.V.*, *supra* note 119 at 186. Lord Scarman noted that “inconsistency is not necessarily unfair” but was satisfied that, in this case, the change of position was unfair and would could lead to further injustice.

¹²² [1985] 2 All E.R. 327 [*Preston*].

Templeman had both made statements embracing review where unfairness amounted to an abuse of power, regardless of whether the unfairness was analytically within or beyond the power conferred by law. For example, Lord Scarman said intervention was justified if the commissioners had “abused their powers or acted outside them” and “purported exercise of a power can be such that is an abuse or excess of power”. He said “judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel, ... [although] whether it was or not and whether in the circumstances the court would in its discretion intervene, would, of course, be questions for the court to decide”.¹²³ Lord Templeman said:¹²⁴

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

Ultimately though, the House of Lords concluded the correspondence did not disclose any clear agreement or representation that the commissioners would not re-open the tax assessments for various years if the taxpayer withdrew his claims for interest relief and capital loss.¹²⁵

The real breakthrough for estoppel and substantive legitimate expectation came with the English Court of Appeal’s decision in *Coughlan*. It recognised and applied substantive legitimate expectation in the case of an individualised representation or promise.

¹²³ *Ibid.* at 330.

¹²⁴ *Ibid.* at 341.

¹²⁵ Lord Templeman said:

[T]he 1978 correspondence does not disclose any agreement or representation that the commissioners would abandon their right and neglect their duty of raising further assessments on the [taxpayer] ... if further information showed that, notwithstanding the explanations furnished by the [taxpayer] in 1978, further tax chargeable.

Ibid. at 342.

Miss Coughlan was seriously injured in a motor accident in 1971. She was a tetraplegic, doubly incontinent, and suffered from breathing problems and recurring headaches. In 1993, she was transferred from hospital to a purpose-built care facility, Mardon House. She, and other patients, were persuaded to move to Mardon House by representations on behalf of the health authority that it was more appropriate to their needs and by an express assurance or promise that they could live there "for as long as they chose". Subsequently in 1998, the health authority resolved to withdraw services from Mardon House and to close the facility. Following the instigation of judicial review proceedings, the health authority rescinded its decision and agreed to consult with the patients about the proposed closure. However, following consultation, the health authority affirmed its decision to close the facility and sought to transfer responsibility for the general nursing care of Miss Coughlan to the local authority's social services. Miss Coughlan challenged that decision.

The Court of Appeal, in an unanimous judgment to which all members of the Court contributed,¹²⁶ upheld Miss Coughlan's challenge. First, the Court said the decision was unlawful because the health authority, in Miss Coughlan's particular case, could not transfer responsibility to the local authority's social services and the health authority misunderstood its general legal obligations to provide care for patients, such as Miss Coughlan.¹²⁷ Secondly, the Court ruled the decision was an unjustified breach of a clear promise to Miss Coughlan that she should have a home for life at Mardon House. Using a legitimate expectation framework, the Court ruled this constituted unfairness amounting to an abuse of power by the health authority.¹²⁸ Lastly, it said the decision was an unjustified breach of Miss Coughlan's right under article 8(1) of the European Convention on Human Rights "to respect for ... [her] home ...".¹²⁹

The Court undertook a lengthy discussion of the doctrine of legitimate expectation. It said there was still "some controversy" as to the courts' role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that they will be treated in one way and the public body wishes to treat them in a different way.¹³⁰ The Court set out three possible outcomes:

¹²⁶ Lord Woolf M.R., Mummery and Sedley L.JJ.

¹²⁷ *Ibid.* at paras. 49 and 118.

¹²⁸ *Ibid.* at paras. 89 and 118.

¹²⁹ *Ibid.* at paras. 90-93. Although the *Human Rights Act* 1998 (which would require the courts to, where possible, interpret matters consistently with Convention rights) was not yet in force, the Court said in the interim it should "pay particular attention" to Convention rights.

¹³⁰ *Ibid.* at para. 56.

- (a) The public authority is only required “to bear in mind its previous policy or other representation giving it the weight it thinks right, but no more” before changing its policy or reneging on its previous assurance. The courts are confined to reviewing the decision on *Wednesbury* grounds.¹³¹
- (b) The promise or practice induces a legitimate expectation of being consulted before a particular decision is taken and the court will require the opportunity for consultation to be given unless there is an overriding reason to resile from it.¹³²
- (c) The (lawful) promise or practice induces a legitimate expectation of a benefit which is substantive, not simply procedural, and the court will decide whether to frustrate the expectation by taking a different course that is “so unfair that ... [it] will amount to an abuse of power. In doing so, the court will “weigh the requirements of fairness against any overriding interest relied upon for the change of policy”.¹³³

The Court considered these three categories could co-exist: the first task, and “[i]n many cases the difficult task”, will be to decide which category the case falls.¹³⁴ It suggested the following considerations. Referring to the first category, the Court said that attention needs to be given to what it is in the nature of the circumstances that limits the person’s legitimate expectation “to an expectation that whatever policy is in force at the time will be applied to him” – that is, without any entitlement to procedural or substantive fairness.¹³⁵ As to the second and third categories, the Court recognised “the difficulty of segregating the procedural from the substantive”.¹³⁶ However, it said most cases in the third category are likely to arise “where the expectation is confined to one person or a few people, giving the promise or representation the character of contract”.¹³⁷ Implicit in its discussion of the appropriate categorisation is the assumption that the starting point for “ordinary cases” is the second category. That is, unless the circumstances suggest some limitation or expansion of the entitlement, the person would be accorded conventional procedural fairness.

¹³¹ *Ibid.* at para. 57.

¹³² *Ibid.* at para. 57.

¹³³ *Ibid.* at para. 57.

¹³⁴ *Ibid.* at para. 59.

¹³⁵ *Ibid.* at para. 59. As the case moved quickly to consider the second and third categories, the Court did not elaborate in any great detail on what it had in mind.

¹³⁶ *Ibid.* at para. 59.

¹³⁷ *Ibid.* at para. 60.

Again, the Court acknowledged that “the courts’ role in relation to the third category is still controversial” so took some time to demonstrate that it was mandated by authority and otherwise justifiable.¹³⁸ The Court started its analysis with the *ultra vires* doctrine (“[i]t is axiomatic that a public authority which derives its existence from statute cannot validly act outside those powers”¹³⁹). It recognised that public bodies may lawfully adopt policies to guide the exercise of their discretion, but since they cannot abdicate their general remit, they must remain free to change their policies.¹⁴⁰ The Court said the task of the court “is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and are justified on relying, on a current policy or extant promise”.¹⁴¹ The appropriate standard to resolve such conflicts was a major concern for the Court.

The Court expressed particular concern about how *Wednesbury* unreasonableness applied to a “class of case which is visibly different”.¹⁴² By this the Court meant cases involving “not one but two exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two”.¹⁴³ It doubted a bare rationality test would promote judicial intervention in such a case because “a decision to prioritise a policy change over legitimate expectations will almost always be rationale from where the authority stands, even if objectively it is arbitrary or unfair”.¹⁴⁴

It relied on the foreshadowing of substantive review under the concept of “abuse of power” by the House of Lords in *Preston* and the cases which followed expressing similar sentiments.¹⁴⁵ Reliance was also placed upon Lord Diplock’s famous speech in *Council of Civil Service Unions v.*

¹³⁸ *Ibid.* at para. 59.

¹³⁹ *Ibid.* at para. 64.

¹⁴⁰ Citing *British Oxygen Co. Ltd. v. Minister of Technology* [1970] 3 All E.R. 165 [*British Oxygen*].

¹⁴¹ *Coughlan*, *supra* note 103 at para. 65.

¹⁴² *Ibid.* at para. 66.

¹⁴³ *Ibid.* at para. 66.

¹⁴⁴ *Ibid.* at para. 66.

¹⁴⁵ The Court also relied on the following cases: *Laker Airways*, *supra* note 112, *H.T.V.*, *supra* note 119, *R v. Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd.* [1990] 1 W.L.R. 1545, *R v. Inland Revenue Commissioners, ex parte Unilever plc* [1996] S.T.C. 681, *R v. Secretary of State for the Home Department, ex parte Khan* [1985] 1 All E.R. 40 [*Khan*], and *R v. Secretary of State for the Home Department; ex parte Ruddock* [1987] 2 All E.R. 518 [*Ruddock*].

Minister for the Civil Service.¹⁴⁶ In particular, the Court highlighted the absence in his speech of any restriction of legitimate expectation to procedural benefits (“...benefits or advantages which the applicant can legitimately expect to be permitted to continue to enjoy”¹⁴⁷).

The Court felt the approach described in *Preston* allowing for judicial intervention where unfairness amounted to an abuse of power “recognises the primacy of the public authority both in administration and in policy development, but it insists, where these functions come into tension, upon the adjudicative role of the court to ensure fairness to the individual”.¹⁴⁸ It made it clear that it did not consider fairness could be restricted to the merely procedural: it said fairness, at least in the current situation, “if it is to mean anything, must ... include fairness of outcome”.¹⁴⁹

The Court went on to consider the appropriate circumstances for judicial intervention in this type of case. In cases of prior assurances reneged upon, the court said it would only give effect to a legitimate expectation within the statutory context – which “should avoid jeopardising the important principle that the executive’s policy-making powers should not be trammelled by the courts”.¹⁵⁰ In addition, it accepted that the policy, and the reasons behind adopting or changing it, were part of the “factual data” and therefore “not ordinarily open to judicial review”. However, the courts’ task is then “limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power”.¹⁵¹ Critical, in the Court’s view, was the recognition and accommodation of the previous assurances:¹⁵²

In many cases the authority will already have considered this and made appropriate exceptions (as was envisaged in *British Oxygen Co Ltd v. Minister of Technology* and as had happened in *Ex p Hamble (Offshore) Fisheries Ltd*), or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the

¹⁴⁶ *Supra* note 8.

¹⁴⁷ *Coughlan*, *supra* note 103 at para. 11 and *C.C.S.U.*, *supra* note 8 at 949. The Court in *Coughlan* also highlighted Lord Diplock’s endorsement of the approach in *Findlay*:

“[Lord Diplock] referred to *Findlay*’s case (a decision in which he had participated) as an example of a case concerning a claim to a legitimate expectation – plainly a substantive one, albeit that the claim failed”.

Coughlan, *supra* note 103 at para. 77.

¹⁴⁸ *Coughlan*, *supra* note 103 para. 70.

¹⁴⁹ *Ibid.* at para. 71.

¹⁵⁰ *Ibid.* at para. 82.

¹⁵¹ *Ibid.* at para. 82.

¹⁵² *Ibid.* at para. 82 [citations omitted].

court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.

In summary, the requirements of the *Coughlan* "abuse of power" test are as follows:

- (d) A situation where substantive protection is appropriate (such as where the expectation is confined to one person or a few people, giving an unqualified promise or representation the character of contract).
- (e) A policy change.
- (f) Resultant unfairness (*i.e.*, an abuse of power).

First, the promise. The Court indicates that it had in mind "cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract".¹⁵³ When discussing the assurance in Miss Coughlan's situation, the Court also places some emphasis on the fact that the promise was made "on a number of occasions in precise terms" and "was in unqualified terms".¹⁵⁴ Importantly, the Court said that honouring the promise would not mean the body would be acting inconsistently with its statutory or other public law duties.¹⁵⁵ This suggests the Court would not be willing to hold a public body to an *ultra vires* promise. Secondly, a policy change is required. Little need be said about the policy change – the public interest underlying the policy change falls for consideration under the last element of the test. Presumably though, a complete reversal of a policy or complete "U-turn" on an assurance will be more likely to amount to an abuse of power than minor changes to the policy or assurance which do not undermine the general thrust of the policy or assurance.

Lastly, resultant unfairness. On its face, the Court's standard appears somewhat amorphous: "whether the consequent frustration of individual's expectation is so unfair as to be a misuse of the authority's power".¹⁵⁶ However, this broad standard is coloured by the way the Court applied it to Miss Coughlan's circumstances. Accommodation – presumably to an adequate degree – of the previous assurance will be sufficient to avoid judicial intervention. The Court commended public bodies making "appropriate exceptions" or resolving to pay compensation ("where money

¹⁵³ *Ibid.* at para. 59.

¹⁵⁴ *Ibid.* at para. 86

¹⁵⁵ *Ibid.* at para. 86.

¹⁵⁶ *Ibid.* at para. 82.

alone will suffice”¹⁵⁷). Only in cases where there has been a failure to make accommodations will the Court go on to consider the fairness of consequent frustration of the expectation.¹⁵⁸ There is some suggestion later in the judgment the Court would have assessed the quality of alternative housing and services offered to Miss Coughlan.¹⁵⁹ However, the Court later – in my view, incorrectly – said if they found the decision to close was an abuse of power, “there [was] no need to address the question of whether a suitable alternative placement could be found offering conditions similar to those available at Mardon House”.¹⁶⁰ Presumably an acceptable accommodation of her expectation would be offering similar, but alternative, facilities. If this was done, there then would be no basis for the conclusion that the change in policy was so unfair as to be an abuse of power. This conclusion also seems inconsistent with its earlier statement warning against prejudging the outcome if such an offer was made. The Court was also careful to ensure that scrutiny is limited to the recognition and accommodation of the assuree’s expectation, not an overall appraisal of the policy change. It said:¹⁶¹

In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself.

Soon after the *Coughlan* decision, the House of Lords expressed some interest in the approach, with Lord Hobhouse describing the Court of Appeal’s judgment as “valuable”.¹⁶² As discussed earlier, more recently the House of Lords in *Reprotech* appeared to wholeheartedly endorse the *Coughlan* approach.¹⁶³ Unfortunately, the circumstances of the case meant the House of Lords did not get to apply the *Coughlan* test or offer more detailed comments on the test. The case for the applicant appeared to be argued on the basis of estoppel only and, in any event, the applicant would have failed at the first threshold because their Lordships found that the alleged assurances – a

¹⁵⁷ *Ibid.* at para. 82.

¹⁵⁸ *Ibid.* at para. 82.

¹⁵⁹ *Ibid.* at para. 89. The Court said:

Furthermore, we do not know ... the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was an offer of accommodation which could be said to be reasonably equivalent to Mardon House...

¹⁶⁰ *Ibid.* at para. 106.

¹⁶¹ *Ibid.* at para. 89.

¹⁶² *R. v. Department of Education and Employment, ex parte Hindley* [2000] 2 W.L.R. 730 at 740.

¹⁶³ See text accompanying note 98 above.

planning officer's opinion and committee resolution – “could not have reasonably have been taken as a binding representation”.¹⁶⁴ Their Lordships' general comments, however, appear to be endorsing the “abuse of power” approach in *Coughlan* and acceptance, at least in limited circumstances, of an alternative substantive ground of review to the previous *Wednesbury* “bare rationality” standard.

Ultimately, this class of cases provides one of the most fertile grounds for the development of estoppel and/or substantive legitimate expectation. Because the representations are *intra vires*, legality *per se* is not an issue. The individualized nature of the representations mitigate the extent of the concerns about impinging on policy development. However, the cases still require consideration of whether, broadly, estoppel principles are otherwise inconsistent with a public body's functions. On the flipside, the individualized representations are seen to carry stronger expectations and lead to greater injustice. I return to these considerations in more detail later.

III *Changes of, and departures from, general policies*

The last category of cases present perhaps the most difficult issues. They raise the question of whether public bodies can depart in individual cases from general policies or are otherwise restricted from changing these general policies.

One of the most significant cases applying estoppel principles and substantive legitimate expectation in a situation involving a general policy came rather early in the piece with the Privy Council's decision in *Attorney-General (Hong Kong) v. Ng Yuen Shiu*.¹⁶⁵ The Privy Council built on the foundations of legitimate expectation forged in *Liverpool Taxis* and continued to develop the doctrine consistently with estoppel principles. The Privy Council ruled the government of Hong Kong could not renege on an undertaking given to a group of illegal immigrants about the procedure to be followed when considering whether they were to be deported or not. Hong Kong had previously operated a “reached base” policy where illegal immigrants were not deported if they managed to reach urban areas without being arrested. However, the vast influx of immigrants lead to the policy being changed and illegal immigrants from China being deported. Following concerns

¹⁶⁴

Ibid. at para. 32.

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[1983] 2 A.C. 629 [*Ng Yuen Shiu*]. While this case arose from Hong Kong, the case formed a critical part of the development of English law by the Privy Council. For this reason I have included it in the section dealing with English law despite it being obviously tramontane. Further, the case is variously referred to as *Ng*, *Shiu*, or *Ng Yuen Shiu*. To avoid any confusion, I have adopted the latter.

from a group of illegal immigrants of Chinese origin but who has entered Hong Kong from Macau, the government clarified that illegal immigrants from Macau would be treated the same as illegal immigrants from countries other than China, would be interviewed, and "each case would be treated on its merits". Ng Yuen Shiu, an illegal immigrant from Macau, had been required to report to immigration and was interviewed by an official but given no opportunity to explain the humanitarian grounds or other special factors as to why the deportation discretion should be exercised in his favour.

The Privy Council considered the undertaking that such cases would be considered on their "merits" effectively promised a right to a hearing, conducted fairly and in accordance with natural justice, before a deportation order was made. The government breached the undertaking when it failed to give Ng Yuen Shiu an opportunity to put his case against deportation. The Privy Council couched its ruling in terms of legitimate expectation arising, in this case, from a promise to follow a certain procedure. Their Lordships assumed that, as a general proposition, an alien had no general right to have a hearing in accordance with the rules of natural justice. However, drawing the genesis of the legitimate expectation in *Schmidt* and its application in subsequent cases such as *Liverpool Taxis*,¹⁶⁶ the Privy Council said the existence of a legitimate expectation gave a person the ability to challenge the legality of a decision, including a failure of a public body to act fairly towards them when carrying out the decision making process. Their Lordships said such legitimate expectations are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis".¹⁶⁷ In this context, an expectation could be based on some statement or undertaking by or on behalf of the public body that it would follow a certain procedure: "The justification for it is primarily that, 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".¹⁶⁸ That caveat, however, was important: the Privy Council drew a line in the sand effectively indicating that public bodies would not be required to honour an undertaking, even if strictly procedural, if the undertaking was *ultra vires*.

¹⁶⁶ The Privy Council also endorsed the development of the doctrine in *Salemi v. Minister for Immigration and Ethnic Affairs (No 2)* (1977) 14 ALR 1, *R. v. Criminal Injuries Compensation Board, ex p Lain* [1967] 2 All E.R. 770, *R. v. Hull Prison Board of Visitors, ex p St Germain (No 2)* [1979] 3 All E.R. 545 and *O'Reilly v. Mackman* [1982] 3 All E.R. 1124.

¹⁶⁷ *Ng Yuen Shiu, supra* note 165 at 350.

¹⁶⁸ *Ibid.* at 351.

Although the term “estoppel” was absent from the Privy Council’s reasons, the linking of breach of undertakings with the concept of legitimate expectation was strongly suggestive of estoppel principles that had informed Lord Denning’s earlier development of legitimate expectation by borrowing from the concept of private law estoppel. *Ng Yuen Shiu* was the first of a number of cases in the 1980s which moved into the area of substantive protection – even in the case of changes to general policies.

Soon after *Ng Yuen Shiu*, in one of the most famous judicial review decisions, *C.C.S.U.*,¹⁶⁹ the House of Lords considered the relationship between legitimate expectation and a countervailing factor – national security. The dispute arose after the Minister unilaterally, without any prior consultation, issued an instruction excluding the employees of the security intelligence headquarters from union membership. The Minister sought to justify the absence of prior consultation on the basis that previous union activity associated with the negotiation and alteration of employment terms had led to the virtual disclosure of the department undermining national security. Ultimately, their Lordships ruled that the countervailing national interest trumped any claim based on legitimate expectation. However, several judges made some broad comments about the applicability of legitimate expectation generally, putting the national interest considerations to one side. Lord Fraser said “even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law”.¹⁷⁰ He went on to say that a “[l]egitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue”.¹⁷¹ Before his famous tripartite summary of judicial review grounds, Lord Diplock said:¹⁷²

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue

¹⁶⁹ *C.C.S.U.*, *supra* note 8.

¹⁷⁰ *Ibid.* at 944.

¹⁷¹ *Ibid.* at 944.

¹⁷² *Ibid.* at 949.

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 first an opportunity of advancing reasons for contending that they should not be withdrawn.

Later, he said “the *prima facie* rule of ‘procedural propriety’ in public law, applicable to a case of legitimate expectations [is] that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason”.¹⁷³

Lord Roskill spoke more broadly, keeping open the possibility of the shape of the expectation.¹⁷⁴

But this appeal is vitally concerned with the third, the duty to act fairly. The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had ‘a reasonable expectation’ of some occurrence or action preceding the decision complained of and that that ‘reasonable expectation’ was not in the event fulfilled. ... Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure.

The case appeared to be argued on the entitlement to consultation prior to the change, not on the basis that no change was possible. Throughout the decision, their Lordships expressed caution that judicial review was concerned with procedure, not the merits of the case.¹⁷⁵ Despite this caution, it will be seen that later cases justify the expansion of substantive legitimate expectation on the basis that it is not inconsistent with the speeches in *C.C.S.U.*

The approach in *Ng Yuen Shiu* was followed soon after by the Court of Appeal in *Khan*.¹⁷⁶ The Home Office had issued a circular giving guidance on when a person in the United Kingdom might be permitted to adopt a foreign child. The policy only provided for such admission for adoption in “exceptional cases” and if four specific requirements were met (there was a genuine intention to adopt; the child’s welfare in the UK was assured; a UK court would be likely to grant an

¹⁷³ *Ibid.* at 952.

¹⁷⁴ *Ibid.* at 954.

¹⁷⁵ Citing *Chief Constable of the North Wales Police v. Evans* [1982] 3 All E.R. 141 [*Evans*].

¹⁷⁶ *Khan*, *supra* note 145.

adoption order; that one of the intending adopters was domiciled in the UK). The policy also set out the set out the procedural steps to be taken when such an application was made (including referral to Secretary of State to make inquiries with the Department of Health and Social Security as to whether there were any reasons for an adoption order to be refused by the UK court). The policy did not say that if the four requirements were met, then the child *would* be allowed in, although one judge said “a reader might well infer that this would be the likely result”.¹⁷⁷

Mr and Mrs Khan sought to adopt a relative’s child who lived in Pakistan and applied for an entry clearance certificate for the child. An immigration officer concluded that there was nothing to show that the four requirements were not met, but referred the application to the Secretary of State for consideration of the likelihood of adoption being permitted by the UK courts. However, the Secretary decided the application by applying different criteria (those applying to settlement children who were already adopted by persons settled in the United Kingdom) and rejected the application.

Lord Parker said the “guidance” given in the Home Office letter was “grossly misleading”.¹⁷⁸ He had no doubt that the letter “afforded the applicant a reasonable expectation that the procedures it set out ... would be followed”.¹⁷⁹ Undoubtedly, though, the case also involved an substantive expectation, that is, the published criteria would be applied. Applying the principles expressed in *Liverpool Taxis* and *Ng Yuen Shiu*, Lord Parker considered the department should either apply the published policy or, if it considers it desirable to operate the new policy, to afford Khan a full opportunity to make representations why, in his case, the new policy should not be followed.¹⁸⁰

[T]he Secretary of State [is] free either to proceed on the basis of the letter or, if he considers it desirable to operate the new policy, to afford the applicant a full opportunity to make representations why, in his case, it should not be followed.

Interestingly, Lord Parker went further than simply requiring procedural protection (*i.e.*, a hearing) of the Khans’ expectations; he suggested any change of policy – vis-à-vis the Khans – was only permitted if full and serious consideration was given to “whether there is some overriding public interest which justifies a departure from the procedures stated in the letter”.¹⁸¹

¹⁷⁷ *Ibid.* at 42.

¹⁷⁸ *Ibid.* at 45.

¹⁷⁹ *Ibid.* at 48.

¹⁸⁰ *Ibid.* at 49.

¹⁸¹ *Ibid.* at 49.

Lord Dunn agreed with Lord Parker's conclusion that the department's actions were unfair but also considered the case could be determined under orthodox unreasonableness and abuse of discretion principles. Although the letter did not create an estoppel, the Secretary had set out the matters to be taken into consideration and "then reached his decision on a consideration which on his own showing was irrelevant".¹⁸² Accordingly, the Minister had misdirected himself according to his own criteria and acted unreasonably.

In *Findlay*,¹⁸³ convicted prisoners tried to argue that major policy changes in the administration of parole were unlawful because they breached their legitimate expectation. The Minister tightened the availability of parole, with parole for certain types of offenders only being available in exceptional circumstances. The changes were introduced without consultation, even of the Parole Board. The prisoners tried to argue the new policy was unlawful because, amongst other reasons, it breached their expectation that on becoming eligible for parole, they would have their case determined on its merits. In respect of two prisoners serving determinate sentences, their Lordships held that the new policy would not affect that expectation because their case would still be considered on the merits. In respect of the other two serving life sentences (and therefore expecting release much earlier than would apply under the new policy), the Lordships accepted that "a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review".¹⁸⁴ However, given the substance and purpose of the legislative provisions governing parole, they said the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever (otherwise lawful) policy the minister adopted.¹⁸⁵

Any other view would entail the conclusion that the unfettered discretion conferred by the statute on the minister can in some cases be restricted so as to hamper, or even prevent, changes of policy. Bearing in mind the complexity of the issues which the [minister] has to consider and the importance of the public interest in the administration of parole, I cannot think that Parliament intended the discretion to be restricted in this way.

¹⁸² *Ibid.* at 52. The remaining judge, Watkins L.J. dissented, concluding the so-called policy was only intended as a "helpful guide" and did not undertake that the discretion would be exercised according to stated criteria. Therefore, the Secretary was fully entitled to exercise the discretion, provided he acted in good faith, in any other manner deemed by him to be appropriate for immigration interests.

¹⁸³ *Findlay v. Secretary of State for the Home Department* [1984] 3 All E.R. 801.

¹⁸⁴ *Ibid.* at 830.

¹⁸⁵ *Ibid.* at 830.

Therefore there is some suggestion of substantive protection but these hopes were dashed by the overriding public interest and complexity of the issues in cases of parole.

The extension of the protection of expectations based on published policies beyond mere procedural protection was also contemplated in *R. v. Secretary of State for the Home Department, ex parte Ruddock*.¹⁸⁶ A issue arose whether the Secretary of State was bound by published criteria when considering whether to grant a telephone interception warrant. The Secretary had argued that he was not so bound; any legitimate expectation, at best, only entitled a person to procedural protection – which, obviously, in this case was not possible because providing a person with a hearing in advance would defeat the purpose of the phone tap. However, Taylor J. considered that doctrine of legitimate expectation was not confined to a procedural duty to act fairly. Relying on *C.C.S.U., Ng Yuen Shiu*, and *Findlay*, Taylor J. said if a policy was adopted then it ought to be followed:

I accept ... the [minister] cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it. But then if the practice has been to publish the current policy, it would be incumbent on him in dealing fairly to publish the new policy, unless again that would conflict with his duties.

Taylor J. envisaged only two situations in which the published policy could be departed from. First, the minister was free to change the policy, in this case, on national security grounds. However, the new policy must be published (unless those national security grounds prevented publication). Secondly, the minister could depart from the policy in an individual case if national security grounds required such a departure. In this case, the Secretary did not seek to advance either exception and therefore the Secretary was required to adhere to the published policy. Ultimately though, Taylor J. concluded that there was no evidence (on a *Wednesbury* unreasonableness standard) that the Secretary had not properly applied the published criteria. It is interesting to see the development of a requirement of justification of a change of policy on certain grounds, along with it being linked to the traditional test for review for reasonableness or abuse of discretion.

Soon after the development of the “abuse of power” test in *Coughlan*, the Court of Appeal needed to deal with arguments that the new formulation of the test was triggered by a situation of apparent changes of education policy in *R. v. Department of Education and Employment, ex parte*

¹⁸⁶

Ruddock, supra note 145.

Begbie.¹⁸⁷ The question arose whether the Minister was bound by assurances made that proposed changes to a particular education scheme would not affect the financial support payable to children already on the scheme. The assurances were made on both an individualized and general basis while in opposition in the election campaign and while in government soon after. When the policy change was implemented, the children on the scheme were not protected from the impact of the policy changes for as long as some parents had understood.

The Court rejected any claim for legitimate expectation. First, pre-election promises are not statements made on behalf of a public authority and generally are not regarded as being binding or having legal consequences.¹⁸⁸ Secondly, the statements were “very general and in one sense literally true” and “no reasonable informed reader ... could believe that it was the announcement of a change of policy in detailed form”.¹⁸⁹ Thirdly, the individualized assurance was in fact made in error and inaccurately stated the government’s position.¹⁹⁰ However, this inaccurate assurance was corrected within five weeks and the claimant had suffered no detrimental reliance in the meantime (or generally). The Court accepted all she had was a “hope no doubt, by not an expectation”.¹⁹¹

Although the claim proved unsuccessful at the first hurdle, Laws L.J. made some helpful general comments on the availability of the *Coughlan* “abuse of power” approach and its application. He indicated the categories of review in *Coughlan* are “not hermetically sealed” and “the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review”.¹⁹² At one end lay cases involving “a change of tack by a public authority, though unfair from the applicant’s stance, may involve questions of general policy affecting the public at large or a

¹⁸⁷ [1999] E.W.C.A. Civ 2100 [*Begbie*].

¹⁸⁸ Gibson L.J. said:

There are good practical reasons why this should be so. ... It is obvious that a party in opposition will not know all the facts and ramifications of a promise until it achieves office. To hold that the pre-election promises bound a newly elected Government could well be inimical to good government. I intend no encouragement to politicians to be extravagant in their pre-election promises, but when a party elected into office fails to keep its election promises, the consequences should be political and not legal.

Ibid. at paras. 55-56.

¹⁸⁹ *Ibid.* at para. 57.

¹⁹⁰ Laws L.J. said the “government’s policy was misrepresented through incompetence”; *ibid.* at para. 83.

¹⁹¹ *Ibid.* at para. 101.

¹⁹² *Ibid.* at para. 80.

significant section of it (including interests not represented before the court)".¹⁹³ He said in such cases "judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear".¹⁹⁴ At the other end are cases where "the act or omission complained of may take place on a much smaller stage, with far fewer players".¹⁹⁵ Laws L.J. indicated this is what made the *Coughlan* case special and allowed greater scrutiny by the Court:

[Only a] few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

Laws L.J. warned that there will be a multitude of cases falling within these extremes or sharing the characteristics of one or other. However, he expressed this approach as more of a question of the degree of scrutiny:

The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.

To put the present case beyond doubt, he concluded it properly fell in the "macro-political" category – in contrast to the *Coughlan* case – where the courts applies a lower degree of scrutiny.

Overall, this set of cases serves to highlight the – at times, powerful – countervailing public law factors weighing against the recognition of estoppel and legitimate expectation. Holding the administration to previous general policies strikes at the heart of the principles of non-fettering, administrative flexibility, and governance in the public interest. Despite this, some courts have controversially allowed estoppel and substantive legitimate expectation to operate in this area – as

¹⁹³ *Ibid.* at para. 80.

¹⁹⁴ *Ibid.* at para. 80.

¹⁹⁵ *Ibid.* at para. 81.

long as doing so did not undermine any (tangible and relatively significant) countervailing public interest.

B Other Commonwealth jurisdictions

I Australia

Australia's experience with estoppel and substantive legitimate expectation has generally been conservative. The courts have fully recognised the procedural form of legitimate expectation, but have been reluctant to extend the protection of expectations into the substantive domain – either through substantive legitimate expectation or estoppel.¹⁹⁶ However, the High Court has foreshadowed the possibility of balancing between the substantive protection of expectations and the countervailing public interest.

The High Court's endorsement of procedural legitimate expectation is evident in *Haoucher v. Minister of State for Immigration and Ethnic Affairs*.¹⁹⁷ A non-citizen had been convicted of an offence and the government sought to deport him. Being doing so, they accorded him a hearing. However, on appeal, the Administrative Appeals Tribunal recommended that the deportation order be quashed. The minister had previously indicated a policy of accepting such recommendations unless there were "exceptional circumstances". The minister determined that there were exceptional circumstances in this case and confirmed the previous deportation order – in this case, without giving the deportee an opportunity to be heard. The failure to afford a subsequent hearing was challenged on the basis of legitimate expectation.

All members of the High Court accepted the general proposition that a legitimate expectation leads to an obligation to afford a person procedural fairness, such as the opportunity to be heard. However, there was disagreement about whether that obligation extended to a subsequent hearing where the circumstances of the case were being reconsidered – by a 3-2 majority, the Court ruled that it did. On the doctrine of legitimate expectation generally, the Court endorsed the approach adopted in English cases. McHugh J. noted the introduction of legitimate expectation in *Schmidt* "extended the range of protection given by the common law rules of natural justice [with] [p]rospective, as well as existing, rights, interests, privileges and benefits ... now being within the

¹⁹⁶ Thomson, *supra* note 7 and Stewart, *supra* note 67.

¹⁹⁷ (1990) 93 A.L.R. 51 [*Haoucher*].

domain of natural justice".¹⁹⁸ As was the case under common law when a statutory power prejudiced a person's existing rights or interests, "the common law now gives a person the right to be heard before the exercise of a statutory power prejudices some right, interest, privilege or benefit which that person can legitimately expect to obtain or enjoy in the future".¹⁹⁹ Dawson J. was anxious to avoid any confusion that could arise from the terminology used:²⁰⁰

[T]he expression "legitimate expectation" is used in reference to an ultimate benefit, such as the renewal of a licence, it is a convenient one but that when it is put to a wider use it is apt to mislead. To speak, as the cases often do, of the legitimate expectation of a particular procedure or of the legitimate expectation of procedural fairness generally is to speak of something quite different. When the law requires the observance of the rules of natural justice, it does so because it is fair in all the circumstances that they should be observed in the protection of some interest liable to be affected by administrative decision. It is the nature of the interest which is liable to be affected – it may be no more than a legitimate expectation of some particular benefit – which, in all the circumstances, gives rise to the requirement. To speak also of a legitimate expectation of procedural fairness is to confuse the interest which is the basis of the requirement with the requirement itself. It is quite unnecessary to do so.

The position adopted was therefore orthodox and in line with the English development of procedural legitimate expectation. Two other estoppel and legitimate expectation cases in Australia are of particular interest to the question of the substantive protection of expectations.

Estoppel arising from a general policy was considered by the High Court in *Attorney-General (NSW) v. Quin*.²⁰¹ The judgment was delivered on the same day as the Court's decision in *Haoucher*. The challenge in *Quin* arose after the Attorney-General decided not to appoint 5 of the 100 stipendiary magistrates of the Courts of Petty Sessions as magistrates in the new Local Courts when the court system was reformed.²⁰² The Attorney-General's decision not to recommend the appointment was declared void by the New South Wales Court of Appeal.²⁰³ The

¹⁹⁸ *Ibid.* at 73.

¹⁹⁹ *Ibid.* at 73. He noted the common law right could be excluded by statute.

²⁰⁰ *Ibid.* at 57.

²⁰¹ (1990) 93 A.L.R.1 [*Quin*].

²⁰² The Attorney-General had said he did not favour the appointment of the five plaintiffs on the ground that their past performance had raised questions as to their suitability in point of ability and temperament.

²⁰³ *Macrae v. Attorney-General (N.S.W.)* (1987) 9 N.S.W.L.R. 268. The Court ruled that procedural fairness had been breached because material adverse to the magistrates had been considered, no notice of it had been given to them, and that they had no opportunity of answering it.

Attorney-General then advised that he had changed the policy for appointing magistrates: rather than appointing former magistrates who were not unfit or unsuited for the new office (*i.e.*, not in competition with other applicants), he would select entirely on merit and that required an assessment of competing applicants.²⁰⁴ The Attorney-General confirmed that, if the former magistrates applied, he would ensure that the adverse material would not be taken into account unless the former magistrates were given an opportunity to respond. However, the reality of the change of policy meant the former magistrates, when assessed comparatively with other candidates, would unlikely be appointed regardless of whether the adverse material was considered.²⁰⁵

The High Court, by a 3-2 majority, decided that any legitimate expectation only created an obligation of procedural fairness and could not, as was effectively being sought, found substantive relief. On the estoppel issue, the Court ruled that once it was accepted the decision to change the appointment policy was in conformity with the statutory power, then any representation made by the Executive could not preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy. Mason C.J. said he was "unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does".²⁰⁶ As other courts have done, he relied on the principle that the executive "cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power".²⁰⁷

²⁰⁴ The Court said "... there is nothing in the materials which would support any suggestion that the change of policy was motivated by a desire to take into account the adverse materials [and] we must proceed on the footing that the Attorney-General changed his policy in making recommendations because he considered that the new policy would better serve the interests of the administration of justice in New South Wales by securing the appointment as magistrates of those persons who were best qualified and willing to serve"; *Quin, supra* note 201 at 10.

²⁰⁵ Deane J. noted that the change of policy was to "move back (or, as would seem probable, to remove) the goal posts" and it was a reasonable assumption "that Mr Quin would not be appointed a magistrate of a Local Court if he were treated on the same basis as if he were a fresh applicant"; *Ibid* at 10.

²⁰⁶ *Ibid.* at 10.

²⁰⁷ *Ibid.* at 11.

Mason C.J. did not, however, foreclose on the possibility that estoppel could be raised in some situations:²⁰⁸

What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.

Again, the rejection of estoppel was not complete – with the door being left open for cases involving a great deal of injustice without countervailing public interest factors against protecting the expectation.

The other most significant case is a decision of the Federal Court of Australia, *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic*.²⁰⁹ It considers estoppel in the context of a (potential) individualized assurance and contains one of the most thorough public law estoppel analyses. Again though, it demonstrates a greater conservatism in relation to public law estoppel in Australia. Estoppel was again confined to narrow classes of cases and, as seems typical, the claimant failed to establish factually that he fell within those classes or that he otherwise had an expectation deserving of protection.

Kurtovic was convicted of two counts of manslaughter. As he was not an Australian citizen and had not been a resident for more than 10 years at the time when he committed the offences, the Minister of Immigration could have ordered that he be deported. The Minister issued a deportation order, but a challenge to the Administrative Appeals Tribunal recommended it be revoked. On behalf of the Minister, the Department advised Kurtovic that the deportation order had been revoked and issued him with a warning not to reoffend, suggesting he would be deported if he did.²¹⁰ In a

²⁰⁸ *Ibid.* at 11, referring to Lord Denning's observations in *Laker Airways*, but noting the criticism of such an approach by Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic* (1990) 92 A.L.R. 93 [*Kurtovic*].

²⁰⁹ *Kurtovic, ibid.* The judgment was issued four months earlier than *Haoucher* and *Quin*.

²¹⁰ The letter warned:

challenge by Kurtovic to the Parole Board's refusal to release him on parole, the New South Wales Criminal Court of Appeal recommended the Minister reconsider his revocation of the deportation order. The Minister did so, but again confirmed the decision to maintain the status quo. As a result, the Criminal Court of Appeal rejected Kurtovic's appeal against the decision not to release him on parole. When Kurtovic was eventually released, the Department advised Kurtovic that the Minister was reconsidering whether he should be deported. After giving Kurtovic an opportunity to make written submissions, the Minister issued a deportation order against him.

Kurtovic challenged the deportation order on the ground, amongst others, that the Minister was estopped from making the deportation order because of the Department's warning. He argued the warning in the letter carried the implication that if Kurtovic gave no further cause to be deported, then he would be free to continue his life in Australia. Initially, the Federal Court upheld the challenge to the order on this basis. On appeal, the General Division of the Federal Court ruled that any claim based on estoppel failed at the first hurdle for "want of a sufficiently clear and unambiguous representation to the effect contended for".²¹¹ It accepted estoppel, assuming it was available, could be founded upon an implication drawn from an express statement but disagreed with the lower court judge that such an implication was capable of being drawn from the letter.

In his judgment, Gummow J. considered the general principle of whether estoppel could be raised against a public body. He started by recognising that estoppel could not be raised to assert that "the executive or other public authority is estopped from asserting a particular action, of which the other party seeks performance, would be *ultra vires* as exceeding the powers given by or pursuant to a law of the Parliament"²¹² – to do so would undermine the doctrine of *ultra vires*. However, in the case that did not arise because the estoppel raised by Kurtovic would, if allowed, not produce a result which would be *ultra vires* the powers of the Minister.

You are warned that any further conviction which renders you liable to deportation will lead to the question of your deportation being reconsidered by the Minister. Consequently, if you again become liable to deportation, you should expect that disregard of this warning will weigh heavily against you when the Minister reconsiders your case.

²¹¹ *Ibid.* at 108.

²¹² *Ibid.* at 108.

Gummow J. saw the following extract from *Halsbury's* as stating the generally accepted position:²¹³

Estoppel cannot operate to prevent or hinder the performance of a positive statutory duty, or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public.

However, he went on to consider the basis for this proposition and whether there were exceptions or qualifications to it. He identified the commonly argued objection to estoppel that:²¹⁴

... there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding...

Gummow J. also recorded Sir Alexander Turner's qualification to this principle: "But it must appear that frustration of its duty or of its discretion will be the result of allowing the estoppel; anything less than this will be insufficient as an affirmative answer".²¹⁵

He then went on to discuss the (limited) classes of cases in which estoppel could be applied against public bodies:

- (a) *Functus officio* – "... where a decision-maker cannot make a second decision by which he resiles from the first decision, not because he is estopped from doing so but because the power in question is spent by the making of the first decision".²¹⁶
- (b) Waiver of procedural requirements – "... where, upon its proper construction, the legislation may permit the decision-maker to waive procedural requirements or observance

²¹³ *Ibid.* at 109, citing *Laws of England*, 4th ed., vol. 44, "Statutes" (London: Butterworths, 1980-) at para. 949.

²¹⁴ *Ibid.* at 111.

²¹⁵ *Ibid.* at 111, citing Sir Alexander Turner, *The Law Relating to Estoppel by Representation*, 3rd ed, (London: Butterworths, 1977) at 150.

²¹⁶ *Ibid.* at 112. Gummow J said this category included decisions like *Wells*, *Western Fish* and *Lever Finance*.

of those procedural requirements which may be regarded as directory rather than mandatory”.²¹⁷

- (c) Lack of authority and ostensible authority – where public authorities were held to representation made by their officers or delegates. Gummow J. considered such a principle would be “the first true exception or qualification to the general rejection of estoppel in public law”.²¹⁸
- (d) Affirmative misconduct by official – where, in the United States, there had been some suggestion of raising estoppels by representation against the Government where the officers involved have engaged in “affirmative misconduct”.²¹⁹
- (e) Actions of government in its private or proprietary capacity – where “there is no question of illegality or *ultra vires* and the subject matter of the dealing would ordinarily be covered by private law ...dealings of public bodies with outsiders have attracted the operation of principles of estoppel and proprietary estoppel”.²²⁰
- (f) Operational decisions – where a public authority makes representations in the course of implementation of a previously made policy decision arrived at by the exercise of its discretion, “then usually there will not be an objection to the application of a private law doctrine of promissory estoppel”.²²¹

Gummow J. rejected the availability of a general principle of estoppel beyond any of these types of cases. He said Lord Denning’s general statement in *Robertson* that the Minister “must so administer [the relevant powers] as to honour all assurances given by or on behalf of the Crown”, despite the uses to which it has been put from time to time, was unnecessary because the case was simply about the delegation of authority, not estoppel of a statutory duty or discretion. He also rejected the general statement of estoppel in *Rubrico v. Minister for Immigration and Ethnic Affairs*.²²² *Rubrico* arose

²¹⁷ *Ibid.* at 112.

²¹⁸ *Ibid.* at 114.

²¹⁹ *Ibid.* at 114.

²²⁰ *Ibid.* at 115.

²²¹ *Ibid.* at 116. Gummow J. recognises though that “it may be difficult, in a given case, to draw a line between that which involves discretion and that which is merely “operational”. *Ibid.* at 116.

²²² (1989) 86 A.L.R. 681 [*Rubrico*].

after an immigration department erroneously issued an entry permit without the appropriate endorsement and later sought to rely on lack of the endorsement when deporting a non-citizen. Lee J. indicated a willingness to apply the *Robertson* line of authority, suggesting that while estoppel could not prevent the performance of a statutory duty or discretion, estoppel could be raised "where the words or conduct of the authority involved a representation that the duty had been performed or the discretion exercised".²²³ Gummow J. in *Kurtovic* criticized this approach because "if the decision-maker were estopped from resiling from a single exercise of his discretion, then the nature of the discretionary power (being exercisable from time to time) would be stifled".²²⁴

Eventually, Gummow J. considered that the case did not fall within any of the recognised classes of estoppel which could be raised – even if estoppel could be founded upon a clear representation or implication in the Department's letter. However, the deportation order was overturned on the sole basis that the Minister relied on material from a source other than Kurtovic himself, without giving Kurtovic the opportunity to be heard on that material.

Since *Kurtovic* and *Quin*, claims based on estoppel and substantive legitimate expectation in Australia have generally been unsuccessful.²²⁵ Although the door was left open for estoppel, the narrow opportunity to do so has not really been taken up. Indeed, some courts have expressed a degree of uncomfortableness with Mason C.J.'s balancing process contemplated in *Quin*,²²⁶ reinforcing the conservative attitude taken by the Australian courts.

II *New Zealand*

In New Zealand, the treatment of estoppel and substantive legitimate expectation has been quite variable.²²⁷ Many of the cases in New Zealand deal with the issue of erroneous advice and assurances. Unfortunately, a comprehensive approach has not been applied.

A couple of cases preferred to deal with expectation issues using orthodox public law grounds. For example, the High Court in *Tay v. Attorney-General*²²⁸ considered estoppel and

²²³ *Ibid.* at 703. Lee J. considered that, in that particular case, the application of an estoppel "would not involve the endorsement of acts that would otherwise be beyond power ... nor would it involve interference with an exercise of power or performance of a duty".

²²⁴ *Kurtovic*, *supra* note 208 at 115.

²²⁵ Stewart, *supra* note 67 at 634.

²²⁶ See *Roberts v. Repatriation Commission* (1992) 39 F.C.R. 420.

²²⁷ See France, *supra* note 111 and Poole, *supra* note 6.

substantive legitimate expectation after an official misrepresented the immigration department's policy – causing significant difficulties for a family after their application for residence permits were later declined. Hillyer J. said that “a misrepresentation made by an immigration officer as to the department's policy cannot operate to give a substantive protection”. However, he overturned the decision because the Minister failed to consider “exactly what the officer said and exactly what detriment Mr Tay suffered” (because these circumstances were not put before him).

Similarly, in *Carmichael v. Director-General of Social Welfare*²²⁹ the High Court suggested that substantive fairness or estoppel could be relied on to prevent a couple from being prejudiced by incorrect departmental advice about eligibility to superannuation benefits, although ultimately the Court did not need to rely on either because an orthodox analysis was sufficient to grant relief. Smellie J., said the present situation was consistent with “a number of administrative law decisions where ... misleading information from those in authority had caused them to alter their positions to their detriment.”²³⁰ He also noted that there was authority in New Zealand which supported substantive fairness being available as a legitimate ground of review. Although he ultimately accepted that in that case unreasonableness in the narrow sense was sufficient to justify overturning the decision, unfairness and unreasonableness overlap: “[l]ooked at objectively, the [couple's] case is really one of estoppel or the denial of legitimate expectations”.²³¹ In *Steinborn v. Minister of Immigration*,²³² the Court of Appeal used estoppel to preserve the right of appeal from a deportation order where the immigration department had incorrectly advised the appellant of the location for filing the appeal. The deportee's appeal was filed at the incorrect address within the appeal period, but was not received at the proper address until after the appeal period had expired. The Court of Appeal accepted that the legislation did not permit the extension of the appeal period and that the appeal had failed to be brought in time. However, the Court ruled that the Tribunal should be estopped from denying that the appeal was valid after its agent, the immigration department, gave incorrect advice about where the appeal was to be filed.

228 [1992] 2 N.Z.L.R. 693.

229 [1994] 3 N.Z.L.R. 477.

230 *Ibid.* at 482.

231 *Ibid.* at 484.

232 [2002] N.Z.A.R. 36.

Several cases endorsed the view that estoppel could not give entitlements beyond what was permitted by statute. In *Narain v. Attorney-General*,²³³ the High Court rejected any argument that estoppel could be relied on so as to give a person “beyond those which he is entitled to under the statute”. A prisoner had incorrectly been advised of his expected release date. Some days later, when the error was realised, the department advised the prisoner of the (later) correct date. The High Court rejected any argument that the department was estopped from denying the earlier release date because to do so mean the Court would be fixing “a date of release other than which, by law, the prison authorities are bound to comply with”.²³⁴

The High Court in *Nanden v. Wellington City Council*²³⁵ specifically adopted the approach taken in *Western Fish* that councils could not be estopped from carrying out their statutory duty of enforcing the relevant planning instruments and legislation. A resident tried to argue that the local council’s approval of some alterations for building control purposes, without any specific qualification that planning approval was also needed, amounted to a representation that the alterations complied with the planning controls. Young J. said he was “at the very least, sceptical” about whether the resident could point to a representation or conduct by the council that the alterations complied with the planning controls. In any event, he said the council could not be estopped from carrying out its statutory duty of enforcing the local planning instrument and the provisions of the legislation generally, especially where the effect of estoppel would be to place the resident in a better position than a properly processed statutory application – at the expense of the participatory rights of third parties. However, the Court of Appeal relied on estoppel to cure erroneous advice – albeit relating to procedure obligations, not substantive rights.

The New Zealand position on the protection of expectations in cases where illegality *per se* was not an issue has also been left open. In the early 1990s, some judges pointed to the possibility of the development of a general doctrine of “substantive fairness”.²³⁶ Much of this was speculative, with the cases where it was discussed inevitably being able to be resolved on other grounds. In *Northern Roller Milling Co. Ltd. v. Commerce Commission*,²³⁷ a department assured a manufacturer

²³³ (23 May 1990), CP115/90 (Wgtn. H.C.).

²³⁴ *Ibid.* at 7.

²³⁵ [2000] N.Z.R.M.A. 562 (H.C.)

²³⁶ See Poole, *supra* note 6.

²³⁷ [1994] 2 N.Z.L.R. 747 [*Northern Roller Mills*].

and the industry groups that interest costs would be recoverable as part of the price-setting formula but later sought to renege on that position after plans were developed to move to a deregulated market. On the possibility that the actions could be impugned on the basis of substantive fairness, the High Court said it was "prepared to accept that the concept of fairness need not be confined to mere procedural matters".²³⁸ Gallen J. went on to say:²³⁹

I do not think that the field is so wide open that some broad concept of fairness can be used to justify interfering with a decision which merely gives rise to perhaps a general unease or distaste. ... It could perhaps be suggested that the concept of fairness is an elastic means of ensuring that standards generally held by the community are brought to bear on decisions made within the community.

Gallen J. also considered it was possible that the situation could be brought within the legitimate expectation doctrine.²⁴⁰ Ultimately though he did not need to apply either substantive fairness or estoppel because he was able to deal with the case on the basis that the body failed to take into account all relevant considerations. In *Thames Valley Electric Power Board v N.Z.F.P. Pulp & Paper Ltd.*,²⁴¹ Cooke P. accepted that substantive unfairness was "a legitimate ground of judicial review, shading into but not identical with unreasonableness".²⁴² While he suggested some possible

²³⁸ *Ibid.* at 750.

²³⁹ *Ibid.* at 750.

²⁴⁰ *Ibid.* at 750. He said suggested that "legitimate expectation itself as a concept is a shorthand term for an expectation that decision making will be carried out not only according to law, but in accordance with those principles which the law embodies unless there is something in the decision-making power itself which excludes such an approach". He noted the affinity between substantive formulation of legitimate expectation and estoppel but also noted "the difficulties in applying estoppel to the making of decisions because of the extent to which this may impinge upon the necessary discretion without which a decision would be no decision at all". *Ibid.* at 754.

²⁴¹ [1994] 2 N.Z.L.R. 641 [*Thames Valley*].

²⁴² *Ibid.* at 652.

methods which could be adopted in such an assessment,²⁴³ he concluded “the limits or categories of substantive fairness will never be defined with exhaustive precision”.²⁴⁴

More recently, the rubric of “substantive fairness” has been replaced with *Coughlan*-style “abuse of power”. Two recent decisions indicate the courts’ general approach to legitimate expectation situations where no illegality arises, one dealing with an individualized representation and the other a general policy change. In *Challis v. Destination Marlborough Trust Board Inc*,²⁴⁵ the High Court endorsed the House of Lords’ rejection of public law estoppel in favour of *Coughlan*-style substantive legitimate expectation in a case involving an alleged individualized assurance. Wild J. concluded that “estoppel has no place in modern public law”.²⁴⁶ He placed particular reliance on the doctrine of legitimate expectation being “the established recognised remedy in public law in this area”.²⁴⁷ He recognised that estoppel was analogous to legitimate expectation, “overlapping and essentially duplicating it, and adding nothing but confusion”.²⁴⁸ Adopting the same reasoning as the House of Lords in *Reprotech*, Wild J. said:

None of [the] estoppel principles can properly achieve anything in the public law arena that cannot now be achieved by invoking breach of a legitimate expectation. Estoppel made an entrée into public law at a time when breach of legitimate expectation was not an established remedy. ... In short, public law no longer needs to lean upon the “crutch” of the private law remedy of estoppel.

Wild J. went on to discuss some of the reasons why estoppel is “unsuited” to public law. First, he highlighted the problem that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty, which would be undermined if public bodies were bound by *ultra vires* representations. Secondly, he said the courts were reluctant to extend other

²⁴³ *Ibid.* at 652. His discussion ranged from “a duty to act fairly otherwise than in the procedural sense of according a hearing”, consideration of the “adequacy of the administrative consideration given to a matter and of the administrative reasoning [, that is,] a degree of review, although not of course to appeal” to “where the procedure and the decision of an administrative body, although possibly just surviving challenge if viewed separately, were in combination so questionable as to impel the conclusion that, in the words of Lord Donaldson of Lymington M.R. in *R. v. Panel on Take-overs and Mergers, ex parte Guinness plc* ‘something had gone wrong of a nature and degree that required the intervention of the court’”; *ibid.* at 652.

²⁴⁴ *Ibid.* at 652.

²⁴⁵ [2003] 2 N.Z.L.R. 107 [*Challis*].

²⁴⁶ *Ibid.* at para. 105.

²⁴⁷ *Ibid.* at para. 105.

²⁴⁸ *Ibid.* at para. 105.

doctrines into areas where other remedies already right any wrong. For example, he suggested there was an analogy with the courts' unwillingness to extend the law of negligence into situations already covered by the law of defamation, especially where specific defences – carefully developed over the years to strike a balance between the freedom of speech and the protection of an individual's reputations – are available in defamation but not in negligence. Wild J. pointed to the similar recognition of this balancing process in public law remedies:²⁴⁹

Similarly, ... public law remedies against public authorities must take into account the interests of the general public. Individual rights and expectations must be balanced against the public interest. The public law remedy of breach of legitimate expectation allows that balancing to occur in a manner that the private law remedy of estoppel does not.

In any event, the plaintiffs' case was doomed because Wild J. found that they failed to satisfy each of the requisite elements for public law estoppel. The plaintiffs had been operating a visitor information centre under a contract with the local council and later the trust board. As the end of the plaintiffs' contract approached, the Board called for tenders for a 3 year operating contract. Ultimately, it declined all three registrations of interest, including the plaintiffs'. However, the Board renewed the plaintiffs' contract for 12 months (extended for a further 6 months) while it continued discussions with the plaintiffs and reconsidered possible changes to the operation of the information centre. On the eve of the termination of the plaintiffs' extended contract, the trust board's chief executive spoke with one of the plaintiffs and advised that the trust board wished the plaintiffs to continue to operate the centre until a more permanent arrangement could be put in place. This was followed up in writing by the trust board confirming it wanted the plaintiffs to "continue with the existing contract on a monthly pro-rata contract". Discussions with the plaintiffs continued, but ultimately the board called for tenders for a 3 year operating contract. Again the plaintiffs' tender was rejected and ultimately the month-by-month arrangement was also terminated. The plaintiffs claimed they were entitled to a 3 year contract because of an alleged assurance to that effect in the telephone conversation with the chief executive. However, the High Court concluded the conversation – against the backdrop of previous limited extensions and rejection of the tender – could not be taken as assuring the plaintiffs of a 3 year (or similar length) contract. Nor did the High Court consider the plaintiffs could point to any detrimental reliance on the assurance, if indeed such an assurance was made.

²⁴⁹

Ibid. at para. 105.

In *N.Z. Association for Migration and Investments Inc. v. Attorney-General*,²⁵⁰ the High Court considered a challenge to a general tightening of immigration policy. Two classes of cases were to be assessed under the new rules although under a transitional regime most applicants would still be considered under the old rules applicable when they filed their applications and determined. Randerson J. considered the applicable legitimate expectation principles – in the event that those people to whom the new rules applied could establish a legitimate expectation that their application be processed according to the old policy. Drawing on the “abuse of power” approach adopted in *Coughlan*, Randerson J. said:²⁵¹

It is clear that the approach adopted by the Court in legitimate expectation cases involving policy changes will be very much fact dependent. The response will depend on a range of factors including the specificity of the promise; the significance of the consequences to the individual or class concerned if the promise is not kept or the prior practice not followed; whether the decision-maker has given proper consideration to the position of affected parties; what provision, if any, has been made to accommodate those affected by way of transitional provisions whether by the creation of expectation from the application of a new policy or by compensation or otherwise, and the nature and strength of any countervailing public interest factors justifying the course proposed.

He went on to say that even when taking into account all these factors, the “intensity” of scrutiny may vary. In cases where “very specific promises are made to an individual or a small class with serious consequences for them if the promises are not kept”, the courts are likely to undertake a “particularly close examination ... to ensure that the legitimate expectations of individuals are not unfairly or unreasonably thwarted ... [and] to ensure the decision-maker had conscientiously considered the position of those affected, has sound and logical reasons for reneging on the promises made, and has otherwise acted lawfully, fairly, and reasonably”.²⁵² In other cases, such as where “the policy choices are very much in the macro-political field and there are strong countervailing grounds to support the course adopted”, the courts are likely to “give greater recognition to the wider public interest in enabling governments to adjust policy including where change is required and how, in their judgment, it is to be achieved”.²⁵³ However, even in such cases, he suggested the courts

²⁵⁰ (16 May 2003), M1700/02, (Auckland H.C.).

²⁵¹ *Ibid.* at para. 157.

²⁵² *Ibid.* at para. 158.

²⁵³ *Ibid.* at para. 158.

would not forego their “proper constitutional duty on judicial review of ensuring that the decision-maker has acted in accordance with law, fairly, and reasonably”.²⁵⁴

Randerson J. ruled the present circumstances fell into the latter category. Accordingly, he considered that, even if applicants could establish a legitimate expectation, any breach of that expectation would not be invalid. He pointed to the presence of a general transitional regime, thorough assessment of whether to extend the transitional provisions to the two classes of people (declining to do so because it would “mean a continuation of poor outcomes under the less robust ... policy for several years”), his view that this assessment could not be characterised as “irrational”, and the fact that the decision in the “political category involving a complex range of considerations of cultural, social, economic, and administrative matters”.²⁵⁵ Randerson J. accepted there was still some potential for some cases of unfairness because the entitlement to the transitional regime would depend on when an applicant’s application was processed by the department, “[b]ut the line has to be drawn somewhere”.²⁵⁶

Finally, it is important to note the (perhaps) special approach taken in New Zealand to legitimate expectation where the expectation relates to the treaty obligations to indigenous people. In *New Zealand Maori Council v. Attorney-General*,²⁵⁷ the Privy Council followed its forthright approach in *Ng Yuen Shiu* to general changes of policy and suggested the Crown would be unable to renege on a general policy where that policy formed part of the Crown’s obligation to Maori under the Treaty.²⁵⁸

Some Maori had challenged the divestment of broadcasting assets by the Crown to private interests on the basis that doing so would undermine the Crown’s obligation under the Treaty to protect taonga (treasure) of Maori people, in this case, Maori language and culture.²⁵⁹ At first

²⁵⁴ *Ibid.* at para. 158.

²⁵⁵ *Ibid.* at paras. 176-179.

²⁵⁶ *Ibid.* at paras. 176-179.

²⁵⁷ [1994] 1 N.Z.L.R. 513 [*N.Z.M.C. (Broadcasting Assets)* (P.C.)].

²⁵⁸ The Court of Appeal had in *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 [*N.Z.M.C. (S.O.E.)* (C.A.)] previously held that in cases where the Treaty was incorporated into domestic legislation, the Crown’s obligations under the Treaty were enforceable.

²⁵⁹ The Crown conceded language and culture needed to be protected under the Treaty – with the courts previously indicated that it was to be protected. For example, Cooke P. in *N.Z.M.C. (S.O.E.)* at 663 said: “*Taonga*, rendered in the [English translation of the Maori] version as *treasures*, is represented

instance, the High Court had dismissed the claim in respect of radio assets but had given the Crown an opportunity to develop a scheme on how Maori language would be protected following the proposed divestment of television assets. After considering the proposed scheme, the High Court considered that the divestment of assets would not breach the Crown's obligations under the Treaty. The Court of Appeal and Privy Council agreed, with the Privy Council going on to foreshadow that the Crown may be bound to apply the proposed scheme on the basis of legitimate expectation, even though there was no other specific legal requirement to do so.

It is unclear the extent to which the comments expressed by the Privy Council are applicable to all legitimate expectation cases. It seems better to treat its discussion as applying to the special type of case where the Crown was subject to a co-extensive positive duty to protect Maori language and to honour its responsibilities under the Treaty.²⁶⁰

Overall, the approach in New Zealand has tended to place a greater emphasis on public bodies' obligations to protect expectations – although the doctrinal approach adopted has not been consistent or coherent through the range of cases.

III *Canada*

In Canada, the doctrine of legitimate expectation has not had the same significant role as in England and other Commonwealth jurisdictions. This difference can be attributed, in part, to the "existence of a general duty of fairness owed when administrative decisions are being made"²⁶¹ – there being no equivalent general statement of the duty of fairness in England.²⁶² As a general rule common law principle, administrative – but not legislative²⁶³ – decisions which affect the rights,

in the English text as *other properties* and in [Williams' Maori Dictionary] as *property, anything highly prized*. The Waitangi Tribunal has treated the word as embracing the Maori language." The Waitangi Tribunal had previously ruled that "taonga" meant things that are highly valued and included both tangible and intangible possessions. See *Report of the Waitangi Tribunal on the Manukau Claim (Wai 8)* (Wellington: Government Printer, 1985) at 70.

²⁶⁰ The Court of Appeal in *N.Z.M.C. (S.O.E.) (C.A.)* *supra* note 258 ruled that although the principles of the Treaty did not include a direct duty to consult Maori of all government decisions, it was likely that in many circumstances the duty to act in good faith would require consultation.

²⁶¹ Wright, *supra* note 4 at 143.

²⁶² *Ibid.* at 143.

²⁶³ The use of the word "legislative" is perhaps a misnomer. It has been defined expansively and includes "higher level" decisions, such as ministerial decisions, which have a significant policy

privileges or interests of an individual must comply with the requirements of procedural fairness.²⁶⁴ As procedural protection is already afforded in most cases when elsewhere (procedural) legitimate expectation need to be relied on, legitimate expectation as a doctrine has not developed with the same fervour. However, the courts have still needed to confront the question of the substantive protection of expectations. Two relatively recent cases demonstrate an unusual approach.

In *Minister of Health and Social Services v. Mount Sinai Hospital Center*,²⁶⁵ the Supreme Court of Canada had the opportunity to consider the appropriateness of the doctrine of public law estoppel and the recent development of (substantive) legitimate expectation by the English Court of Appeal in *Coughlan*. The Mount Sinai Hospital Center was originally a long-term care facility, primarily for the treatment of tuberculosis, situated outside Montreal. As the incidence of tuberculosis declined, it began introducing new services, including short-term care facilities. Such services fell outside its existing permit. It began negotiations with the Ministry of Health and Social Services to move to Montreal. During the negotiations in 1984, the Center made it clear that it wanted its permit "regularized" to reflect the reality that it was offering both long-term and short-term facilities. The Ministry promised that the Center's permit would be formally altered once the Center had moved to Montreal. The Center then engaged in a large campaign to raise over \$6M for its move to Montreal. Its status as both a long-term and short-term care provider was an important feature of its campaign. The Ministry's promise was reaffirmed by subsequent Ministers over the period of the fundraising campaign. In 1991, following its move to Montreal, the Center formally requested that the Minister regularize its permit. Without giving the Center an opportunity to make submissions, the Minister advised that it would not receive the promised permit and that it would need to continue to operate under its existing permit. Following a change to the governing legislation, this meant the Center would then lose its independent board of directors.

The Center challenged the Minister's decision not to issue the promised permit. Marcelin J. of the Quebec Superior Court upheld the change saying the Ministry's promises and conduct created a legitimate expectation that the Center would be given the promised permit. However, as the

content. L'Heureux Dubé J. in *Board of Education of the Indian Head School No. 19 v. Knight* [1990] 2 S.C.R. 735 contrasted decisions of a "legislative and general nature" with those of a "more administrative and specific nature" – the former not triggering a duty of procedural fairness. See also *Re Canada Assistance Plan (Canada)* [1991] 2 S.C.R. 525 [*Canada Assistance Plan*].

²⁶⁴ *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643, 653 [*Cardinal*].

²⁶⁵ (2001) S.C.R. 281 [*Mount Sinai*].

doctrine of legitimate expectation was limited to fairness and procedural remedies, she ordered that the Minister hear submissions from the Center before determining whether to alter the permit. The Center appealed. On appeal, the Quebec Court of Appeal unanimously allowed the appeal and ordered the Minister to issue the promised permit. The Court confirmed Marcelin J.'s ruling that remedies for breaches of legitimate expectations were restricted to procedural remedies. However, it relied on public law estoppel to provide a substantive remedy.

The Minister appealed. The Supreme Court dismissed the appeal, but for different reasons than relied on by the Court of Appeal. Although reaching the same conclusion, the Court was divided as to the appropriate approach.²⁶⁶ The majority found that the Minister had in fact exercised the statutory discretion necessary for the grant of the promised permit but the actual granting of the permit was deferred until the Center moved to Montreal. The legislation said the Minister "shall" grant a permit "if he considers that it is in the public interest". The majority said the Minister had determined that it was in the public interest to grant the permit when the Minister promised the Center that it would receive the modified permit, endorsed the fundraising campaign, and continued to fund the short-term care services despite the mismatch between those services and the Center's permit.²⁶⁷ Any decision to reverse that determination was groundless and inconsistent with the Minister's subsequent behaviour – the logical inference of which was that the Minister believes the granting of the permit was in the public interest.²⁶⁸ The majority preferred this approach over the Court of Appeal public law estoppel analysis: "Although I agree with the Court of Appeal that the Minister is bound to issue the Center the promised permit, I do not think that the proper basis for this order is the application of public law promissory estoppel."²⁶⁹

The minority also agreed the appeal should be dismissed and the Minister should issue the promised permit. However, the minority preferred a different analysis than the majority. Binnie J., with whom McLachlin C.J. agreed, ruled the Minister's decision to repudiate the promise to issue a modified permit patently unreasonable²⁷⁰ and procedurally unfair.²⁷¹ The minority went on to say

²⁶⁶ The majority comprised Bastarache, L'Heureux-Dube, Gonthier, Iacobucci and Major JJ; Binnie J. and McLachlin C.J.C. formed the minority.

²⁶⁷ *Ibid.* at para. 100.

²⁶⁸ *Ibid.* at paras. 109-110.

²⁶⁹ *Ibid.* at para. 90.

²⁷⁰ *Ibid.* at paras. 64-64.

that there was only one option available to the Minister that was not patently unreasonable – that is to issue the modified permit.²⁷² Rather than send the decision back to the Minister to be reconsidered in the light of the decision – which would “have an air of unreality” – the minority agreed the Minister should be ordered to issue the modified permit.

The minority also determined the doctrine of public law estoppel was not available on the facts of the case.²⁷³ Binnie J. said the estoppel may be available against a public authority, including a Minister, “in narrow circumstances”.²⁷⁴ He did not explicitly identify what such narrow circumstances were although he did make some general comments about when the doctrine may need to yield to an overriding public interest:²⁷⁵

However, this is not a private law case. Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text. As stated in *St. Ann's Island Shooting & Fishing Club Ltd. v. R.*: “there can be no estoppel in the face of an *express* provision of a statute” (emphasis added). See also *R. v. Dominion of Canada Postage Stamp Vending Co.*

He said the cases where estoppel had been applied “generally deal with lesser powers or a narrower discretion at a lower level of officialdom”,²⁷⁶ “were matter of form not substance and the statute

²⁷¹ *Ibid.* at paras. 18-21. The minority said any entitlement to procedural fairness this arose irrespective of the Minister's assurances. It said it arose because the Center was requested modifications to its permit. It relied on the principle *Cardinal* that public authority making an administrative decision which is not of a legislative nature and which affect the rights, privileges or interests of an individual owe a duty of procedural fairness. The Court said it was not necessary to rely on the doctrine of legitimate expectation (which was limited to procedural relief) when the Minister already owed the Center to act in accordance with the rules of procedural fairness. *Ibid.* at para. 38.

²⁷² *Ibid.* at para. 67.

²⁷³ *Ibid.* at para. 51.

²⁷⁴ Binnie J. said a form of estoppel had already been applied in a range of Canadian cases: *Québec (Sous-ministre du Revenu) c. Transport Lessard (1976) Ltée*, [1985] R.D.J. 502, [1985] R.D.F.Q. 191 (Que. C.A.), *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 73 D.L.R. (3d) 18 (Ont. C.A.), *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*, 1994 1 S.C.R. 80, (S.C.C.), and *Aurchem Exploration Ltd. v. Canada* (1992), 91 D.L.R. (4th) 710, (Fed. T.D.). He also relied on its (limited) application in England and the United States: *Mount Sinai*, *supra* note 265 at paras. 40-44.

²⁷⁵ *Mount Sinai*, *supra* note 265. 47 [citations omitted].

²⁷⁶ *Ibid.* at para. 49.

itself contemplated the possibility of waiver”²⁷⁷ and “none of the cases was the statutory power of decision framed in broad policy terms”²⁷⁸ as in the present case. He cautioned that “[t]here is a public law dimension to the law of estoppel which must be sensitive to the factual and legal context”.²⁷⁹ The primary considerations in the present case which weighed against estoppel were the wording of the statute and the status of the decision-maker.²⁸⁰ As to the requirements of estoppel (in the event that the doctrine was available), the minority implicitly endorsed the criteria relied on by the Court of Appeal. The Court of Appeal had adopted the private law definition of promissory estoppel provided by Sopinka J. in *Maracle v. Travellers Indemnity Co. of Canada*.²⁸¹

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position. ... [T]he promise must be unambiguous but could be inferred from circumstances.

Binnie J. agreed with the Court of Appeal that these requirements were satisfied in this case – albeit that this was not relevant because as a general proposition the doctrine was not available in this case.²⁸²

Binnie J. also considered the expansion of legitimate expectation under English law in *Coughlan*. He firmly rejected the application of such an approach in Canada. Affirming that, in Canada, the doctrine of legitimate expectations is limited to procedural relief, he reasoned that “the

²⁷⁷ *Ibid.* at para. 49.

²⁷⁸ *Ibid.* at para. 49.

²⁷⁹ *Ibid.* at para. 51.

²⁸⁰ *Ibid.* at para. 51.

²⁸¹ *Supra* note 20 at 57.

²⁸² Binnie J said:

Successive Ministers made clear and specific representations that were intended to be acted on, and were in fact acted upon by the respondents. Ministers encouraged the new mix of short- and long-term beds which they knew would impact the legal relationship, *i.e.*, the respondents’ compliance with the existing permit, and the resulting need for permit modifications. Assurances were given with respect to the issuance of a modified permit. If the Minister is allowed to reverse his promise of a modified permit after the respondents had made changes to their hospital operations, including the fund raising campaign and the move to Montreal, the respondents say they would have acted on the Minister’s promises to their detriment.

Ibid. at para. 46.

decisions of the English courts and other courts that give effect to *substantive* legitimate expectations must be read with due regard to the differences in Canadian Law”.²⁸³ As Binnie J. notes, “Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation”.²⁸⁴ Under Canadian case law, he continues, “the availability and content of procedural fairness is generally driven by the nature of the applicant’s interest and the nature of the power exercised by the public authority in relation to that interest”.²⁸⁵ On the other hand, the doctrine of legitimate expectations “looks to the *conduct* of the public authority in the exercise of that power”.²⁸⁶

The Supreme Court’s reluctance to apply estoppel in public law cases therefore stems from its strong conviction against substantive benefits in judicial review and – in particular – the rejection of the substantive protection of expectations. Despite these views, it is curious that the Court was prepared to grant relief for review for abuse of discretion (under a high degree of deference) when, in reality, the determination of the unreasonableness was almost entirely related to the change of position by the government and the consequences for those affected.

A similar approach can be seen in the Supreme Court’s recent decision in *Canadian Union of Public Employees v. Ontario (Minister of Labour)*.²⁸⁷ This case was a broad challenge to appointments by the Minister to arbitration tribunals considering hospital employment disputes. The legislation provided that if the parties failed to agree on a mutually acceptable arbitrator, a three-person tribunal was convened; two members were appointed by the parties and, if the parties could not agree, the third was appointed by the Minister. For some time, a practice developed that the Minister would appoint from a list of arbitrators with expertise acceptable to both hospital employers and unions (the legislation allowed a discretionary power to develop such a list). However, in the course of reforming the legislation, the provincial government foreshadowed a move to appointing

²⁸³ *Ibid.* at para. 37.

²⁸⁴ *Ibid.* at para. 28.

²⁸⁵ *Ibid.* at para. 29.

²⁸⁶ *Ibid.* at para. 29. He endorsed the comments of Sopinka J. in *Canada Assistance Plan* as to the appropriate role of legitimate expectation in Canada:

[T]he doctrine of legitimate expectation [is] “an *extension* of the rules of natural justice and procedural fairness” which may afford “a party affected by the decision of a public official an opportunity to make representations *in circumstances in which there otherwise would be no such opportunity*”.

²⁸⁷ [2003] S.C.J. No. 28 [C.U.P.E.].

arbitrators such as judges and academics with "expertise in labour relations". After concerns were raised, such legislative change was abandoned with the Minister announcing a return to a "sector-based system of appointing arbitrators". Despite indications that any change had been abandoned and the status quo would remain, soon after the (successor) Minister appointed four retired judges to arbitration panels rather than appointing from the industry-acceptable list of arbitrators. The move was welcomed by the hospital employers, but not the unions. The unions brought a general challenge to the new appointment approach. Ultimately, a majority of the Supreme Court upheld the challenge to the new method of appointment.²⁸⁸ The majority's approach touched on issues of legitimate expectation and, although any claim on this basis was rejected, the later finding that the decision was patently unreasonable seemed to be informed by estoppel type principles.

Binnie J., for the majority, considered whether the previous practice or the assurance of the maintenance of the status quo created a legitimate expectation of some kind. He ruled the evidence of both was "equivocal". He said the reality was that the purported past practice of appointing solely from the industry-acceptable list was variable. Similarly, while the legislative change to appointments from the industry-acceptable list was abandoned, the Minister had not foreclosed on more general reforms to the system. Binnie J. said the evidence supporting the unions assertions of various agreements and "understandings" were "not clear and ... certainty not unqualified or unambiguous";²⁸⁹ in particular:

[T]he evidence does not establish a firm 'practice' in the past of appointing from the [industry-acceptable list] or proceeding by way of 'mutual agreement'. A general promise 'to continue under the existing system' where the reference to the system itself is ambiguous, and in any event was state by the Minister to be subject to reform ...

Although Binnie J. re-iterated the Canadian view that doctrine of legitimate expectation is "an extension of the rule of natural justice and procedural fairness" and if established the courts "may grant appropriate procedural remedies to response to the 'legitimate' expectation",²⁹⁰ somewhat surprisingly, he later referred to the threshold for relief under *Preston*. When discussing the equivocal nature of the agreements and undertakings, he said "[t]o bind the exercise of the Minister's discretion the evidence of a promise or undertaking by the Minister or on his behalf must generally

²⁸⁸ The majority comprised Gonthier, Iacobucci, Binnie, Arbour, LeBel and Deschamps JJ; the minority was McLachlin C.J. and Major and Bastarache JJ.

²⁸⁹ *C.U.P.E.*, *supra* note 287 at para. 145.

²⁹⁰ *Ibid.* at 131.

be such as, in a private law context, would be sufficiently certain and precise as to give rise to a claim for breach of contract or estoppel by representation".²⁹¹ This discussion of substantive protection seems inconsistent with Binnie J.'s rejection – when speaking for the minority in *Mount Sinai* – of the substantive doctrines of legitimate expectation and public law estoppel.

Despite Binnie J.'s rejection of any basis for founding a legitimate expectation, the Court went on to conclude that the decision was patently unreasonable because the Minister had substituted relevant criteria (previous labour relations experience and broad industry acceptability) for another criterion (prior judicial experience). Binnie J. noted the potential overlap: "In a preceding discussion, I concluded that the Minister was not required, by reason of the doctrine of legitimate expectation, to limit his appointments to the [industry-acceptable] list, but the question at this later stage is whether it was patently unreasonable of him, as a matter of law, not to do so".²⁹² He ruled the need for "labour relations expertise, independence and impartiality, reflected in broad acceptability," were key criteria that "went straight to the heart of the ... legislative scheme" and the appointment of a inexperienced and inexperienced arbitrators who were not seen as broadly acceptable to the labour relations community was "a defect in approach that [was] both immediate and obvious".²⁹³ Most interesting was the basis on which this legislative intent was determined. Binnie J. pointed to such a purpose having "been a constant refrain" of successive ministers to the legislature since the legislation was introduced and amended, was "reinforced by the evidence of practice and experience in the labour relations field", and was confirmed by the Minister when he wrote an arbitrators association about the scope of his mandate in this area.²⁹⁴

This approach raises the question whether the underlying rationale driving the majority's assessment is in fact based around the concept of legal certainty and is driven by concerns that the Minister had inappropriately breached expectations previously induced by that government. If this is so, it is again interesting to note the Canadian preference for determining such issues under the head

²⁹¹ *Ibid.* at para. 144, referring to Lord Templeman's speech in *Preston*, *supra* note 122.

²⁹² *Ibid.* at para. 168.

²⁹³ *Ibid.* at paras. 176-177.

²⁹⁴ *Ibid.* at paras. 177-183. The minority disagreed that such a factor was evident from the legislative scheme or surrounding circumstances and the consequential assessment that an omission to apply such a factor breached the high threshold for intervention under the patent unreasonableness standard; *ibid.* at paras. 30-37.

of review for abuse of discretion, rather than a separate doctrine of legitimate expectation (or estoppel).

In summary, the Canadian response to the question of substantive expectations has been to deal with issues under the guise of reasonableness, under its “pragmatic and functional” approach, albeit in a rather veiled manner. It is particularly interesting to note that in neither case did the Court need to resort to a level of deference below the patent unreasonableness (*i.e.*, *Wednesbury* irrationality) test. The Supreme Court has preferred this approach over the separate doctrine of legitimate expectation – which is a much narrower and strictly procedural role in Canada.

C The different doctrines – a discussion

The examination of the existing body of case-law exposes an undulating history for estoppel and substantive legitimate expectation. While some cases have embraced legal certainty, others have expressed strong concerns about the amenability of legal certainty to public law situations. Equally, the doctrinal frameworks applied throughout have been fickle, and no clear, coherent model has evolved. The courts have addressed estoppel and expectation issues under various different rubrics: from public law estoppel to substantive legitimate expectation, along with more general assessments under the labels such as reasonableness, substantive fairness and “abuse of power”. However, in my view, the similarities between the different doctrines which have been used to protect expectations on a substantive basis and means the ultimate choice of doctrine is largely immaterial.

The case-law highlights three main approaches. The first is the doctrine of estoppel, recently rejected by the House of Lords because of its private law origins and apparent inflexibility. The latter two are both “made in public law” frameworks: the overall evaluation and justificatory approaches.²⁹⁵ The labels I have adopted are not the same names attributed to the various tests the courts have applied but, in my view, the methods adopted by the courts can sensibly be grouped under those two approaches. I begin by outlining the essential elements and methods in each framework before discussing the suitability of each approach.

First, public law estoppel. Broadly speaking, as outlined in Chapter 2, the following elements are required:

²⁹⁵

I have borrowed the term “overall evaluation” from Philip A. Joseph, “The Demise of *Ultra vires* – Judicial Review in the New Zealand Courts” [2001] Pub. L. 354 at 371 [Joseph, “The Demise”].

- (a) A representation of a particular state of affairs or promise.
- (b) The representee detrimentally relies on the representation.
- (c) Reneging on the representation is unconscionable or inequitable:

I have expressed the public law estoppel element in the simply form because this seems consistent with both the specific application of estoppel by the courts in public law cases and the private law doctrine of estoppel from which it is derived.

Secondly, overall evaluation. This framework connotes the idea that the public body's actions are assessed on a global basis against some sort of reasonableness, fairness, or justice standard. This type of method can be seen in the range of different approaches. Most obviously in the context of the legitimate expectation, it is found in the approach adopted by the English Court of Appeal in *Coughlan* and later endorsed by the House of Lords in *Reprotech*. In summary, the elements are:

- (a) A situation where substantive protection is appropriate (such as where the expectation is confined to one person or a few people, giving an unqualified promise or representation the character of contract).
- (b) A policy change.
- (c) Resultant unfairness (*i.e.*, an abuse of power).

The overall evaluation approach need not have grown out of the concept of legitimate expectations for it to be able to recognise the importance of legal certainty and to protect substantive expectations. For example, under a sliding threshold of review for abuse of discretion, lower standards than *Wednesbury* unreasonableness, irrationality, or patent unreasonableness allow for the overall evaluation of a public body's actions and the degree to which it deals with any expectations it has created. It is possible that one of the grounds for justifying an increased level of scrutiny of a public body's action could be where the public body has induced of an expectation which it later seeks to depart from. A failure to sufficiently provide for previous expectations is more likely to fall foul of a pure reasonableness standard such as the one proposed by Lord Cooke.²⁹⁶ Alternatively,

²⁹⁶

See note 559 below.

under the pragmatic and functional approach applied by the Canadian courts, the previous inducements of expectations could be a factor which suggests a lower level of deference be applied, lowering the standard from the usual patent unreasonable was standard to reasonableness *simpliciter*.²⁹⁷ The overall evaluation approach is also evident in the "substantive fairness" jurisprudence applied by the New Zealand courts.²⁹⁸ Like the abuse of power test in *Coughlan*, the courts' enquiry is whether the general actions of the public body are substantively unfair. While substantive unfairness need not be grounded in breaches of expectations, some of the cases which have suggested the application of the doctrine have involved breaches of previous assurances by the public body.

Ultimately, the essential commonality in this legal method is broad, unstructured assessment of a public body's action against general standards of (substantive) propriety, fairness or justice. The similarity with a (properly applied) test of public law estoppel is therefore obvious. The "unconscionability" test has the same flavour as the overall evaluation approach because, in reality, it envisages a broad, equitable assessment of the circumstances in which the representation or assurance was made.

Finally, there is the justificatory approach. Again, this test can be expressed in terms of a general test applicable to the reviewability of all types of situations or can be tailored to situations of expectations. As a general approach, the elements of proportionality (or, as described by Joseph, constitutional review²⁹⁹) are as follows:³⁰⁰

- (a) A *prima facie* violation of private interests in order to obtain a desired end.
- (b) An assessment of how necessary the measure was for obtaining the desired end.
- (c) An assessment of how suitable it was for achieving the end.

²⁹⁷ Of course, the recent decisions of the Supreme Court suggest it may not be necessary to lower the standard from patent unreasonableness to reasonable *simpliciter* for a decision to be impugned because it failed to respect previously induced expectations. See text accompanying note 562 below and Chapter 3, Section B, Part III above.

²⁹⁸ See Chapter 3, Section B, Part II above.

²⁹⁹ Joseph, "The Demise", *supra* note 295.

³⁰⁰ Craig, *Administrative Law*, *supra* note 64 at 591 and Jeffrey Jowell and Anthony Lester, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1988] P.L. 368 at 375 [Jowell & Lester, "Beyond *Wednesbury*"].

- (d) An assessment of whether the measure imposed excessive burdens on the applicant.

Schönberg also suggests the proportionality approach could be specifically tailored to legitimate expectation cases by modifying the present *Coughlan* test:³⁰¹

[O]nce it is established that a person holds a reasonable expectation, then the court will have the task of weighing the requirements of substantive fairness against any overriding interest relied upon for taking an action which will disappoint the expectation. ... [The court] will only intervene if there is a *significant* in favour of the individual's expectations.

Under both formulations, the essential feature is the requirement for a reasoned justification for not honouring the expectation. Once a *prima facie* case is established, e.g., a breach of a reasonable or legitimate expectation, the burden falls on the administration to justify the breach or burden on the individual. Craig and Schönberg consider proportionality imposes a "more precise, structured test of review".³⁰² Ultimately, Craig says:³⁰³

It would be perfectly possible to employ a more searching form of scrutiny that the traditional *Wednesbury*, without thereby embracing a principle of review expressed in terms of general substantive fairness. Proportionality entails just such form of scrutiny.

He argues that requiring such a "reasoned justification", both by the particular body when justifying the measure and the courts when overturning a measure, would be beneficial.³⁰⁴

This approach has not had the same degree of explicit application as the other two approaches. However, to a certain degree, the justificatory approach can be seen in the public law estoppel cases. If estoppel is treated as being circumscribed by any countervailing public interest, as was suggested by Lord Denning in *Liverpool Taxis* and *Laker Airways* and Mason C.J. in *Quin*. It is also the approach recommended by Thomson in his discussion of public law estoppel.³⁰⁵ Of course, it may not be necessary to treat the countervailing public interest approach as limiting the application of estoppel or circumscribing its application. The broad framework of estoppel contemplates the incorporation of countervailing factors within the broad unconscionability assessment.

³⁰¹ Schönberg, *supra* note 2 at 154. See also Craig & Schönberg, *supra* note 311 at 699.

³⁰² Craig, *Administrative Law*, *supra* note 64 at 700.

³⁰³ *Ibid.* at 621.

³⁰⁴ *Ibid.* at 622.

³⁰⁵ Thomson, *supra* note 7.

Either explicitly or implicitly, all three doctrinal frameworks are evident from the courts treatment of expectations. Indeed, there are strong commonalities between all three approaches. In particular, public estoppel contains elements of both other approaches and, strictly speaking, could sit comfortably within either rubric. It is therefore quite surprising that the House of Lords rejected public law estoppel in favour of *Coughlan* substantive legitimate expectation.

The House of Lords rejected estoppel partly on the basis that its results “did not give universal satisfaction”.³⁰⁶ Similarly, Wild J. in *Challis* described estoppel as “unsuited” to public law. A common theme in both cases was that resort to estoppel was unnecessary because the legitimate expectation has now developed to fill the previous void in public law. Lord Hoffman in *Reprotech* spoke of the time for public law “to stand upon its own two feet”.³⁰⁷ Wild J. in *Challis* suggested that “public law no longer needs to lean upon the “crutch” of the private law remedy of estoppel”.³⁰⁸ In addition, concerns were raised that estoppel was overly rigid and lacked the flexibility of legitimate expectation.³⁰⁹ Wild J. in *Challis* expressed concern that estoppel would bind public bodies to *ultra vires* representations and lacked the flexibility to balance between expectations and the public interest.³¹⁰

Individual rights and expectations must be balanced against the public interest. The public law remedy of breach of legitimate expectation allows that balancing to occur in a manner that the private law remedy of estoppel does not.

In my view, though, these criticisms are unduly harsh, particularly when the flexible nature of the doctrine of estoppel in private law is taken into account. Part of the problem appears to arise because the courts themselves have applied the elements of estoppel in a rigid fashion to public law cases; they have lost sight of the broad and flexible unconscionability test originally contemplated by Lord Denning when he developed the doctrine and that continues to be applied by the courts in private law today. Any problematic rigidity with the approach seems to be more a problem of application, not framework. Further, the “unconscionability” test has the same flavour as the overall evaluation approach adopted in *Coughlan*. The rejection of estoppel therefore seems to be more an

³⁰⁶ *Reprotech*, *supra* note 98 at para. 35.

³⁰⁷ *Ibid.* at para. 35.

³⁰⁸ *Challis*, *supra* note 245 at para. 105.

³⁰⁹ See, for example, Dyson J.’s comments in *R. v. Leicester City Council ex parte Powergen U.K. Ltd* J.P.L. 629 at 637.

³¹⁰ *Challis*, *supra* note 245 at para. 105.

issue to with its non-public law origins and the semantics, rather than any strong objection to the method of analysis.

The “abuse of power” framework itself has not been accepted with universal approval – even by those that support the recognition of expectations. Craig and Schönberg criticize it as “somewhat lacking in precision” and suggest the abuse of power concept does “not, in and of itself, provide a criterion for deciding whether the reasons advanced by the public authority are sufficient, nor does it furnish us with an unequivocal guide as to the standard by which the court will judge the sufficiency of those reasons”.³¹¹ Similarly, Stewart contends the test falls to set out a “solid and sustainable ground of review ... in clear fashion” and is “vague and uncertain”.³¹² He argues that the approach “replac[es] unstable bureaucratic decision-making with unstable judicial ‘legislation’ [n]either [of which] furthers the cause of legal certainty and the rule of law”.³¹³ Craig and Schönberg suggest three other possible frameworks or, alternatively, a refinement of the *Coughlan* test. Two of their alternatives are, in reality, simply alternative formulations of the abuse of power test or overall evaluation approach. That is, “the more intense application of the *Wednesbury* test” similar to, but to a lesser degree, that proposed in cases involving human rights,³¹⁴ or Lord Cooke’s reformulation of the *Wednesbury* test in *I.T.F.* (“whether the decision in question was one which a reasonable authority could reach”).³¹⁵ Their third suggestion – and their favoured approach – is the proportionality test.

If the abuse of power test remains though, they suggest it should be refined – effectively introducing a similar balancing process into the *Coughlan* test. Drawing on the experience in European Community law,³¹⁶ they suggest the courts should only intervene if there is a significant imbalance between the public and private interests at stake. That is, cases where there is only a trivial imbalance will not succeed. While still accepting this does not fully answer the imprecision, they say this refinement strikes a more appropriate balance between administrative autonomy and

³¹¹ Paul Craig & Søren Schönberg, “Substantive Legitimate Expectations and *Coughlan*” [2000] Pub. L. 684 [Craig & Schönberg, “*Coughlan*”].

³¹² Stewart, *supra* note 67 at 633, 635.

³¹³ *Ibid.* at 633.

³¹⁴ Craig & Schönberg, “*Coughlan*”, *supra* note 311 at 700.

³¹⁵ *Ibid.* at 700, citing *R. v. Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd.* [1999] 1 All E.R. 129 at 157 [*I.T.F.*].

³¹⁶ Craig & Schönberg, “*Coughlan*”, *supra* note 311 at 700 and Schönberg, *supra* note 2 at 154.

judicial review.³¹⁷ Their suggested refinement would bring the overall evaluation and justificatory approaches closer together. The approach would not explicitly require the administration to justify the breach of expectation by demonstrating the outcome was “proportionate”. However, it still envisages a balancing process where intervention is only mandated when there is a “significant imbalance” between private and public interests (as opposed to a “disproportionate” between those interests).

There is some value in this suggested refinement, although it should not be overstated. While providing a stronger framework for analysing possible unfairness, the mechanistic balancing approach suggested by Craig and Schönberg – either under their proposed proportionality test or refined abuse of power test – still has a degree of artificiality about it. Inevitably, the balancing of interests involves significant judicial discretion and may be difficult for administrators to predict the outcome of the balancing of interests by the courts. It may be simpler and no more deleterious to merely focus the inquiry, as the Court in *Coughlan* did, on whether the public body’s actions were fair. As Lawton L.J., once said, defining fairness, “[l]ike defining an elephant, ... is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise”.³¹⁸

At the end of the day, the minor differences between the doctrinal approaches are less significant than their commonalities. None of the approaches can avoid the more fundamental questions about whether an expectation is worthy of protection, the degree to which any countervailing interests are to be taken in account, and the need to endeavour to walk the fine line between protecting worthy protections without making judicial intervention either unpredictable or simply a matter of a substantive appeal on the merits. However, each of the approaches has the flexibility to accommodate these issues within their present framework. Against that backdrop, I now consider how compelling the basis for protection expectations is and the strength of the arguments against doing so in public law.

³¹⁷ Craig & Schönberg, “*Coughlan*”, *supra* note 311 at 701.

³¹⁸ *Maxwell v. Department of Trade and Industry* [1974] 2 All E.R. 122. He suggests the efforts to define what constitutes fairness has meant the word has acquired “the trappings of legalism” and encouraged administrators to be placed into “legal straitjackets”. He proposed asking simply whether the decision-maker acted fairly towards the plaintiff. Although the comments were directed at procedural fairness, the same could be said of substantive fairness. Similar sentiments are expressed by Lord Cooke in Cooke, “Simplicity”, *supra* note 5.

Chapter 4 The conceptual basis for protecting expectations

Before moving to a detailed assessment of the difficulties raised by protection of expectations in public law and questions of the appropriate framework for dealing with such issues, I step back and consider the philosophical justification for protecting expectations. It is out of this theory that the doctrines of estoppel and legitimate expectation have been born. I summarise the various manifestations of this theory that the law is already familiar with. Finally, I raise the issue of whether the principle of legal certainty is intended to be absolute and how it fits with competing interests.

A Legal certainty – the cornerstone of estoppel and substantive legitimate expectation

The theoretical justification for estoppel and substantive legitimate expectation is grounded in the concept of legal certainty. The desirability of legal certainty is found within broader legal concepts of liberty and the Rule of Law. It also reinforced by reliance theory and is consistent with promoting trust and confidence in the administration. The essence of legal certainty is the same regardless of where on the philosophical map it is found. Legal certainty connotes the ideal that a person be able to plan their lives conscious of the (legal) consequences that flow from their choices.

The Rule of Law is a broad, multifaceted principle. One of its key threads is the need for the law to sufficiently certain to allow people to plan accordingly. Hayek wrote:³¹⁹

... stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

One of the most powerful writers on this concept is Raz. He sees legal certainty as a critical component of the Rule of Law, that is, the principle, as he describes it in its broadest sense, that “people should obey the law and be ruled by it”.³²⁰ The corollary of the notion that people should

³¹⁹ Friedrich A. von Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 54.

³²⁰ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 212 [Raz]. Similarly, Dworkin identifies one conception of the Rule of Law – what he describes the “rule-book” conception of the Rule of Law: “[S]o far as possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all.” See Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard

obey the law is the notion that “the law must be capable of being obeyed”;³²¹ it must be “capable of guiding the behaviour of its subjects”.³²² Raz argues this translates into, amongst others, two important principles for the law: first, all laws should be prospective, open, and clear; and, secondly, laws should be relatively stable.³²³ Obviously, one cannot be guided by a retroactive law because it does not exist at the time of action. Likewise, if law is changed too frequently, the law cannot guide people in their short or long term planning: “[O]nly if the law is stable are people guided by their knowledge of the content of law”.³²⁴

The concept of legal certainty can also be seen as flowing from the concept of autonomy, liberty, or freedom. In his discussion of personal freedom and its relationship to the legal regulation by the state, Waldron says:³²⁵

[T]here is a deeper argument about freedom. Most of us accept that the state should carry out certain tasks associated with the pursuit of the common good In accepting that, we have to recognize that it may involve a certain amount of interference by the state and its officials in the running of our lives. ... Those constraints and interruptions are part of the price of the pursuit of the common good, and most people are prepared to put up with them. But they are prepared to put up with them only because they know, broadly speaking, where they stand. They know the occasions or sorts of occasions in which they can expect state interference, and they know roughly what they can do to minimize its disruptive impact.

Therefore a central element of autonomy or liberty is a person’s ability to plan their life conscious of the consequences that will flow from the actions they choose. In the context of law, the ability to make informed choices based on the likely consequences of those choices necessitates that the consequences of law be predictable and certain. Waldron explains that “[p]eople like to be able to plan their lives, to know what they can count on, to know what things they can do without inviting official intervention and what are the sort of things or situations that *will* call down the forces of the

University Press, 1985) at 11. The other conception of the Rule of Law which he refers to is the “rights” conception, that is, “the ideal of rule by an accurate public conception of individual rights”. Dworkin is more famous for his emphasis of his substantive rights-based theory of the Rule of Law. However, it is clear his theory presupposes, the formal rule of law theory but then expands on it.

³²¹ Raz, *supra* note 320 at 212.

³²² *Ibid.* at 214.

³²³ *Ibid.* at 214.

³²⁴ *Ibid.* at 215, note 5.

³²⁵ Jeremy Waldron, *The Law* (London: Routledge, 1990) at 49 [Waldron].

state upon them”.³²⁶ If those situations are known and predicable, then people can make informed decisions about how to act.³²⁷

[I]f at least we know the sort of circumstances in which [the state or its officials] are likely to interfere ... [t]hen we have some idea of what we have to do to avoid official disruption, and can plan accordingly. Or – if the interference is universal and unavoidable, like taxes say, or speed limits, or conscription – we can plan around it, taking it into account, like the cost of living or the possibility of rain.

Globerman and Schwindt describe this as the principle of “reckonability”; that is, “individuals should be able to predict the legal ramifications of their behaviour.”³²⁸ Oliver says “autonomy” is one of the five key values that underlie both public and private law.³²⁹ She contends autonomy – along with dignity, respect, status, and security – support the three “paramount values” of democracy, participation, and citizenship.

The importance of legal certainty to economic activity is identified by Weber, who contends it is essential for rational enterprise in a capitalist economy.³³⁰ Weber argues that “an economic system, especially of the modern type, could certainly not exist without a legal order”.³³¹ One of the central tenets of legal order in his view is “legal guaranty”. He says the “tempo of modern business communication requires a promptly and predictably functioning legal system” and the “universal predomination of the market consociation requires ... a legal system the functioning of which is *calculable* in accordance with rational rules”.³³² Similarly, Streit argues autonomy and legal certainty are central to economic activity. He says law “serve[s] to secure the autonomy of economic agents as a prerequisite of self-co-ordination on the basis of private contracts”.³³³ It is perhaps

³²⁶ *Ibid.* at 49.

³²⁷ *Ibid.* at 49.

³²⁸ S. Globerman & R. Schwindt, “The Economics of Retroactive Liability for Contaminated Sites” (1995) 29 U.B.C. L. Rev. 27 at 38 [Globerman & Schwindt].

³²⁹ Dawn Oliver, “The Underlying Values of Public and Private Law” in Forsyth, *Judicial Review*, *infra* note 453, 217 [Oliver, “Underlying Values”].

³³⁰ Max Weber, *Economy and society : an outline of interpretive sociology* ed. by Guenther Roth and Claus Wittich; trans. by Ephraim Fischhoff *et al* (Berkeley: University of California Press, 1978) at 336.

³³¹ *Ibid.* at 337.

³³² *Ibid.* at 337.

³³³ M.E. Streit, “Economic Order, Private Law and Public Policy” (1992) J.I.T.E. 675 at 678.

unsurprising therefore that calls for legal certainty are strong within private law and private law has, in part, driven its development in public law.

Looking at the issue in an slightly different way, the need for legal certainty can also be based in co-ordination and communicative theory. This seminal advocate of this approach is Habermas.³³⁴ He argues that behavioural expectations of individuals form the basis of “communicative action” and “action co-ordination”; if those behavioural expectations are destabilized then co-ordination problems result.³³⁵

[S]ocial interactions linked together in space and time are subject to conditions of double contingency. Actors expect each other in principle to be able to decide one way as well as the other. Thus every social order with relatively stable behavior patterns must rely on mechanisms of action coordination – in general, on influence and mutual understanding. Should coordination fail, anomic action sequences ensue that the actors themselves experience as problems.

Habermas goes on to argue that the intrinsic function of law is “the stabilization of behavioural expectations” and the contribution of political power to law is to “engender *legal certainty* that enables addressees of law to calculate the consequences of their own and others’ behavior”.³³⁶ There is some similarity between Habermas’ conception of the role of law and the Rule of Law theory based around the concept of autonomy – beyond the conclusion of about the importance of legal certainty. However, Habermas rejects moral or ethical respect for others as providing the foundation for personal autonomy. Instead, his starting point is the discourse principle, which he argues provides an impartial justification of norms of action, such as personal autonomy.³³⁷

³³⁴ Jürgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge: MIT Press, 1996) [Habermas]. Schönberg draws on Habermas’ theory in his argument for the recognition of legal certainty as a core concept in public law. He says:

[I]f one accept that law is a system which reinforces existing co-ordination, it follow that law should be certain, predictable, and applied consistently (with formal equality). There requirements are, despite their root in co-ordination and communicative theory, similar to those developed by Joseph Raz and other on the basis of autonomy.

Schönberg, *supra* note 2 at 24.

³³⁵ Habermas, *supra* note 335 at 139.

³³⁶ *Ibid.* at 143.

³³⁷ *Ibid.* at 108. Habermas argues: “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses”. *Ibid.* at 107.

The need for legal certainty can also be drawn from “reliance theory”.³³⁸ Under this theory, expectations should be protected because to do otherwise would inflict harm on individuals who rely on such expectations. Schönberg says that a utilitarian analysis suggests that preventable harm – in this case, the disappointment of induced reliance – should not be tolerated. Translating this into the public law context, “a public authority’s freedom to take action in the public interest is limited to the extent that it causes harm to particular individuals [and it is under a *prima facie* duty to act in such a way that the reliance will not be detrimental to the representee”.³³⁹ Schönberg, however, suggests reliance theory is too inflexible as a comprehensive justification for the protection of expectations. He says reliance theory – or, alternatively, the “preventable harm” principle – is both over- and under-inclusive because it fails to capture the balancing of individual harm and the broader public interest, which he sees as central to the debate about protecting expectations. Further, he says it fails to deal with cases not involving (demonstrable) reliance where a person’s expectations have been unfairly disappointed.³⁴⁰

The relationship between legal certainty and reliance theory is most apparent in contract law. Farnsworth suggests reliance theory provides the true basis for enforcing promises.³⁴¹ However, he notes that the law of contract gives primacy to *assent* or the act of the promise rather than the reliance. He rationalises this treatment by noting the relationship between reliance, promises, and expectations:³⁴²

Promising is an important activity because a promise affords the promisee a basis for planning. But a promise will be of little use as a basis for planning unless it can be relied upon, and protecting a promisee’s expectation is the most effective way of protecting a promisee’s reliance.

He concludes that assent simply acts as a surrogate for reliance. Even though reliance itself need not be proven in every case, reliance is the fundamental concept that underlies the law of contract.

³³⁸ Schönberg, *supra* note 2 at 9-12.

³³⁹ *Ibid.* at 10.

³⁴⁰ *Ibid.* at 11.

³⁴¹ E. Allan Farnsworth, *Farnsworth on Contracts*, 2nd ed. (New York: Aspen Law & Business, 1998) at c. 6 “A Surrogate for an Enigma”.

³⁴² *Ibid.* at 57. He suggests promisees may hesitate to rely on promises “out of fear that the burden of proving reliance would complicate or prevent enforcement” or “promisees may even feign or engage in wasteful reliance with a view to making legal sanctions available”. *Ibid.* at 57.

Similar comments apply to administrative law. Governmental assurances and policies are only valuable for individual planning if they are capable of being relied on. The two cannot be divorced. However, unlike contractual relations, the interests of others – particularly the broader public – come into play. Therefore, the act of making an assurance is not in itself sufficient to justify protection. Holding the administration to all assurances would come at the expense of the broader public interest.

Of course, individual planning is not a static process. This leads to the question of when interference with an individual's planning process becomes illegitimate. If a person is assured of a certain state of affairs but then, before they act on it, that assurance is withdrawn, then has their ability to plan been undermined? Take an every day example. During the week I am invited at a person's place for Saturday night dinner. If that person cancels that invitation, I am obviously disappointed because I was looking forward to that dinner and would have enjoyed it. I had also added it to my schedule for the week. But even if the invitation had formed part of my individual planning and I would suffer some *disappointment* as a result of its withdrawal, how serious is the withdrawal of the invitation? Only my hopes have been affected. I am still able to make alternative plans for Saturday night. Any effect on my individual planning is therefore negligible. However, if I had acted on the basis of the invitation, say, by cancelling other plans, buying new clothes or wine, *etc.*, somehow I would be more affronted by the cancellation of the invitation.

But what makes these two examples different? The key is *detrimental reliance* on the invitation or assurance. Reliance on an assurance makes it much harder for a person to alter their plans as a result of an assurance being reneged on. The eggs have already been scrambled. They cannot be now be poached. Philosophically, it does not seem to offend our sense of justice if the assurance reneged upon can be remedied and a person can be returned to the same (or similar) position as if the assurance had not been made. In cases where a person detrimentally relies on the assurance, they will suffer personal losses to return to the previous status quo – if indeed that is possible.

Therefore I do not share Schönberg's concerns about the inadequacy of reliance theory in providing a rationale for legal certainty. When dealing with the substantive protection of expectations, reliance is in fact a key foundation on which it is based. Even if reliance may not be an element in every case, this stems from the inadequacy of proving reliance in the individual cases. Of course, Schönberg's examination was broader than mine. He was seeking a comprehensive justification for all forms of protection of expectation: both procedural and substantive. My analysis is solely concerned with substantive expectations. It follows that "reliance theory" may provide an additional element specific to substantive protection of expectation. In addition, his concerns about

over-inclusiveness seem to prematurely deal with the relationship between a theoretically justified principle of legal certainty and other competing principles such as administrative flexibility. I prefer to deal with the question of administrative flexibility separately from the question of whether legal certainty is a principle deserving of some form of substantive protection or recognition.

The recognition of legal certainty can also be supported by the principles of good administration and the legitimacy of government. Not only is legal certainty beneficial for individuals, it is also beneficial to public bodies. The recognition of legal certainty can also be justified on the basis that it promotes trust confidence in public bodies and enhances administrative efficacy. Trust in government benefits public bodies and makes it easier for them to govern. However, citizens will only trust public bodies if they demonstrate that they are reliable.

The reliability of public bodies and officials seems to be captured by Oliver in her search for the common underlying values in both public and private law. She suggests the uniquely public law values might include "duties of selflessness, integrity, objectivity, accountability, openness, honesty and leadership".³⁴³ Schönberg argues that public bodies will be "perceived as legitimate authority" if they can be relied on to honour their assurances and representations.³⁴⁴ This leads to more efficacious administration because it "encourages individuals to participate in decision-making processes, to co-operate with administrative initiatives, and to comply with administrative regulations".³⁴⁵ It is not in the interests of administrators to be regarded as being untrustworthy. The process of administration entails regular and frequent interaction with citizens, particularly at more developed levels such as local government. Collaborative, rather than contested, administration is generally regarded as being more effective and efficient. Administrative reliability is central to this approach. Forsyth captures this point well: "Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long established practices."³⁴⁶

³⁴³ Oliver, "Underlying Values", *supra* note 329 at 217. She draws these values from the Nolan (now Wick) Committee on the principles of public life: U.K., H.C. "First Report of the Committee on Standards in Public Life", Cm 2850-1 (1995). Oliver would also add the protection of national security and efficiency and effectiveness in government.

³⁴⁴ Schönberg, *supra* note 2 at 25.

³⁴⁵ *Ibid.* at 25.

³⁴⁶ Christopher Forsyth, "Wednesbury protection of substantive legitimate expectations" [1997] Pub. L. 375 at 384.

In summary, the need for legal certainty is found in the principles of liberty, autonomy, and the Rule of Law. These principles are concerned with an individual's ability to plan their affairs conscious of the legal consequences that flow from them. As a substantive principle, it is also built on reliance theory and the avoidance of preventable harm to individuals. Further, the endorsement of legal certainty is good for the administration itself because it promotes trust and confidence in the administration, therefore allowing the administration to govern and engage with its constituency more effectively.

B Irrational expectations?

Before moving on, it is essential to note an important caveat – one that is implicit in the conceptual analysis and one that has an important effect on the rules applying to the protection of expectations. The creation of an expectation *per se* does not irresistibly lead to the conclusion that that expectation be protected. Earlier I discussed this in the context of reliance theory and the idea that detrimental reliance is an essential threshold for the protection. Similarly, in my view, for protection to be justified, reliance should also be reasonable.

Individual planning is not a mechanical process where outcomes are calculable after inputting conclusive variables. Nor though is it a entirely random process made without reference to risk or the probability of certain factors. For example, whether it will rain or not is never certain – therefore the decision to take an umbrella involves a degree of assessment about the risk of rain. Generally though, this decision is made on a rational basis, taking into account factors relevant to the risk of rain. We cannot demand absolute certainty from our weather forecasters. For obvious reasons, however, we are more likely to rely on the opinion of a weather forecaster than our neighbour over the road or a tarot card reader. We instinctively place greater weight on dependable types of information when planning our affairs. Accordingly, we are more dissatisfied – and consequentially more prejudiced – if more ostensibly more dependable information proves false. So too with the law. There are a range of situations which suggest the law is more or less dependable. From a specific and equivocal rule at one end to a broad discretionary power at the other end. The objective dependability of each varies. In my view, this does not mean the answer to the problem is that people should never rely on undependable law such as assurances – the point is that their ability to rationally plan is undermined if governmental assurances are never dependable and people often are faced with no other avenue for achieving greater dependability for the purpose of planning their affairs.

In the context of governmental assurances and policies, there may be cases where, after the thorough consideration of their proposed action, a clear, written assurance that they can proceed as they intend; alternatively, an assurance may take the form of a casual, flippant remark from a official like "I guess there wont be a problem if you go ahead", after only a cursory consideration of general proposed course of action. One is obviously more appropriate to base the planning of one's affairs on. The Rule of Law is not intended to be an excuse for fools. The call for greater certainty from government and the law is based on such certainty being necessary for people to rationally plan their affairs. Implicit is the notion that on reliance the information must also be rational – people cannot have it both ways. If they rely on information when it is not rational to do so then the expectations based on that information do not deserve to be protected. It follows that not all expectations need be protected – only those that are reasonably or legitimately formed. In my view, the significance of this factor should not be overlooked – it strikes at the core of the theoretical justification of legal certainty.

C The different manifestations of legal certainty

The principle of legal certainty can be found in different shapes and forms throughout the law. The most obvious manifestation of the principle of legal certainty is law's objection to retroactive or retrospective laws.³⁴⁷ Fuller says "taken by itself, ... a retroactive law is truly a monstrosity".³⁴⁸ Munzer says:³⁴⁹

³⁴⁷ The distinction between the terms "retroactive" and "retrospective" can be confusing. Often, the two are used interchangeably: see, for example, the speech of Lord Hope in *Wilson v. Secretary of State for Transport and Industry* [2003] U.K.H.L. 40 [*Wilson*]. However, others draw a distinction between the two. See, for example, Iacobucci J. in *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 at para. 39 said:

The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264 at pp. 268-69, has offered these concise definitions which I find helpful:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

Lord Rodger in *Wilson*, *ibid* at para. 188, offered a similar but slightly different interpretation said:

"[A] retroactive law will deprive a person of the opportunity to decide what to do with knowledge of the law that will be applied to him. This explains why retroactive laws are generally objectionable: We feel that a person is morally entitled to know in advance what legal character and consequences his acts have."

Retroactive laws take away an individual's ability to make an informed choice about their actions.

Blackstone's Commentaries capture this rationale in relation to criminal sanctions.³⁵⁰

There is still a more unreasonable method than this, which is called making of laws ex post facto; ... here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.

This principle is seen in the common law presumption against retroactivity or retrospectivity.³⁵¹ In *Secretary of State for Social Security v. Tunncliffe*, Staughton L.J. described the principle in the following terms:³⁵²

Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties – only prospectively, with effect from the date of commencement. Although such provisions are often referred to as "retrospective", Viscount Simonds rightly cast doubt on that description in *Attorney General v. Vernazza* [1960] A.C. 965 at 975.

³⁴⁸ Lon L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964) at 53 [Fuller]. He explains:

Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose.

³⁴⁹ S.R. Munzer, "Retroactive Law" (1977) 6 J. Legal Studies 373 at 391.

³⁵⁰ Sir William Blackstone, *Blackstone's Commentaries on the Laws of England* 19th ed., (London: Sweet, 1836) at 46.

³⁵¹ See by Roy Wilson and Brian Galpin, eds., *The interpretation of statutes*, 12th ed., (London: Sweet and Maxwell, 1962) at 215:

Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

Scarman J. said in *Carson v. Carson and Stoyek* [1964] 1 All E.R. 681 at 686 that this passage is "so frequently quoted with approval that it now enjoys itself almost judicial authority".

[T]he true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree-the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

The principle of legislative supremacy means the principle is limited to an interpretative principle which can be overridden by clear and precise language.

Actual retroactive laws, however, are not the only threat to a person's ability to plan their lives secure in the knowledge of the legal consequences. A person's autonomy or liberty can be undermined even if laws are changed on a prospective basis. A person may have planned their actions on the basis of the then law but then, during the course of undertaking those actions, the law is changed. If this occurs, there is no relationship between the person's choices and the legal consequences that flow from them – their planning becomes nugatory. This concept has been described as “apparent”³⁵³ or “secondary” retroactivity³⁵⁴ or, more generally, “retrospectivity”.³⁵⁵

As Staughton L.J. suggests, the concern about retroactivity or retrospectivity stands more sensibly as a question of degree. The abhorrence to retrospectivity is to be judged by the (in)ability of a person to be able to react to the change in the law and to alter their planned actions in the light of the altered legal consequences. Therefore, in the case of actual retrospective laws, the actions are complete and cannot be changed; the objection to this type of retrospectivity is therefore very strong. At the other end of the spectrum are laws which operate in a fully prospective fashion. These laws give people sufficient time to change their planned actions in complete freedom. The sting of retrospective laws therefore depends on the ability to adjust their planning to take account of the new laws and any costs they incur in doing so.

³⁵² [1991] 2 All E.R. 712, 724 [*Tunncliffe*]; recently endorsed by Lord Nicholls in *Wilson*, *supra* note 347. See also *Brosseau v. Alberta (Securities Commission)* [1989] 1 S.C.R. 301, *Maxwell v. Murphy* (1957) 96 C.L.R. 261, and *R. v. Poumako* [2000] 2 N.Z.L.R. 695.

³⁵³ Craig, *Administrative Law*, *supra* note 64 at 622.

³⁵⁴ *Bowen v. Georgetown University Hospital* 488 U.S. 204 (1988) at 219. Scalia J. explained “primary retroactivity” in terms of when a new law or rule “alter[s] the past legal consequences of past actions”. However, he considered a new law or rule “with exclusively future effect can unquestionably *affect* past transactions”, thereby making the transactions less desirable. He described this situation as “secondary retroactivity”.

³⁵⁵ See note 347 above.

Obviously though, life and the law cannot stand still forever. A person cannot insist that laws never change. As Fuller explains, “[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever”.³⁵⁶ Similarly, Craig recognises that while the moral arguments against actual retroactivity are “powerful and straightforward”, apparent retroactivity is “more problematic”;³⁵⁷ the state must have the ability to alter its policies for the future, “even though this may implications for the conduct of private parties which has been planned on the basis of the pre-existing legal regime”. I return to the question of how absolute the Rule of Law theory is and the balancing of it with other principles later.

The principle of legal certainty also underpins the doctrine of precedent applied by the judiciary when determining individual cases. As is well-known, in general terms, the doctrine of precedent is the body of rules providing guidelines about when courts are obliged to follow an earlier decision of another court and when they may depart from those decisions.³⁵⁸ The Latin name for the doctrine – *stare decisis* – means “the decision stands”.³⁵⁹ The doctrine requires that courts “adhere to precedents, and not ... unsettle things which are established”.³⁶⁰

The doctrine of precedent stands on top of, amongst others, the principle of legal certainty.³⁶¹ The classic conception of this doctrine was captured by Parke J. in 1823:³⁶²

³⁵⁶ Fuller, *supra* note 348 at 60.

³⁵⁷ Craig, *Administrative Law*, *supra* note 64 at 612.

³⁵⁸ Morag McDowell and Duncan Webb, *The New Zealand Legal System: structures, processes and legal theory* (Wellington: Butterworths, 1998) at para. 8.8.

³⁵⁹ *Butterworths New Zealand Law Dictionary*, s.v. “stare decisis”. The phrase “*stare decisis*” is a variation on the Latin phrases *stare rationibus decidendis* or *stare decisis et non quieta movere*.

³⁶⁰ *Black's Law Dictionary*, 6th ed., s.v. “stare decisis et non quieta movere”, referring to *Ballard County v. Kentucky County Debt Commission*, 290 Ky. 770 (1942).

³⁶¹ For a detailed analysis of the doctrine and its rationale, see E. W. Thomas, “A Critical Examination of the Doctrine of Precedent”, in Rick Bigwood, ed., *Legal Method in New Zealand: Essays and Commentaries* (Wellington: Butterworths, 2001) 141 [Thomas, “Doctrine of Precedent”]. Thomas suggests the following reasons are relied on to justify the doctrine:

[A]ssuring stability in society by promoting certainty and predictability in the law; protecting the interests of those who have relied on existing case-law; maintaining the legitimacy of the law and public confidence in the Courts; and achieving greater judicial efficiency.

Ibid. at 148. While not seeking to eradicate the doctrine, Thomas is a proponent of the “relaxation” the doctrine.

Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.

Therefore part of the rational behind consistency in judicial determination is “reckonability”.³⁶³ That is, like with other laws, a person ought to be able to predict with reasonable certainty how a dispute or case will be determined if the issue goes to court so that they can plan their affairs in the light of the probable legal consequences.

While the principle underlying the doctrine of precedent may be straight-forward, in reality the body of rules within the doctrine is more complex. The body of rules govern when courts are obliged to follow decisions of earlier courts (that is, when the decision is of a court higher – or, in some circumstances, at the same level – in the judicial hierarchy), the determination of whether the later case is materially identical to the earlier one (whether the later case is distinguishable on the facts), and the circumstances in which the court may depart from a point considered by a previous court regardless (whether the point forms part of the *ratio decidendi* of the case or is merely *obiter dictum*). One point of particular interest in this area for the principle of legal certainty is when courts may depart from previous decisions of the same court. Legal certainty principles were forefront in Lord Halsbury’s mind when delivering the House of Lords’ ruling in 1892 that the House was bound by its previous decisions:³⁶⁴

Of course I do not deny that cases of individual hardship may arise, and that there may be a current of opinion in the profession that such and such a judgement was erroneous; but what is the occasional interference with what is perhaps abstract justice, as compared with convenience – the disastrous inconvenience – of having each question subject to being re-argued and the dealings of mankind rendered doubtful be reasons of different decisions so that in truth and in fact there would be no real final Court of Appeal?

However, the rule against overruling its previous decisions was softened by the House of Lords when the House issued a practice direction allowing a limited ability to review previous decisions.³⁶⁵

³⁶² *Mirehouse v. Rennell* (1833), 1 Cl & Fin 527 at 546; 6 E.R. 1015 at 1023.

³⁶³ *Globerman & Schwindt*, *supra* note 328.

³⁶⁴ *London Street Tramways Co. Ltd. v. London City Council* [1898] A.C. 375 at 380.

³⁶⁵ *Practice Direction (Judicial Precedent)* [1966] 3 All E.R. 77.

Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The underlying rationale of legal certainty remains evident but the House also recognised that too rigid application of these principles could cause injustice and prevent the development of the law. Again, this theme is notable. The power to depart from previous decisions has been exercised sparingly.³⁶⁶ Similar approaches are adopted by the English Court of Appeal (both in its civil and criminal jurisdictions)³⁶⁷ and other appellate courts throughout the Commonwealth.³⁶⁸

Within the different areas of our law, legal certainty presently plays a significant role. As mentioned earlier, the law of contract is founded on the need for legal certainty as between private parties in their dealings with each other. Even the law of tort contains the elements of the principle of legal certainty – or, perhaps more properly described, reliance theory – where a duty of care may be imposed in negligence. For example, a duty of care may arise where a person assumes responsibility for a matter (such as the accuracy of a statement)³⁶⁹ or undertakes to do, or otherwise induces reliance on them doing, something that they later fail to do.³⁷⁰ In addition, the criminal law contains several developing principles which built on the legal certainty principle. For example, in some jurisdictions, such as Canada, the criminal law objects to laws which are excessively vague or overbroad because they do not give fair notice to citizens of what is prohibited or place any limits on

³⁶⁶ *Halsbury's Laws of England*, 4th ed., vol. 37, "Practice And Procedure" (London: Butterworths, 1980-) at para. 1241. Since the 1966 Practice Direction (until 2001) there were only 8 reported cases of the House unequivocally overruling a previous decision, either in whole or part, while declining to do so in 12 cases; see Thomas, "Doctrine of Precedent", *supra* note 361 at 144.

³⁶⁷ *R. v. Simpson* [2003] 3 All E.R. 531.

³⁶⁸ Canada: *Binus v. The Queen*, [1967] S.C.R. 594 and *Canada (Minister of Indian Affairs and Northern Development) v. Rainville* [1982] 2 S.C.R. 518; Australia: *Jones v. Commonwealth* (1987) 71 A.L.R. 497 at 498; New Zealand: *Collector of Customs v. Lawrence Publishing Co. Ltd.* [1986] 1 N.Z.L.R. 404; Privy Council: *Baker v. R.* [1975] 3 All E.R. 55.

³⁶⁹ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

³⁷⁰ *Stovin v. Wise* [1996] A.C. 923.

law enforcement discretion.³⁷¹ This is sometimes known as the void for vagueness doctrine but is applied by virtue of the fundamental justice protection in section 7 of the *Charter*. There is also a developing, but narrow, defence of officially induced error where a person reasonably relied on an erroneous legal opinion or advice from an official responsible for the enforcement of a particular law.³⁷²

D Legal certainty and the Rule of Law – absolute concepts?

Rule of Law theorists accept the degree to which the rules in the legal system satisfy the paragon's threads of the Rule of Law is a question of degree: "Some infringements are worse than others".³⁷³ Waldron suggests the threads of the Rule of Law "look attractive enough when they are expressed as slogans, but they prove difficult to apply in any straightforward way to the governing apparatus of modern society".³⁷⁴ Therefore, the report card of modern society may demonstrate a patchy record of attaining the high aspirations of the Rule of Law. The reality is that the Rule of Law is applied as a set of exemplar principles, not absolute concepts, and the extent to which the law lives up to these principles may be a matter of degree.³⁷⁵

This can be seen throughout all the various manifestations of legal certainty in the law. For example, the presumption against retrospectivity is a common law interpretative maxim and can be "overridden" by clear and precise legislation. Nor does the principle apply to merely procedural or evidential matters.³⁷⁶ In the case of actual retroactivity, Fuller accepts that giving retroactive effect to some laws in some situations may be "tolerable" and in some cases may actually be "essential to

³⁷¹ See Kent Roach, *Irwin Law Essentials of Canadian Law: Criminal Law*, 2nd ed. (Irwin Law: Toronto, 2000) (Chapter 2, A2(e)).

³⁷² *R. v. Cancoil Thermal Corp and Parkinson* (1986) 27 C.C.C. (3d) 295. This is an exception to the general rule that mistake of law is no defence – a general rule which, of course, is predicated on the law being sufficiently clear and certain. The defence seeks to remedy any deficiencies in the law by allowing reliance on official advice where the law is not so clear and certain.

³⁷³ Raz, *supra* note 320 at 215.

³⁷⁴ Waldron, *supra* note 325 at 52.

³⁷⁵ This has led to some critics questioning the Rule of Law. See, for example, Sir Ivor Jennings, *The Law and the Constitution* 5th ed., (London: University of London Press, 1959) at 42-62, mentioned in Sir William Wade & Christopher Forsyth, *Administrative Law*, 8th ed. (Oxford: University Press, 2000) at 21, note 5 [Wade].

³⁷⁶ *Blyth v. Blyth* [1966] A.C. 643.

advance the cause of legality".³⁷⁷ The threads which make up the Rule of Law and may need to be balanced against other interests. For example, in the context of legal certainty and the desirability of *ex ante* rules, Jowell recognises a tension: "the virtues of rules – their objective, even-handed features – are opposed to other administrative benefits, especially those of flexibility, individual treatment, and responsiveness".³⁷⁸ It is also true that legal certainty manifested in the doctrine of precedent is not an absolute concept. As discussed earlier, provision is made for final appellate courts to overrule their previous decisions.

It is the compatibility of the ideal – or slogan – of legal certainty within the framework of dynamic administration in the public interest on which the battle about estoppel and substantive legitimate expectation takes place. Can the ideal be protected in a meaningful way without violating the foundations of dynamic administration? The fact that there is a potential contest or need to reconcile these things together is difficult *does not* mean, as Waldron warns, the Rule of Law should be abandoned.³⁷⁹ Instead, he says we should recognize the ideal of the Rule of Law "has its costs, and we ought to be as clear as we can about why those costs ought to be borne".³⁸⁰ Similarly, in the administrative law context, Wade cautions against dismissing the Rule of Law (in the context of his discussion, manifested in the principle of legality) because the corresponding restrictions to be put on discretionary power by the courts are a matter of degree. In his view:

Faced with the fact that Parliament freely confers discretionary power with little regard to the dangers of abuse, the courts must attempt to strike a balance between the needs of fair and efficient administration and the need to protect the citizen against oppressive government. Here they must rely on their own judgement, sensing what is required by the interplay of forces in the constitution. The fact that this involves questions of degree ... is true only in the sense that every system of law must have its own standards for judging questions of abuse of discretionary power.

In the next chapter, I go on to consider the interplay between legal certainty, as a Rule of Law principle, with other competing principles within public law.

³⁷⁷ Fuller, *supra* note 348 at 53. He suggests retroactive law may be indispensable as a "curative measure" when things go wrong. In addition, retroactivity is implicit in the judicial resolution of disputes on the meaning of rules. *Ibid* at 55.

³⁷⁸ Jeffrey Jowell, "The Rule of Law Today" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (Oxford: Clarendon Press, 1994) 57 at 65.

³⁷⁹ Waldron, *supra* note 325 at 52.

³⁸⁰ *Ibid.* at 52.

Chapter 5 The arguments against protecting expectations in public law

Legal certainty, as a theory, is compelling. However, in reality, legal certainty in a substantive sense does not appear to sit comfortably with public law. After all public law is about government and, as the name suggests, central is a public body's ability to "govern" – that is, to make and administer laws, to control and exert influence and to exercise political authority. Change – the antithesis of legal certainty – is unavoidable. It is therefore no surprise that there is a vigorous debate about the amenability of legal certainty theory to public law.

In this chapter, I briefly introduce the present debate in administrative law about this issue and the respective opposing analyses about the appropriateness of legal certainty in the unique public law environment. I then thoroughly critique each of these objections to determine how impregnable the purported barriers to legal certainty in public law really are. My discussion is confined to substantive legal certainty, although much of the writing begins with procedural legitimate expectation and considers whether this ought to be extended to substantive protection.

A Legal certainty in public law – the present debate

Within the writing in this area, there are two obvious schools of thought. On the one hand, there are those who reject any role for estoppel and legitimate expectation in public law. On the other hand, there are those who are staunch advocates for the protection of expectations in a substantive sense and who support the doctrines of estoppel and substantive legitimate expectation. The views of both groups are diametrically opposed. Between the two extremes fall those who cautiously accept (limited) substantive protection of expectations in a narrow range of situations.

The objection to recognising estoppel and legitimate expectation can be seen in Elliott's writings.³⁸¹ He opposes any move away from *Wednesbury* "irrationality" as the proper standard of review for matters of substance.³⁸² Elliott argues that the move towards the substantive protection of expectations – particularly to the "abuse of power" approach developed by the English Court of

³⁸¹ Mark Elliott, "Coughlan: Substantive Protection of Legitimate Expectations Revisited" [2000] J.R. 27.

³⁸² *Ibid.* at paras. 13-16. The *Wednesbury* test is the famous test for "unreasonableness" or "irrationality" for *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1947] 2 All E.R. 680 [*Wednesbury*].

Appeal³⁸³ – is not supported by authority and is “inconsistent with the broader public law framework within which the law of legitimate expectation subsists”.³⁸⁴

A similar position is adopted by Poole.³⁸⁵ She is critical of the substantive protection of expectations and the expansion of the role of legitimate expectation, describing these moves as “unnecessary[,] inappropriate ... [and] problematic”.³⁸⁶ She says to “reinvent the doctrine of legitimate expectation as a mechanism for compelling the delivery of a substantive benefit gives new life to the old complaints of uncertainty and confusion, and requires the court to usurp the decision-maker’s powers when a case appears meritorious”.³⁸⁷ Poole is not troubled by the different labels under which the extension into the substantive domain takes place *e.g.*, substantive legitimate expectation, public (law) estoppel, or “substantive fairness”; she rejects all of these concepts across the board. While recognising the existence of “difficult cases” behind these developments, she is a strong advocate of the view that all of these concepts exceed the courts’ functional role. Poole recognises there is a choice between, on the one hand, having an “individual disadvantaged in order to preserve the wider (and competing) public interest and the ultimate right of the administration to determine substantive questions” and having, on the other hand, an “individual who has suffered the defeat of an expectation [having] that expectation upheld by the courts, overriding the original decision-maker”. She argues the former is the lesser of two evils.³⁸⁸ Poole accepts that her conclusion may appear “unduly harsh” but offers an alternative. She points to compensation (and its possible expansion from its tortious origins into a uniquely public law approach) as a possible means of ameliorating the effect of confining the protection of expectations to the procedural.³⁸⁹ Ultimately though she accepts there may be some cases not caught by any of the grounds of review or entitled to

³⁸³ See text accompanying note 126 above.

³⁸⁴ Mark Elliott, “Legitimate Expectation: The Substantive Dimension” [2000] C.L.J. 421 at para. 1.

³⁸⁵ Poole, *supra* note 6.

³⁸⁶ *Ibid.* at 426.

³⁸⁷ *Ibid.* at 432.

³⁸⁸ *Ibid.* at 440.

³⁸⁹ *Ibid.* at 446. Based on the development in New Zealand of (public law) compensation for breaches of rights under the *New Zealand Bill of Rights Act 1990*, she says:

[W]e may be beginning to develop a new approach to compensation. If... this type of compensation is one solely within the arena of public law, it may well be time to implement a mechanism to compensate for loss sustained as a result of incorrect or improper undertakings by those exercising public law powers.

Ibid. at 446.

compensation. She would see this as an acceptable price to pay for the wider public interest: “[a]ny exercise of public power must remain sufficiently flexible to accommodate the overriding nature of that power, for it is the public who those authorities serve and whose interest must ultimately prevail”.³⁹⁰

This conservative approach is also found in many of the doctrinal commentaries on this issue and in criticisms of cases which have been ready to apply estoppel and substantive legitimate expectation; see, for example, Crawford,³⁹¹ France,³⁹² and Stewart.³⁹³ Strong emphasis is placed on the primacy of administrative flexibility and administration in the public interest. Weight is also placed on the idea that such review undermines the functional role of the courts and breaches the concept of the separation of powers as the courts intervene in matters of substance. Generally though, these writings fail to develop these conceptual objections in any substantial way. Certainly, there is a general failure to contemplate the recognition of competing interests – such as legal certainty and individual fairness – and the absence of a robust assessment about this possibility weakens their position.

The alternative school of thought fully embraces the importance of protecting expectations in public law and argues there is no impediment in principle to the recognition of estoppel and legitimate expectation in public law. Two of its most vocal proponents are Craig and Schönberg. Separately,³⁹⁴ and together,³⁹⁵ they have argued that the protection of substantive legitimate

³⁹⁰ *Ibid.* at 446.

³⁹¹ Cohn Crawford, “Estoppel in public law — the final nail in the coffin?” (1982) 45 *The Modern Law Review* 87.

³⁹² France, *supra* note 111. France reviews the development of the general doctrine of legitimate expectation in England and New Zealand. His discussion of substantive concepts arising from the potential of what he describes as “the Denning gloss” (*i.e.*, the suggestion in *Liverpool Taxicabs* of a substantive protection of expectations in the absence of an overriding public interest). France’s position is balanced, highlighting the “real risk of unduly interfering with a decision-maker’s discretion”, but suggesting the “opportunities to impose a better standard of decision-making should not be missed”. He supports a cautious approach which “avoid the potential excesses of the concept”. *Ibid.* at 142-143.

³⁹³ Stewart, *supra* note 67.

³⁹⁴ Craig, *Administrative Law*, *supra* note 64 at c. 19, “Abuse of Discretion: Legitimate Expectations and Equality” and Schönberg, *supra* note 2. Craig makes similar arguments in P.P. Craig, “Legitimate Expectations: A Conceptual Analysis” (1992) 108 *L.Q.R.* 79, P.P. Craig, “Substantive Legitimate Expectations in Domestic and Community Law” (1996) *C.L.J.* 289 [Craig, “Domestic and Community Law”], and P.P. Craig “Substantive Legitimate Expectations and the Principles of

expectations is theoretically justified. Their views are echoed by a range of other commentators, such as Forsyth,³⁹⁶ Mullan,³⁹⁷ MacPherson,³⁹⁸ and Loutzenhiser.³⁹⁹

Craig grounds his argument on the concept of legal certainty and the Rule of Law, that is, in simple terms that “people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions”.⁴⁰⁰ He argues this principle is offended in cases where a person has planned their actions on the basis of a policy choice made by a public body and that policy choice is later altered by the public body – albeit on a prospective, rather than retrospective, basis.⁴⁰¹ Craig describes the situation as “problematic”: the arguments for protection in this case being “powerful and straightforward” but, at the same time, the “administration must obviously have the power to

Judicial Review” in M. Andenas. (ed) *English Public Law and the Common Law of Europe* (London, 1998).

395 They summarise their collective conceptual arguments in favour of the protection of legitimate expectation in their joint article: Craig & Schönberg, “*Coughlan*”, *supra* note 311.

396 Forsyth, “*Wednesbury*”, *supra* note 346. Forsyth cautiously accepts the possibility of substantive protection where procedural expectation is inadequate. He argues “the protection of the trust placed in statements of officials ... is of great importance”. *Ibid.* at 384.

397 David J. Mullan, “Canada Assistance Plan: denying legitimate expectation a fair start?” (1993) 7 Admin LR 269 [Mullan, “Canada Assistance Plan”] and D.J. Mullan “Legitimate expectation in Canadian public law” in *Contemporary law: Canada reports to the 1998 International Congress of Comparative Law* (Cowansville, Qc.: Yvon Blais, 1999) [Mullan, “Legitimate Expectation”]. Mullan says the Canadian Supreme Court “did the law of legitimate expectation a disservice” in *Re Canadian Assistance Plan (Canada)* [1991] 2 S.C.R. 525 and *Old St Boniface Residents Association v. Winnipeg (City)* [1990] 3 S.C.R. 170 when it narrowed the reach of legitimate expectation (Mullan, Canada Assistance Plan, *ibid* at 289). However, he concludes by saying “estoppel may still come to provide some room for a surreptitious insinuation into Canadian law of a substantive version of the doctrine” (Mullan, “Legitimate Expectation”, *ibid.* at 290).

398 Paula A. MacPherson, “The Legitimate Expectation Doctrine and Its Application to Administrative Policy” (1995) 9 Can. J. Admin. L. & Prac. 141.

399 Glen Loutzenhiser “Holding Revenue Canada to its Word: Estoppel in Tax Law” (1999) U.T.L.J. 127. Loutzenhiser’s examination is confined to the area of tax law. He recognises the that the presence of “important policy issues, such as the need to protect the treasury and to maintain the power of the legislature over the bureaucracy, can supersede the protection that might otherwise be available to a taxpayer harmed by reliance on an erroneous representation” but argues that “for one special type of representation, the advance income tax ruling, the need to protect the taxpayer and the Ruling process (for the benefit of taxpayers and Revenue Canada) outweighs the general rule that the Queen cannot be estopped by the actions of her servants”. *Ibid.* at 164.

400 Craig, *Administrative Law*, *supra* note 64 at 612; citing Raz, *The Authority of Law*, *supra* note 320.

401 Craig notes the distinction between “actual” and “apparent” retroactivity, suggesting reneging on assurances raises the issue of “apparent” retroactivity.

alter its policy for the future".⁴⁰² Craig also accepts the recognition of expectations based on particular representations of public bodies may create a clash between legal certainty and the principle of legality both in terms of the rule against public bodies fettering their discretion and the rule that a public body cannot act beyond its powers (*i.e.*, legality *per se*).⁴⁰³

Despite these countervailing interests, Craig argues administrative law should still protect substantive expectations. He argues any aversion to substantive legitimate expectation stems from the primacy given to the legality principle. However, he contends that this "initial conceptualisation is incomplete" and leads to a legal outcome which is "flawed" because it fails to take account of the principle of legal certainty.⁴⁰⁴ He goes on to argue that if both principles are factored in the "very realisation that there are two values at stake means that the denial of *any* doctrine of substantive legitimate expectations is no longer plausible".⁴⁰⁵ He points to the recognition of both conflicting interests in the European Community, where, he argues, in principle, there have not been difficulties in recognising the concept of substantive legitimate expectation.⁴⁰⁶ Craig also responds to the argument for absolute administrative flexibility; that is, the idea that government's ability to develop and change policies should never be limited. He says any limitation arising from estoppel and substantive legitimate expectation is only *temporal* not absolute.⁴⁰⁷ He also suggests there is no evidence that the recognition of substantive legitimate expectation in other legal systems has had any undue impact on the various administrations' freedom to develop policy.⁴⁰⁸

Craig identifies four different situations which he says may require different treatment:⁴⁰⁹

⁴⁰² Craig, *supra* note 64 at 612.

⁴⁰³ *Ibid.* at 612-613.

⁴⁰⁴ *Ibid.* at 615.

⁴⁰⁵ *Ibid.* at 616.

⁴⁰⁶ *Ibid.* at 617.

⁴⁰⁷ See text accompanying note 504 below.

⁴⁰⁸ *Ibid.* at 617.

⁴⁰⁹ *Ibid.* at 613. Compare with the four situations adopted by Schönberg for his analysis (Schönberg, *supra* note 2 at 14-15):

- (a) a public authority seeks to revoke a formal decision;
- (b) a public authority, explicitly or implicitly, represents that it will follow a certain procedure or policy in relations to a specific individual or ground and subsequently makes a decision which departs from the representation;

- (a) A general norm or policy choice which an individual has relied on has been replaced by a different policy choice.
- (b) A general norm or policy choice has been departed from in the circumstances of a particular choice.
- (c) There has been an individualized representation relied on by a person which the public body seeks to resile from in the light of a shift in general policy.
- (d) There has been an individualized representation which has been relied on; the public body then changes its mind and makes an individualized decision which is inconsistent with the original representation.

Craig says the fourth category is normally treated as the “strongest” calling for protection: an unequivocal representation to a particular person “carries a particular moral force”, holding the public body to the representation is less likely to have serious consequences for the administration as a whole.⁴¹⁰ By contrast, the first category is more problematic – clearly, it strikes at the heart of public governance and administrative flexibility. Craig suggests that although the different categories raise the same underlying problems, the principles of judicial review can be tailored to reflect the different needs of each type of case.

The work by Schönberg – one of Craig’s allies – is probably one of the most comprehensive analyses of legitimate expectation in both its procedural and substantive form.⁴¹¹ Confronting the initial conceptual question, Schönberg recognises at the outset the importance of the traditionally emphasized principles of “legality” and “administration in the public interest”. However, he argues these principles are not absolute; they may need to be balanced against requirements of morality or fairness.⁴¹² Like Craig, he draws out the need for legal certainty from within the Rule of Law. In his

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- (c) a public authority makes a general representation about the procedure or policy it will follow in relation to a certain type of decision, but subsequently departs from the procedure or policy in a particular case; and
 - (d) an authority departs from its general representation in the light of a shift in general procedural policy which has occurred between the initial representation and the decision.

⁴¹⁰ Craig, *Administrative Law*, *supra* note 64 at 614.

⁴¹¹ Schönberg, *supra* note 2.

⁴¹² *Ibid.* at 7.

view, the Rule of Law is based around autonomy.⁴¹³ For individuals to be autonomous, they must, at least, be able to plan ahead and therefore foresee with some degree of certainty the consequences of their actions.⁴¹⁴ In the administrative law context, often characterised by the conferring of wide-ranging, discretionary powers on public bodies, respect for representations made by public bodies and officials makes the exercise of discretion more predictable. In addition, he explains that the Rule of Law is also concerned with consistency or formal equality: that like cases be treated alike; if not, he argues, the law becomes arbitrary and therefore unpredictable and uncertain. The Rule of Law contemplates a degree of constancy in law; if law and policy changes too often and abruptly, individual planning becomes too difficult. Schönberg concludes that the normative justification for the legal protection of legitimate expectation is “very strong”. However, he recognises that it is “only one side of the equation” and must be “subject to the requirements of lawful government in the public interest”.⁴¹⁵

Schönberg reviews in detail the protection afforded to expectations in English, French, and European Community law.⁴¹⁶ He reaches three principle findings.⁴¹⁷ First, that there is a different emphasis on the protection of expectations in the three jurisdictions. E.C. law has little difficulty accepting that expectations deserve substantive protection. In contrast, English law traditionally recognises only procedural protection and the development of substantive protection has been “slow

⁴¹³ He also notes there is a range of other theories which also support the recognition of expectations and legal certainty. Reliance theory suggests preventable harm, such as when a person detrimentally relies on an assurance, should be avoided. Recognising legitimate expectations encourages administrative efficacy, part of the wider notion of good administration, which promotes trust in the administration. The present recognition of substantive legitimate expectations in European Community law makes a strong case for similar recognition in English law. There is a natural spill over or “osmosis” of legal principles and concepts into English law and harmonization of the two bodies of law is important to avoid “two speed justice”. Further, an economic efficiency argument can also be made for the recognition of legitimate expectations. The substantive protection of expectations would mean citizens could rely safely on representations of public bodies and knowing these expectations would be protected. Therefore the cost of information gathering would be reduced and a more efficient allocation of resources would occur. Schönberg, *supra* note 2 at 24-30.

⁴¹⁴ *Ibid.* at 12.

⁴¹⁵ *Ibid.* at 12.

⁴¹⁶ The framework he adopts separates the jurisprudence into five different categories: procedural protection of legitimate expectation, substantive protection of legitimate expectations – dealing separately with the revocation of decisions and informal administrative decisions, and compensatory protection of legitimate expectation – again dealing separately with the revocation of decisions and informal administrative decisions. *Ibid.* at 2.

⁴¹⁷ *Ibid.* at 237-239.

and difficult". French law has no explicit recognition of legitimate expectation, either procedural or substantive, and instead has preferred to compensate loss caused by reliance. Secondly, "the marked conceptual differences ... do not always lead to different outcomes in decided cases".⁴¹⁸ Thirdly, European Community law provides overall more protection of expectations than English and French law, although English and E.C. law have begun to converge.⁴¹⁹ He notes, however, that two important differences remain. English courts are still reluctant to intervene when expectations are disappointed by general changes of policy; E.C. courts are more willing to impose temporal limitations to reflect previous expectations. Further, English law compensatory principles are more narrow than E.C. law.

Overall Schönberg argues that while English law meets the conceptual requirements of fairness, Schönberg concludes it "does not protect expectations adequately and there is, therefore, a strong case for legal reform".⁴²⁰ His principle suggestion is that expectations cannot be adequately protected by a single legal principle and instead "a combination of procedural, substantive, and compensatory rules is required".⁴²¹ While Schönberg's broad and thorough analysis – particularly on a comparative basis – is very valuable, he is open to criticism that he is too quick to dismiss the conflicting conceptual arguments against the recognition of legal certainty.⁴²²

Between the polar views of the two main schools of thought, there is a possible middle group. There are some who do not object in principle to the substantive protection of expectations but argue for a very circumscribed role for the doctrines of estoppel and substantive legitimate expectation. For example, Wade adopts a rather conservative perspective like Elliott and Poole on substantive legitimate expectation – although he does not wholly reject the idea of substantive protection.

Wade is firmly of the view that estoppel and substantive legitimate expectation cannot interfere with other established principles.⁴²³ They "must give way where their application becomes

⁴¹⁸ *Ibid.* at 237.

⁴¹⁹ *Ibid.* at 238.

⁴²⁰ *Ibid.* at 239.

⁴²¹ *Ibid.* at 239.

⁴²² Mark Elliott, Book Review of *Legitimate Expectations in Administrative Law* by Søren Schönberg [2002] Pub. L. 591.

⁴²³ Wade, *supra* note 375 at 242 [Wade].

incompatible with the free and proper exercise of an authority's powers or the due performance of its duties in the public interest".⁴²⁴ He says the most obvious limitation on estoppel and substantive legitimate expectation is that they cannot be invoked to give a public body powers which it does not possess, that is, "no estoppel can legitimate action which is *ultra vires*".⁴²⁵ He accepts that where principles of justice are forced to give way to the principle of *ultra vires*, "hard cases naturally result".⁴²⁶ He suggests that the courts' endeavours to protect citizens against hardship has meant the courts have "strained the law and given doubtful decisions".⁴²⁷ He says the only acceptable solution is to "enforce the law but to compensate the person who suffered the loss by acting on a ruling from the ostensibly proper official".⁴²⁸ Wade says that estoppel cannot operate at the level of government policy: "[m]any people may be victims of political vicissitudes, and 'estoppel cannot be allowed to hinder the formation of government policy'".⁴²⁹ He recognises the strength of the demands of fairness, but says that those demands cannot be pressed to the point where they obstruct discretionary changes of government policy.⁴³⁰

Wade though does not absolutely condemn the intervention by the courts to impose legal certainty on a substantive basis. For example, he says a public body's duty to act "fairly and consistently" may allow the courts to condemn abuses of discretion which violate legal certainty under the rubric of "abuse of power", but in such cases, he says "there is no need to resort to the doctrine of estoppel".⁴³¹ Wade accepts though that estoppel can operate in minor matters of formality where no question of *ultra vires* arises.

Woolf & Jowell also suggest a moderate role for the substantive protection of expectations.⁴³² At a more philosophical level, their view is that judicial review standards must ultimately be justified by constitutional principles which govern the proper exercise of public power in a democracy; the most obvious principles being the principle of parliamentary supremacy and the

⁴²⁴ *Ibid.* at 242.

⁴²⁵ *Ibid.* at 242.

⁴²⁶ *Ibid.* at 242.

⁴²⁷ *Ibid.* at 243.

⁴²⁸ *Ibid.* at 343. Cf. Poole, *supra* note 6.

⁴²⁹ *Ibid.* at 244, quoting Lawton L.J. in *Laker Airways*, *supra* note 112 at 211.

⁴³⁰ *Ibid.* at 244.

⁴³¹ *Ibid.* at 371.

⁴³² de Smith, *supra* note 66. For further arguments by Jowell in favour of substantive review, see Jowell and Lester, "Beyond *Wednesbury*" *supra* note 300.

principle of the Rule of Law. In addition, they include the “less clearly identified” constitutional principles inherent in a democratic state such as political participation, equality of treatment and the freedom of expression. In their view, the Rule of Law requires “regularity, predictability, and certainty in government’s dealings with the public”.⁴³³ However, they question whether such a doctrine is appropriate in the public law setting where there is “a potential conflict between, on one hand, the value of legal certainty underlying the rule of law and, on the other hand, the principle of legality, which requires public bodies to conform to authorised powers”.⁴³⁴ They say estoppel and substantive legitimate expectation therefore needs to be circumscribed so to ensure that a public body cannot bind itself outside its authorised powers, except in cases of waiving procedural defects – as long as third parties are not affected. They recognise there is room for legal certainty to prevail over the need for flexibility: “[t]he potential antithesis between the object of the protection of legitimate expectation (legal certainty) and the object of the “no-fettering” doctrine (flexibility) may not, however, always be resolved in favour of the latter”.⁴³⁵ However, they do not prescribe a fixed approach and contemplate that a public body may still be able to change its policy despite a legitimate expectation.

B The objections to the recognition of legal certainty in public law

As can be seen, no-one seriously disputes that the concept of legal certainty is admirable and desirable. Instead, the contest is about whether it should have an *instrumental* role in a public law framework. That is, is it a value which deserves to stand along side – and, in many cases, compete with – other concepts such as legality, responsiveness, administrative flexibility, governance in the public interest, as so forth? The proponents of estoppel and substantive legitimate expectation say it is essential that legal certainty has an instrumental role in public law. They argue it is essential any recognition includes recognition in a substantive sense. The opponents – while not disputing its attractiveness – say it cannot undermine the other more important concepts that are central to public law. That is, its role is secondary and, in the case of conflict, it must yield to these more importance concepts. This contest demarcates the essential dispute about estoppel and

⁴³³ *Ibid.* at paras. 8-038 & 13-026.

⁴³⁴ *Ibid.* at paras. 13-026.

⁴³⁵ *Ibid.* at paras. 13-034.

substantive legitimate expectation. The manifestation of legal certainty in a substantive sense through these doctrines creates an apparent conflict with other public law concepts.⁴³⁶

Before moving to these specific conceptual contests, it is necessary to confront the broader distinct character of government and accordingly the public law framework. The manifestation of legal certainty in public law has, to a certain degree, been driven from the spill-over of concepts like estoppel from private law. However, in many respects, the two areas of law have a different character. The jurisprudential discussion of the Rule of Law was quite general and it presupposes the degree of compliance with the Rule of Law principles may vary according to the particular body of law. Public law generally has a different “flavour” than private law. For example there is a view that the interests driving administrators are different to private law players. Oliver suggests that private decision-makers are motivated by an underlying principle of altruism in their decision-making. In contrast, she suggests administrators are driven by duties of selflessness, integrity, objectivity, accountability, openness, honesty and leadership.⁴³⁷

It is also frequently argued that public law in public law decision-making is “polycentric”.⁴³⁸ Polycentrism is often referred to as one of the most significant distinguishing characteristics of a public law framework. Its genesis is often attributed to Fuller, but in his seminal article on the concept he says be derived to concept of the “polycentric” task from Polanyi.⁴³⁹ In simple terms, a polycentric (or alternatively, multi-faceted) decision or situation is one that has many centres. Fuller figuratively describes this type of situation or decision as a spider web:⁴⁴⁰

A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will create a different complicated pattern of tensions. This would certainly occur, for example, if the double pull caused one of them or more of the weaker strands to snap. This is a ‘polycentric’ situation because it is ‘many centred’ – each crossing of strands is a distinct centre for distributing tensions.

⁴³⁶ The manifestation of legal certainty in strictly procedural terms, *i.e.*, through the procedural protection of legitimate expectations, does not create such a harsh conflict and does not seem to raise the same strong objections.

⁴³⁷ Oliver, “Underlying Values”, *supra* note 329 at 217.

⁴³⁸ *Ibid.* at 251.

⁴³⁹ L.L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353 at 395 referring to Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (London: Routledge and Keagan Paul, 1951).

⁴⁴⁰ *Ibid.* at 395.

Fuller raised concerns about the amenability of polycentric situations to judicial adjudication. However, he acknowledged that polycentrism was often a matter of degree.⁴⁴¹

There are polycentric elements in almost all problems submitted to adjudication. A decision may act as a precedent, often an awkward one, in some situations not foreseen by the arbiter. ... In lesser measure, concealed polycentric elements are probably present in almost all problems solved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.

Fuller's comments were not necessarily specific to public law. There is no doubt though that many – if not most – public law or governance decisions have a large degree of polycentrism. This point is emphasised by Elias. She highlights the polycentric nature of judicial review, particularly with the fact that “judicial review requires consideration of all relevant matters and deliberation and reasoning rather than the exercise of a ‘naked preferences’”.⁴⁴² While she acknowledges that polycentrism necessitates a degree of caution in judicial intervention, she suggests that it “would be quite wrong for the ‘abstract rumination’ of polycentricity to be used to deter judicial review in public interest litigation”.⁴⁴³ In his discussion of legal certainty, Schønberg also specifically highlights the “certain tension between procedural and evidentiary constraints upon judicial adjudication and the polycentric nature of the principle of substantive legitimate expectations”.⁴⁴⁴ However, he suggests:⁴⁴⁵

Polycentrism is, at most, a cogent argument against judicial review in *particularly* complex cases where different policy arguments have to be weighed against a person's expectations. The adjudicatory difficulties which arise in such cases can to some extent be reflected in the intensity of review.

On a more specific level, the distinct nature of public law presents a number of possible objections to the recognition of legal certainty through estoppel and substantive legitimate

⁴⁴¹ *Ibid.* at 400.

⁴⁴² Sian Elias, “‘Hard Look’ and the Judicial Function” (1996) 4 Waikato L.R. 1 at 10 [Elias].

⁴⁴³ *Ibid.* at 13. She says:

Adjudication may not be ideal, but it is the best system we have yet devised for resolving disputes in the last resort and, until a better system merges, judicial intervention is essential in public interest litigation to provide a check against executive and legislative over-reaching and to maintain the rule of law.

⁴⁴⁴ Schønberg, *supra* note 2 at 160.

⁴⁴⁵ *Ibid.* at 161.

expectation. Many of these objections are evident from the earlier review of the academic debate. In summary, the objections are as follows:

- (a) The courts' supervisory framework under judicial review is defined by the pre-eminent concept of *ultra vires* or legality. Any shift away from this guiding principle – such as by recognising legal certainty as a core concept to be protected by the courts – is constitutionally unsound. In any event, the courts cannot condone illegality in any form. The desirability of legal certainty cannot require public bodies to act unlawfully or to maintain illegal positions.
- (b) The recognition of legal certainty through estoppel and substantive legitimate expectation requires that public bodies honour or otherwise recognise previous policies and undertakings thereby fettering their discretion. It is unlawful and unsound in principle for public bodies to fetter their discretion. It is critical that public bodies remain continually responsive. If public bodies fetter their discretion, a failure to do so involves abdicating an implicit component of the discretionary power delegated to them – the requirement that they make an individualised decision according to the merits of the case and the relevant public interest.
- (c) The administration's ability to govern is based around its right to develop and implement policies. This necessarily entails the right to change policies if they consider this is in the public interest. The administration, including its successors, must remain free to be able to make such policy changes. Legal certainty manifested in substantive terms through the doctrines of estoppel and substantive legitimate expectation constrains the ability of the administration to change policies because it may hold them to previous policies and undertakings. This fails to reflect the dynamics of governance and the ever-changing circumstances of the public interest.
- (d) The manifestation of legal certainty in substantive terms extends the functional role of the court and requires the court to adjudicate on matters of substance. The courts' functional role in judicial review (as opposed to appeals on the merits) is properly confined to matters of procedure. Any extension of its supervisory jurisdiction into substantive matters or the merits of cases usurps the role of the executive and undermines the separation of powers within the constitutional framework.

- (e) The recognition of legal certainty through the doctrine of estoppel and substantive legitimate expectation is likely to be ineffective. The recognition of these concepts further undermines, rather than enhances, the certainty or stability in the public law because of their inherent vagueness or uncertainty and the likely “chilling effect” these doctrines will have on the willingness of public bodies to make informal advice and policies available.
- (f) Expectations should not be protected where those expectations have no reasonable foundation. In particular, public law should not protect expectations where the regime provides a mechanism for those expectations to be “perfected” under law. Similarly, where public bodies or officials disclaim or caution against relying on assurances, public law should not protect expectations based on such representations.

These arguments are at the heart of the estoppel and substantive legitimate expectation controversy. The contested framework of judicial supervision of administrative discretion is central to the appropriateness of allowing estoppel or legitimate expectation to hold public bodies to previous representations, assurances or policies. I now consider each of these specific objections in more detail. In some cases, there is a degree of overlap between each of these arguments (and their rebuttal). As much as possible though, I have sought to try and group the arguments under the specific objections set out above.

C A critique of the specific objections

I *Legal certainty vs ultra vires: legality per se*

Those opposing estoppel and substantive legitimate expectation champion the *ultra vires* principle as central to judicial supervision of administrative discretion. Wade says “[t]he simple proposition that a public authority may not act outside its powers (*ultra vires*) might fitly be called the central principle of administrative law”.⁴⁴⁶ Any shift away from this guiding principle – such as by recognising legal certainty as a core concept to be protected by the courts – is constitutionally unsound. Roberts explains this argument:⁴⁴⁷

⁴⁴⁶ Wade, *supra* note 423 at 35.

⁴⁴⁷ Melanie Roberts, “Public law representations and substantive legitimate expectations” (2001) 64 Mod. L. Rev. 112 at 121 [Roberts]. It is worth noting though that Roberts herself is a proponent of the contrary view that estoppel and substantive legitimate expectations do not create such a problem.

The doctrine of *ultra vires* defines the boundaries between the legislature, the courts and the administration. If the courts were to dispense with the *ultra vires* doctrine this would entail a shift of power to the courts away from the legislature and the administration; the courts would be usurping Parliamentary Sovereignty.

In any event, the courts cannot condone illegality in any form. The desirability of legal certainty cannot require public bodies to act unlawfully or to maintain illegal positions.

In its narrow form, the *ultra vires* principle says a person to whom power has been granted may only be able to exercise that power within their designated area.⁴⁴⁸ That is, the principle is concerned first with the “boundaries” of administrative discretion. When Parliament delegates power to a public body or official, the court acts as a “check and balance” to ensure they do not act outside the bounds of the power that has been delegated. The narrow form of *ultra vires* is therefore primarily concerned with the jurisdiction of the executive to act and whether this jurisdiction has been exceeded.⁴⁴⁹

The broader form of *ultra vires* or legality goes further. It “imposes constraints upon the way in which the power given to the administrative agency [is] exercised”.⁴⁵⁰ As Oliver explains, “an authority will be regarded as acting *ultra vires* if in the course of doing or deciding to do something that is *intra vires* in the strict or narrow sense, it acts improperly or ‘unreasonably’ in various ways”.⁴⁵¹ She gives as examples disregard of the rules of natural justice, unfairness, taking into account irrelevant considerations, ignoring relevant considerations, bad faith, fettering discretion, attempting to raise taxation, interfering with the free exercise of individual liberties.⁴⁵²

The source of the “principles of good administration” and the theoretical basis for the courts’ insistence on adherence to those principles is, surprisingly, rather controversial. Put simply, there is an ongoing debate about whether those principles are derived from the (actual or presumed)

⁴⁴⁸ Craig, *Administrative Law*, *supra* note 64 at 5.

⁴⁴⁹ Dawn Oliver, “Is the *Ultra Vires* Rule the Basis of Judicial Review?” in Forsyth, *Judicial Review*, *infra* note 453, 3 at 4 [Oliver, “*Ultra vires* Rule”].

⁴⁵⁰ Craig, *Administrative Law*, *supra* note 64 at 5.

⁴⁵¹ Oliver, “*Ultra vires* Rule”, *supra* note 449 at 4.

⁴⁵² *Ibid.* at 4. Craig suggests the limitations are “the agency must comply with the rules of fair procedure, it must exercise its discretion to attain only proper and not improper purposes, it must act on relevant and not irrelevant considerations and it must not act unreasonably”. Craig, *Administrative Law*, *supra* note 64 at 6.

intention of Parliament or independently from the common law.⁴⁵³ The idea that the theoretical underpinnings of the courts' intervention in judicial review is solely confined to the narrow form of *ultra vires* – that is, the power of the courts comes solely from the specific legislative intent of Parliament – appears now to have little, if any, support.⁴⁵⁴ Instead, those relying on the parliamentary intention for the source of judicial supervisory power now base their argument on the general or presumed intention of Parliament. As Forsyth – a (modified) *ultra vires* proponent – describes it, this model justifies judicial intervention on the following basis:⁴⁵⁵

Unless Parliament clearly indicates otherwise, it is presumed to intend that decision-makers must apply the principles of good administration drawn from the common law as developed by the judges in making their decisions.

In contrast, the common law proponents say the judicial power to intervene comes – independent of parliamentary intention – from the common law itself.⁴⁵⁶

Unless Parliament clearly intends otherwise, the common law will require decision-makers to apply the principles of good administration as developed by judges in making their decisions.

The similarities between the two formulations are obvious. Forsyth suggests the debate is almost like the clash between the Big-endians and the Little-endians in Lilliput over the proper end at which to break a boiled egg;⁴⁵⁷ Allan suggests continued debate is “futile” because both lead to, as he would put it, the Rule of Law as developed by the courts.⁴⁵⁸ Although Forsyth made a strong plea for reconciliation, no doubt though the debate will continue.⁴⁵⁹ For present purposes, however, it is not essential to enter the fray and it is sufficient to concentrate on the principles of good

⁴⁵³ See Joseph, “The Demise”, *supra* note 295 and Christopher Forsyth, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) [Forsyth, *Judicial Review*].

⁴⁵⁴ Paul Craig, “Competing Models of Judicial Review” in Forsyth, *Judicial Review*, *supra* note 453, 373 at 375.

⁴⁵⁵ Christopher Forsyth, “Heat and Light: A Plea for Reconciliation” in Forsyth, *Judicial Review*, *supra* note 453, 393.

⁴⁵⁶ *Ibid.* at 396.

⁴⁵⁷ *Ibid.* at 396.

⁴⁵⁸ T.R.S. Allan, “The Rule of Law as the Foundation of Judicial Review” in Christopher Forsyth, ed., Forsyth, *Judicial Review*, *supra* note 453, 413 at 91.

⁴⁵⁹ In particular, Craig is reluctant to concede the contending theories do not lead to differences in judicial doctrine and continues to make the case for the common law model. See Paul Craig, “Constitutional Foundations, the Rule of Law and Supremacy” [2003] Pub. L. 92 at 94.

administration themselves. Both the modified *ultra vires* principle and the common law model envisage the development and application of principles of good administration by the courts.

In *Page v. Hull University Visitor*,⁴⁶⁰ Lord Browne-Wilkinson touched on the principles of good administration:⁴⁶¹

The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully. In all cases, save possibly one, this intervention ... is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense ..., reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully.

Ultra vires, legality or unlawfulness can be therefore used to describe both a narrow and broad conception of legality. I have used the phrase legality *per se* when considering whether public bodies and/or officials are acting within the boundaries imposed by the relevant empowering provision. I discuss separately the question of legality in the sense that imposes other principles on public bodies or officials, such as the principle that they do not unduly fetter their discretion.

It is frequently contented that the centrality of the legality principle means estoppel and substantive legitimate expectation – if they are to exist in public law – cannot at any time have the effect of requiring public bodies to act “beyond their jurisdiction”. This is based around the narrow concept of *ultra vires* discussed earlier. This proposition is not affected by the ongoing argument about whether the *ultra vires* doctrine itself provides the sole constitutional justification for judicial review. The concept of legality expressed in these terms survives that debate. It is readily accepted that the courts ought to ensure public bodies do not exceed their delegated mandate and must insist they act lawfully – regardless of whether this principle comes from the (actual or presumed) intention of Parliament or is developed independently by the courts from the common law.

In the context of estoppel and substantive legitimate expectation, Lord Greene said in *Ministry of Agriculture and Fisheries v. Hunkin*:⁴⁶²

⁴⁶⁰ [1993] 1 All E.R. 97 [Page].

⁴⁶¹ *Ibid.* at 107. The one exception referred to by Lord Browne-Wilkinson was the power to quash decisions for errors on the face of the record.

The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it was possible for the donee of a statutory power to extend his power by effecting an estoppel.

Professor Wade describes this as “the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority power which it does not in law possess”.⁴⁶³ He says “[t]o legitimate *ultra vires* in this way cannot be sound policy, being the negation of the fundamental canons of administrative law”.⁴⁶⁴ But how immutable really is this “canon”? Is it really compatible with the recognition of legal certainty?

First, the notion of *ultra vires* or legality, even in its narrow sense, is not absolute. The status of an *ultra vires* act has been less than straight-forward. Previously a distinction was drawn between decisions which were “void” and “voidable”; the former applied to decisions which were *ultra vires*, while the latter applied to decisions quashed for error of law on the face of the record. However, with collapse of that distinction in *Anisminic Ltd v. The Foreign Compensation Commission*,⁴⁶⁵ a new theory was adopted which avoided the conclusion that every decision that was *ultra vires* was a “nullity”, “void *ab initio*”, or “legal nothing”. The theory of relativity – largely developed by Professor Wade – says that illegal decisions are treated as valid unless and until they are quashed or set aside by a court of competent jurisdiction.⁴⁶⁶ This approach was endorsed by the House of Lords in *F Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry*.⁴⁶⁷ Lord Diplock explained it in these terms:

⁴⁶² (1948). The case is unreported but is quoted in *Ministry of Agriculture and Fisheries v. Matthews* [1949] 2 All E.R. 724 at 729.

⁴⁶³ Wade, *supra* note 423 at 244.

⁴⁶⁴ *Ibid.* at 343.

⁴⁶⁵ [1969] 1 All E.R. 208.

⁴⁶⁶ See Wade, *supra* note 423 at 306-312.

⁴⁶⁷ [1974] 2 All E.R. 1128. Wade argued there still may be a class of cases where the illegality was so “latent” or “fragrant” that an order quashing the decision may not be needed; (*ibid.* at 309-). An alternative theory argued by Taggart that an *ultra vires* decision is *conclusively* valid (and not merely treated as such) until a court declares it invalid; the courts’ actions are therefore “constitutive” not merely “declaratory” and retrospectively invalidates the decision not merely recognising its lack of legal consequence. See Michael Taggart, “Rival theories of invalidity in administrative law: Some practical and theoretical consequences” in Michael Taggart, *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Auckland: Oxford University Press, 1986) and a helpful discussion of the various theories in Philip A. Joseph,

Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed.

This means an illegal decision is “still capable of legal consequences [and] [u]ntil the necessary proceedings are taken, it will remain effective for its ostensible purpose”.⁴⁶⁸ The approach has important consequences for the status of *ultra vires* decisions. Not only do *ultra vires* decisions remain effective if no-one challenges them in court, even if they are challenged, they may still remain effective.⁴⁶⁹

The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The [decision] may be hypothetically a nullity, but the court may refuse to quash it ... In any such case the ‘void’ order remains effective and is, in reality, valid.

Developing this proposition further, it is clear judicial review remedies are “inherently discretionary”.⁴⁷⁰ As Lord Hailsham said in *London & Clydeside Estates Ltd v. Aberdeen District Council*:⁴⁷¹

When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences on himself. ... At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the

Constitutional and Administrative Law in New Zealand 2nd ed. (Wellington: Brookers, 2001) at 769-776 [Joseph, *Constitutional*].

⁴⁶⁸ *Smith v. East Elloe Rural District Council* [1956] 1 All E.R. 855 at 871.

⁴⁶⁹ Wade, *supra* note 423 at 308.

⁴⁷⁰ See Lord Cooke of Thorndon, “The Discretionary Heart of Administrative Law” in Christopher Forsyth and Ivan Hare, eds., *The Golden Metwand and the Crooked Cord* (Oxford: Clarendon Press, 1998) at 220 and J.L. Caldwell, “Discretionary remedies in administrative law” (1986) 6 Otago L. Rev. 245.

⁴⁷¹ [1979] 3 All E.R. 876 at 883.

grant of which may well be discretionary, and by the like token it may be wise for an authority ... to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act.

The decision as to whether relief will be granted in a judicial review case depends on a range of factors. Some of the common reasons for declining relief include delay, waiver or other discrediting conduct by the applicant, the gravity of the error, prejudice to third parties, the availability of alternative remedies, the mootness of the issue or the inevitability of the same outcome, issues of standing, *etc.*⁴⁷² The list of factors is non-exclusive. In cases of illegality or where the public body exceeds its jurisdiction, a refusal to grant relief will lead to the preservation of an illegal or *ultra vires* action.

A further example of where strict legality may not be observed is seen in jurisdictions such as Canada where a deferential standard is applied to questions of law. Under the "pragmatic and functional" approach developed by the Supreme Court of Canada, the courts do not always insist that decision makers adopt the "correct" legal interpretation. Depending on the circumstances (such as legislative framework and purpose and the expertise of the decision-maker), it may be sufficient that the decision maker adopts a "reasonable" or "not patently unreasonable" interpretation. A spectrum of degrees of scrutiny is depending on the circumstances from "correctness", to "reasonableness" to not "patently unreasonableness". This deferential approach envisages occasions in which the courts refrain from intervening, even when according to their interpretation, the legal interpretation was incorrect as long as it was within the appropriate range of reasonable interpretations.

As much as Professor Wade demands that "[i]legal action should be stopped in its tracks as soon as it is shown",⁴⁷³ the reality is that when the courts decline to grant relief when exercising their supervisory jurisdiction, illegal action is tolerated or condoned by the courts. The inviolable nature of the illegality principle should not be overstated. The court presently balance the concept of illegality against other concerns. There is no sound reason why this balancing similarly cannot take place when the concern is the protection of expectations and the endorsement of the concept of legal certainty. As Professor Craig argues, the present aversion to estoppel and substantive legitimate expectation is based on (misplaced) primacy being given to the legality principle. He contends this "initial conceptualisation is incomplete" and leads to a legal outcome which is "flawed" because it

⁴⁷² See, for example, Joseph, *Constitutional*, *supra* note 467 at 973-983, Wade, *supra* note 423 at 688-699, and Craig, *Administrative Law*, *supra* note 64 at c. 24.

⁴⁷³ Wade, *supra* note 423 at 695.

fails to take account of the principle of legal certainty.⁴⁷⁴ If both principles are factored in the “very realisation that there are two values at stake means that the denial of *any* doctrine of substantive legitimate expectations is no longer plausible”.⁴⁷⁵ In his view, the appropriate course is to balance the two important concepts in difference cases. Of course, legal certainty as a Rule of Law principle is not itself intended to be absolute. It too can be circumscribed to a certain degree without violating its essence. There are a range of ways the concept can be circumscribed in application so as to ensure it does not offend the (perhaps similarly circumscribed?) concept of legality. It need not be a reason for ousting the application of the concept altogether.

Secondly, it can be argued that confining estoppel and substantive legitimate expectation to *intra vires* representations is unlikely to have an instrumental role in preventing *ultra vires* acts and the distinction would be a futile and therefore unnecessary protection against the abuse of power. Professor Craig suggests cases involving the purported extension of jurisdiction arise almost exclusively from inadvertence by the public body or officer.⁴⁷⁶ Because the cause of the purported extension is carelessness, not intention, the *ultra vires* rule is unlikely to materially deter public bodies from making erroneous assurances.

Thirdly, estoppel and substantive legitimate expectations could potentially be circumscribed either to ensure their compatibility with the principle of legality *per se* or to mitigate their conflict with it. There are different points the fulcrum for the balancing process can be placed.⁴⁷⁷ In the context of legality, there are several options available. At one end, the protection of expectations could be limited to *intra vires* representations. At the other end, estoppel and substantive legitimate expectation could operate unencumbered by the concept of legality. In between, there is room for either a general balancing of interests or fixed categories of cases which mitigate the degree of violence to the legality and legal certainty principles. I evaluate each of these options.

⁴⁷⁴ Craig, *Administrative Law*, *supra* note 64 at 615.

⁴⁷⁵ *Ibid.* at 616.

⁴⁷⁶ *Ibid.* at 641-642. He suggested cases involving deliberate extensions of jurisdictions may be better dealt with in the same way as other intentional excesses of power – by penalizing the public officer involved.

⁴⁷⁷ The recognition of legal certainty through the procedural protection of expectations is one such example of balancing process.

The recognition of representations can be restricted to *intra vires* representations. This is the suggestion offered by Wade, de Smith and Poole.⁴⁷⁸ On its face, this seems a sensible position to adopt. It finds a role for legal certainty – in relation to *intra vires* representations – but maintains the legality principle unabridged in relation to *ultra vires* representations. Further, the parameters of when estoppel and substantive legitimate expectation can operate seem clear and distinct. In addition, any “pain” that may result to individuals from erroneous or misleading advice from officials may be able to be tempered by monetary compensation – either through existing tortious remedies such as negligent misstatement or misfeasance in public office⁴⁷⁹ or through the development of a peculiarly “public law compensation”.⁴⁸⁰ However, it is not clear that compensation is any more palatable to public bodies than holding them to the substance of the erroneous assurance. It goes without saying that the public purse is not bottomless. Funds to compensate individuals come at the expense of other public projects. Further, there is no guarantee compensation payable will be less than the costs associated with honouring the assurance. Compensation, under orthodox tortious principles, places an individual in the same place but for the erroneous representation. This is normally restricted to reliance, not expectation, losses. There may be cases where the compensation payable is equivalent. Craig points to the *Robertson* case, where compensation for the erroneous entitlement for a benefit would have been equivalent to the cost associated with the paying the soldier the benefit.⁴⁸¹ Of course, there will be a range of cases where compensation would be lower than the expected entitlement under an assurance. But there will also be cases where the public body would not have suffered any tangible cost in honouring the representation. The reliance costs may be significant. Take, for example, the *Laker Airways* case where over £5 million was invested in the project on the assurance of the appropriate operating licence. In such a case, and in cases involving erroneous planning assurances, there is no costs to the public body in honouring the assurance. On a practical

⁴⁷⁸ Wade, *supra* note 423 at 342-344, de Smith, *supra* note 66 at para. 13-028 and Poole, *supra* note 6.

⁴⁷⁹ See Wade, *supra* note 423 at 344.

⁴⁸⁰ Poole, *supra* note 6 at 446. Based on the development in New Zealand of (public law) compensation for breaches of rights under the New Zealand Bill of Rights Act 1990, she says:

[W]e may be beginning to develop a new approach to compensation. If ... this type of compensation is one solely within the arena of public law, it may well be time to implement a mechanism to compensate for loss sustained as a result of incorrect or improper undertakings by those exercising public law powers.

Ibid. at 446.

⁴⁸¹ This assumes the soldier could prove he had a reasonable foreseeable prospect of establishing his entitlement to the benefit but-for the destruction of his x-rays and failure to obtain a contemporaneous medical examination.

level, the distinction between compensation for misstatement and honouring the illegal assurance is important. Liability for negligent misstatement is capable of being insured against and in most cases compensation is paid by the insurers of public bodies and officials; additional expenditure arising from illegal assurances would fall within the ambit of ordinary operational principles and generally public bodies and officials would not be entitled to insure against the risk of such additional expenditure – even if it was equivalent to the amount of compensation payable due to a misstatement.

Another option is a distinction could be drawn between assurances that are substantively *ultra vires* and assurances that are internally *ultra vires*. That is, the subject-matter of the representation was within the power of the public body itself but the public official making the representation was, in that particular case, not formally authorised to make the representation. If the official lacks the authority to make the assurance – say by a formality defect, such as the absence of formal delegation – but in other respects appears to have the necessary authority to make the representation, then the public body can be held to the assurance. This is the rationale which underlies Lord Denning's approach in *Lever Finance* and the limited application of the estoppel principle in *Western Fish*. The illegality is one of formality, not the extension of power beyond the public body's jurisdiction and less likely to be of the same concern.

Overall, taking into account the fact that the *ultra vires* doctrine is not absolute and there are approaches available to minimise any clash with the doctrine, in my view, the doctrine does not present an absolute impediment to the protection of expectations.

II *Legal certainty vs ultra vires: non-fettering or responsiveness*

As mentioned earlier, the non-fettering principle is one of principles of good administration which the courts have developed as a constraint on administration action. Lord Templeman in *Attorney General ex rel. Tilley v. London Borough of Wandsworth* said:⁴⁸²

On well-recognised principles public authorities are not entitled to fetter the exercise of a discretion or to fetter the manner in which they are empowered to discharge the many duties which are thrust on them. They must at all times, in every particular case, consider how to exercise their discretion and how to perform their duties.

Joseph describes the principle in terms of the “abdication of discretionary power”:⁴⁸³

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[1981] 1 All E.R. 1162 at 1170.

When an authority is entrusted with discretionary powers, discretion must be bought to bear in every case. Each case must be considered on its merits and decided as the statute and public interest may require.

The non-fettering rule is therefore sometimes referred to in terms of a “failure to exercise a discretion”.

The non-fettering rule can also be rationalized in terms of procedural (im)propriety or natural justice, as well as legality. For example, de Smith says fettering ones discretion “offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilise the discretion conferred upon it [and] offends against procedural propriety by failing to permit affected persons to influence the use of that discretion”⁴⁸⁴ In his view, the non-fettering rule requires the decision-maker keep an “open mind” and, along with other procedural rules, ensures the decision-making process is “meaningfully and not merely ritualistic”.⁴⁸⁵ Similarly, Hilson draws two distinct threads from the non-fettering principle: individualised, discretionary decision-making “ensures the *particular* applicant is treated fairly [and] may also ensure the relevant aims are not undermined by a rigid, rule-based approach”.⁴⁸⁶

The non-fetter rule prevents (overly) rigid policies. For example, a court decided it was unlawful for a council to decide a blanket rule prohibiting permits for the sale of literature at council parks, stating additionally that “it is not possible to make exception to this rule even in a most deserving case”.⁴⁸⁷ In the leading case on the non-fettering rule and administrative policies, *British Oxygen Co. Ltd. v. Minister of Technology*,⁴⁸⁸ the House of Lords endorsed the adoption of policies

⁴⁸³ Joseph, *Constitutional*, *supra* note 467 at 801.

⁴⁸⁴ de Smith, *supra* note 66 at para. 11-001.

⁴⁸⁵ *Ibid.* at para. 7-004.

⁴⁸⁶ Chris Hilson, “Judicial Review, Policies, and the Fettering of Discretion” [2002] Pub. L. 111 at 113 [Hilson].

⁴⁸⁷ *R. v. London County Council, ex parte Corrie*, [1918] 1 K.B. 68.

⁴⁸⁸ *Supra* note 140. See also *R. v. Port of London Authority, ex parte Kynoch Ltd.* [1919] 1 K.B. 176 [Kynoch].

by public bodies to guide their discretion but ruled the body could not foreclose on considering cases which fell outside the policy.⁴⁸⁹

The general rule is that anyone who has to exercise a statutory discretion must not 'shut [his] ears to the application' ... There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to [the adoption of a policy] provided the authority is always willing to listen to anyone with something new to say.

Hilson recognises that this application of the non-fetter rule, in reality, is a compromise between the individualized, discretionary decision-making and exclusively rule based decision making.⁴⁹⁰ The rule recognises the desirability of individualized decision-making but also recognises the merits of rules or policies guiding the exercise of administrative discretion.⁴⁹¹ It envisages that many decisions will be made according to the policy, rather than individual instances of the relevant discretion.

The non-fetter rule has also been applied to prevent public bodies from contracting so as to bind itself not to exercise a discretion. To do so would be "to renounce a part of their statutory birthright".⁴⁹² In the case of contracts, as for policies, the rule is not absolute. The ability for the public bodies to do so is important.⁴⁹³ The courts have again recognised the competing interests the rule must serve. As Craig expressed it: "A balance is required between the necessity of a public

⁴⁸⁹ *British Oxygen, supra* note 140 at 170. Lord Reid also endorsed a passage from *Kynoch* which noted the policy must have been "adopted for reasons which the tribunal may legitimately entertain". *Ibid.* at 170.

⁴⁹⁰ Similarly, Woolf & Jowell consider the rule accommodates the "legitimate administrative values ... of legal certainty and consistency" and the "equally legitimate administrative value ... of responsiveness"; de Smith, *supra* note 66 at para. 11-004.

⁴⁹¹ Hilson, *supra* note 486 at 112. He says rule-based decision making "ensures fairness and consistency between application because ... like cases are more likely to be treated alike", "promotes efficiency of administration, in that decision-makers will typically be able to dispose of cases more quickly", and "may be the only way to achieve officially determined aims" (e.g., safety rules *etc*). He also suggests publication of policies and rules avoids people making "fruitless applications", enhances public accountability because the rules are open to public scrutiny, and provides legal certainty for people to plan their affairs. *Ibid.* at 112.

⁴⁹² *Birkdale District Electricity Supply Co. v. Southport Corporation*, [1926] A.C. 355 at 371 [*Birkdale*].

⁴⁹³ Wade, *supra* note 423 at 366.

body to make contracts, fairness to the contractor, and the need to ensure that the contracts do not stifle other statutory powers.”⁴⁹⁴ They have recognised the power of public bodies to enter contracts so long as the relevant undertaking is not “incompatible” with their statutory function.⁴⁹⁵ The mere existence of statutory powers does not invalidate “contracts restricting the undertaker’s future freedom of action in respect of the business management of their undertaking”.⁴⁹⁶ The test of “incompatibility” is assessed according to whether it is reasonably foreseeable that a conflict will arise between the contract and the statute. A mere possibility of conflict is insufficient.⁴⁹⁷

In cases even involving apparent incompatibility, Campbell questions whether a rule that public bodies cannot contractually dispose of their public interest discretion is justified.⁴⁹⁸

Presumably when the Crown contracted initially this was thought to be in the public interest, and in the interest that it would be binding. To hold otherwise is to deny the Crown the ability to pursue the public interest in the way it sees fit. Even if the public interest later requires a different policy, this should not vitiate the contract *ab initio*, for that would mean that the initial act was ineffectual. Viewed in this light, the prerogative power to contract is an exercise of power, not an abdication of discretion.

He suggests it is more appropriate to consider the issue in terms of when the Crown is able to break contract and what the consequences of breach should be.⁴⁹⁹ Overall it can be seen that, in the case of contracts, the non-fetter rule is not absolute as a general principle, nor is it unanimously supported.

In any event, in many cases of estoppel and substantive legitimate expectation there is an argument that a significant part of the rationale for the non-fetter rule is not offended at all. When estoppel or substantive legitimate expectation arises on an individualised basis, presumably – at least in many cases – an individualized assessment of the merits is made prior to a promise or assurance

⁴⁹⁴ Craig, *Administrative Law*, *supra* note 64 at 527.

⁴⁹⁵ See *R. v. Inhabitants of Leake* (1833) 110 E.R. 863, *Ayr Harbour Trustees v. Oswald* (1883) App. Cas. 623, *Birkdale*, *supra* note 492, *British Transport Commission v. Westmoreland County Council* [1958] A.C. 126 [*Westmoreland*], and *Petrocorp Exploration Ltd. v. Minister of Energy* [1991] 1 N.Z.L.R. 641 (P.C.) [*Petrocorp*, (P.C.)].

⁴⁹⁶ *Birkdale*, *supra* note 492 at 372.

⁴⁹⁷ See *Westmoreland*, *supra* note 495 and Craig, *Administrative Law*, *supra* note 64 at 528.

⁴⁹⁸ Mark Campbell, “The Legal Consequences of Promises and Undertakings Made by Public Bodies” (2002) 8 *Canta. L.R.* 237 at 239 [Campbell].

⁴⁹⁹ *Ibid.* at 240. This seems to be the approach taken by the majority of the New Zealand Court of Appeal in *Petrocorp Exploration Ltd. v. Minister of Energy* [1991] 1 N.Z.L.R. 1 (C.A.) (*Petrocorp*, (C.A.)). See text at note 500 below.

being issued. The problem arises when the public body later seeks to renege on that assessment. The only possible "defect" is that the assessment is not made contemporaneously with the "formal" decision. To this extent, holding the public body to the (earlier) individualized assessment does not undermine the requirement of an individualized decision. Nor does holding public bodies to previous assurance offend the concept of natural justice. The person affected by the restriction of the discretion receives has received the benefit of the discretion. Any assurance or promise represents a favourable assessment of the merits. This contrasts with cases where a decision-maker fetters their discretion by applying a rigid policy; in such cases, an affected person loses their ability to argue their case for an individualized and favourable assessment.

An excellent illustration of this point is found in the *Mount Sinai* case. The Minister had repeatedly assured a hospital that its permit would be "regularized" to reflect the reality that it was offering both long-term and short-term facilities once its new hospital was built in the city. However, following the construction of the new hospital, the Minister advised that it would not receive the promised permit and that it would need to continue to operate under its existing permit.

Rather than dealing with the issue on the basis of estoppel or substantive legitimate expectation, the majority of the Supreme Court of Canada found that the Minister had in fact exercised the relevant statutory discretion necessary for the grant of the promised permit but the actual granting of the permit was deferred until the new hospital was built. They reasoned that the legislation said the Minister "shall" granted a permit "if he considers that it is in the public interest". The majority said the Minister had determined that it was in the public interest to grant the permit when the Minister promised the hospital that it would receive the modified permit. Any purported decision to reverse that determination was groundless and inconsistent with the Minister's subsequent behaviour. By the Minister's own admission, the only factor which has changed further enhanced the conclusion that granting the regularized permit was in the public interest. In my view, there is a degree of fiction in the majority's analysis about the timing of the relevant formal decision. For example, the minority preferred to treat the relevant decision as being made when the Minister declined to grant the permit but said the decision was (patently) unreasonable because the Minister "did not resile from the previous file history". The file history necessarily included the earlier assessment that granting the regularized permit was in the public interest which was manifest in the assurance that such a permit would be granted, even though the assessment did not amount to a formal determination of that point. Regardless of which analysis is adopted, the point remains that the Minister made an individualized assessment of the relevant factors prior to making an

individualized assurance or promise – albeit at a time earlier than was envisaged or required by the statutory regime. The issue was the timing – not the absence – of the individualized assessment.

A similar rationale is found in *Petrocorp* where some members of the New Zealand Court of Appeal would have been prepared to treat the entry into a contract (which envisages the exercise of a statutory discretion in a particular way) as the exercise of the relevant statutory power, not the abdication of it.⁵⁰⁰ The government had entered into a joint venture contract which presupposed the grant of a statutory mining permit to the joint venture partners (including the Crown). However, in expectation of a significant financial windfall, the Minister granted the relevant permit to the Crown itself and then offered to on-sell the permit to the joint venture. There are indications in the majority judgments that they regarded the earlier entry into the joint venture as the relevant determination of the “national interest” required for the grant of permits, not the abdication of that discretion.⁵⁰¹

Overall, the non-fetter rule is not in itself an absolute rule. A compromise is reached between the desirability of individualised decision-making and the contemporaneous assessment of the public interest in each case with other countervailing interests. In neither the case of policies nor public body contracts is the non-fetter rule rigid such that the alternative interests cannot operate. In the cases of policies, the formal discretion is abdicated for those cases which fall within the policy; for those that do not, they can insist on an individualised assessment or argue for a change of the policy. In the cases of contract, fettering the future discretion is permissible if it is “compatible” with the relevant statutory function. Arguments against estoppel and substantive legitimate expectation based on the impenetrable nature of the non-fetter rule overstate its rigidity. Further, at least in cases

⁵⁰⁰ *Petrocorp* (C.A.), *supra* note 499. However, the decision of the Court of Appeal was overturned by the Privy Council, differing with the Court of Appeal about whether joint venture obligations were relevant to the statutory discretion and holding that the Minister’s later determination of the public interest when he granted the permit to himself was not reviewable. See *Petrocorp Exploration Ltd. v. Minister of Energy* (P.C.), *supra* note 495.

⁵⁰¹ For example, Bisson J. said:

The Minister elected to take a particular course of action by entering into a joint venture. That was the completed exercise of the Minister’s discretion under [the legislation] so far as that mining operation was concerned while the joint venture continued. ... It was the very exercise of those Ministerial powers in a particular commercial direction which carried with it a right to share in the fruits of any discovery by the joint venture and which precluded the Minister from seeking to acquire all the fruits of the discovery by pursuing in his three decisions a different commercial direction, not a different direction prompted by non-commercial national interests.

Petrocorp (C.A.), *supra* note 499 at 50.

of individualised assurances and promises, two objectives of the non-fetter principle are not affected by recognising previous assurances and promises. In such cases, an individualized assessment of the merits is still present and there is no issue of the affected applicant being denied a right to make their case because the earlier assurance or promise is favourable to their case.

III *Legal certainty vs administrative flexibility: policy development*

A common objection to the substantive recognition of expectations is the claim that doing so hinders the development of governmental policy. In *Hughes v. Department of Health and Social Security*, Lord Diplock said:⁵⁰²

Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government.

Opponents of estoppel and substantive legitimate expectation argue that holding public bodies to previous policies and assurances undermines the administration's necessary freedom to change its policies thereby restricting its ability to govern in the public interest. Professor Wade argues estoppel cannot operate at the level of government policy. He says: "Many people may be victims of political vicissitudes, and 'estoppel cannot be allowed to hinder the formation of government policy'".⁵⁰³

The ability of the administration to develop – and, where necessary, to change – policies to reflect the public interest is undoubtedly an important principle. But does the recognition of estoppel and substantive legitimate expectation place an (undue) restriction on the administration's ability to develop policy?

First, it can be argued that the recognition of legal certainty only places a *temporal*, not absolute, restriction on the ability to change policies. Craig argues substantive estoppel and substantive legitimate expectation claims do not, and should not, prevent the administration from changing policy; they "merely speak to the *temporal dimension*, in the sense of questioning when the new policy choice takes effect".⁵⁰⁴ Similarly, Schönberg argues that the recognition of expectations focuses on the temporal dimension of policy changes and suggests that mechanisms

⁵⁰² [1985] A.C. 776 [*Hughes*].

⁵⁰³ Wade, *supra* note 423 at 244, quoting Lawton L.J. in *Laker Airways*, *supra* note 112 at 211.

⁵⁰⁴ Craig, *Administrative Law*, *supra* note 64 at 617.

such as advance notice, transitional provisions and exceptions should be used “to ensure the expectations are upheld to the extent that this does not defy the purpose of the change of policy”.⁵⁰⁵ Of course, there may be some cases in which this distinction breaks down, such as when delaying the introduction of a new policy makes the policy change nugatory. In addition, the temporal restrictions, as Schönberg suggests, “inevitably limit the decision-maker’s discretion to some extent”.⁵⁰⁶ But, as a general proposition, the restriction to temporal limitation means estoppel and substantive legitimate expectation should not hinder policy development.

The restriction of the courts’ role to temporal restrictions is evident in the Court of Appeal’s decision in *Coughlan*. The focus on the Court’s enquiry was on the accommodation of the previous expectations within the new policy framework, not the merits of the policy change *per se*. The Court said:⁵⁰⁷

The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive’s policy-making powers should not be trammelled by the courts. Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data—in other words, as not ordinarily open to judicial review. The court’s task—and this is not always understood—is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exceptions ... or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the court to say whether the consequent frustration of the individual’s expectation is so unfair as to be a misuse of the authority’s power.

The important point is that if adequate accommodation of expectations was made by the use of transitional provisions, satisfaction of the expectations by alternative means, or compensation, the administration would have been permitted to proceed with the policy change immediately. In the absence of adequate accommodation, such a policy change is impermissible – presumably until such time that those expectations expire or cease to be legitimate.

⁵⁰⁵ Schönberg, *supra* note 2 at 143.

⁵⁰⁶ *Ibid.* at 146.

⁵⁰⁷ *Coughlan*, *supra* note 103 at para. 82 [citations omitted]. The Court commended the *Hamble* case as example of where appropriate exceptions were made to a policy change; see *R. v. Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All E.R. 714 [*Hamble*].

Secondly, the comparative analyses of both Craig and Schönberg of the substantive protection of expectations within the European Community conclude that there is no evidence that such protection hinders the development of government policy. Schönberg says.⁵⁰⁸

[T]he EC doctrine of legitimate expectations has neither fetter the Community institutions' discretionary powers, nor shifted the economic risk of societal change from economic operators to Community institutions. The principle only led the Community courts to limit administrative power to the extent justified by the requirements of fairness, legal certainty, and trust in administration. While Community administration has been left free to change policies in tune with societal demands, certain *temporal* restrictions have been imposed on the way new policies are developed.

Thirdly, under an estoppel and substantive legitimate expectation framework, the establishment of a legitimate expectation may not be determinative of the issue.⁵⁰⁹ The establishment of the expectation is only the first step. Both doctrines contemplate a flexible assessment of the fairness or otherwise of defeating the expectation. The accommodation of the expectation is one such factor. Another factor may be some overriding public interest which is inconsistent with the expectation.⁵¹⁰ As Lord Templeman said (in the context of the "abuse of power" protection of substantive legitimate expectation):⁵¹¹

There may be cases in which conduct which savours of breach of [contract] or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation.

The Court in *Coughlan* adopted this passage and alluded to the possibility of an overriding public interest being relevant to the question of whether there was an abuse of power.⁵¹² The *Coughlan* framework also envisages an initial categorization, with two of the three categories not providing any substantive protection of expectations.

⁵⁰⁸ Schönberg, *supra* note 2 at 155. See also Craig, "Domestic and Community Law", *supra* note 394.

⁵⁰⁹ Craig, *Administrative Law*, *supra* note 64 at 618.

⁵¹⁰ Thomson, *supra* note 7.

⁵¹¹ Preston, *supra* note 122 at 341.

⁵¹² The Court said:

It may be observed that Lord Templeman's final formulation [of the abuse of power test], taken by itself, would allow no room for a test of overriding public interest. This, it is clear, is because of the facts then before the House. In a case such as the present the question posed in the *H.T.V. Ltd.* case [of the relevance of an overriding public interest] remains live.

Ibid. at para. 69.

It is clear that whatever mechanism is adopted to assess the appropriateness or otherwise of defeating an expectation, each mechanism is capable of a flexible assessment of the circumstances of the defeat of the expectation. In the case of estoppel, Thomson considers that estoppel based on a representation does not operate in the face of an overriding public interest. Expressed within the traditional estoppel framework, it may be more appropriate to consider any overriding public interest as one of the factors to determine whether reneging on the representation is unconscionable. In the case of substantive legitimate expectation, a range of options are available. The Court in *Coughlan* adopted the initial categorization and "abuse of power" (focussed on the transitional accommodation of expectations). Some commentators, such as Craig and Schönberg, have suggested a range of other tests to assess the appropriateness of defeating expectations instead of the "abuse of power" test: an enhanced-*Wednesbury* test, a general proportionality test, or the balancing of substantive fairness against any overriding interest.⁵¹³

Finally, some courts have considered it possible to circumscribe the estoppel doctrine to recognise the limit of any possible restriction on policy development. For example, Gummow J. in *Kurtovic* mentioned the idea that the applicability or otherwise could be considered under a policy-operational framework:

The planning or policy level of decision-making wherein statutory discretions are exercised has, in my view, a different character or quality to what one might call the operational decisions which implement decisions made in exercise of that policy; cf the distinction drawn by Lord Wilberforce (albeit in a different context) in *Anns v. Merton London Borough Council*. Where the public authority makes representations in the course of implementation of a decision arrived at by the exercise of its discretion, then usually there will not be an objection to the application of a private law doctrine of promissory estoppel. It must, however, be recognised that it may be difficult, in a given case, to draw a line between that which involves discretion and that which is merely "operational".

As Lord Wilberforce said ... :

"Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care."

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Craig, *Administrative Law*, *supra* note 64 at 620, Schönberg, *supra* note 2 at 151, and Craig & Schönberg 395 at 699. See text accompanying note 300 above.

In my view, the same may be said of the super-imposition of the operation of the doctrines of promissory estoppel.

While a plausible approach, Gummow J.'s concerns about drawing a distinction between "policy" and "operational" decisions are well-founded. In any event, such a distinction may be too blunt, providing little, if any, protection of legal certainty for individuals in cases where their ability to plan their affairs based on assurances have been undermined.

A similar, but alternative, way of circumscribing the operation of estoppel and substantive legitimate expectation is to draw a distinction between "individualized" representations or assurances and general policy statements. On this basis, the protection of expectations are less likely to infringe the administration's ability to make general policy changes because general policies would not in themselves generate legitimate expectations. Only individualized assurances would generate expectations justifying substantive protection. Craig suggests cases involving individualized representations and reversals have the "strongest" calling for protection because they carry "a particular moral force".⁵¹⁴ In addition, holding the public body to the representation is less likely to have serious consequences for the administration as a whole.⁵¹⁵ Similarly, Schönberg notes, policies are generally known to be "impermanent", but specific assurances more easily convey "an objectively reasonable impression of finality or promise".⁵¹⁶ However, Best queries whether the distinction – endorsed in *Coughlan* – should make a difference.⁵¹⁷

Why should it make a difference if the same clear promise was made to, say, 20, 30 or even 100 people if all those people formed an expectation in consequence?

The difference between an "individualized" assurance and a "general" policy may in some cases be difficult to discern. For example, it is open to argument whether the Council's assurance in *Liverpool Taxis* not to increase the number of taxi until legislation controlling private hire cars was

⁵¹⁴ Craig, *Administrative Law*, *supra* note 64 at 614.

⁵¹⁵ *Ibid.* at 614.

⁵¹⁶ Schönberg, *supra* note 2 at 146.

⁵¹⁷ Richard Best, "Legitimate Expectation of Substantive Benefit" (2000) N.Z.L.J. 307 at 308. Schönberg also makes a similar point. Schönberg, *supra* note 2 at 146:

On the one hand, what appears to be a general change in policy may in fact impact severely on a limited class of persons who have planned and relied upon previous policy. Such an action can be just as unfair a decision to go back on a specific assurance. On the other hand, it is somehow paradoxical to deny judicial protection when a change of policy disappoints the expectations of a very large number of persons.

in place was an "individualized" assurance or a "general" policy. On one hand, the assurance was made after hearing from representative of a distinct, defined groups of individuals with congruent interests. On the other hand, the group was a large group – around 300 taxicab owners. The distinction also begins to break down in *Laker Airways*. The general policy was to ensure that the British Airways did not have a monopoly and at least one British airline was to have the opportunity of competing with it. This general policy was given effect to by an individualized assurance – in that case, a licence to operate. However, before the operation could commence, there was a change of government and a consequential change in government policy. No longer was competition to British Airways to be permitted on long-haul routes.

It may therefore be preferable to treat the distinction between an "individualized" assurance and a "general" policy as being a question of degree, rather than two distinct categories. Drawing together the "particular moral force" of individualized assurances and the generally understood "impermanence" of policies with the need for flexibility in policy development, these factors could come into play in a balancing of the expectations and interests in changing policies. Individualized assurances may require either a high level of accommodation or high degree of countervailing public interest or justification before a policy change is permitted. Conversely, with general policies, accommodation to a lesser level – such as through short-term transitional arrangements – or a moderate degree of countervailing public interest was be sufficient. This presupposes a flexible assessment of such interests within the framework for the protection of estoppel and substantive legitimate expectation. Of course, such a weighted balancing assessment triggers concerns about the ability of the courts – as opposed to the executive – to undertake such as task.

A particular aspect of the administrative flexibility objection which raises difficult issues is situations where the decision-maker or policy-maker changes. Most obviously, this is where there has been a change in government or administration, usually with a resultant philosophical change in policy and governance. Accordingly, the desire to change policy and, where necessary, resile from assurances made by the previous administration arises.⁵¹⁸ This can perhaps be distinguished from changes to policy and reneging of assurances that arise solely from change circumstances. At the end of the day though, vis-à-vis citizens, the prejudicial effect of changes to policies and reneging on assurances are the same regardless of why the change is made. Conceptually the expectations case

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See, for example, *Laker Airways*, *supra* note 112 and *C.U.P.E.*, *supra* note 287, which involved assurances of previous administrations.

is the same. However, the countervailing flexibility interest is different. It is desirable to avoid the temptation for one administration to effectively bind later administrations – otherwise the democratic notion of elected representatives is lost because the epitaph of one administration will prevail long beyond their elected period.

To a certain degree, the previous rebuttals of concerns about administrative flexibility being undermined apply equally to this situation as for when the flexibility relates to the same administration. The limitations are only temporal and not absolute and, if necessary, more latitude for breaching expectations may be given to pure policy changes. In addition, a number of further points can be made.

First, the issue of one administration effectively binding a later administration is not specific to assurances and policies and the expectations of citizens. Structural changes may be made by one administration that effectively cannot be reversed by a later administration. For example, in reality, the abolition of a department or restructuring of an industry may be so dramatic that later administrations cannot reverse such a change. Taggart suggests the “downsizing” of government and consequential effect on governance is one of the most significance aspects of modern government.⁵¹⁹ It is artificial to treat the impact of each administration as being confined within their period of governance without any later spill-over.

Secondly, the extent to which any temporal limitation exists and therefore binds later administrations will be a matter of degree. The conceptual justification for the protection of expectation relates to the need for individuals to be able to plan their affairs. The horizon of the planning process has an effect on the length of time the expectation is protected. Short-term assurances deserve more protection than long-term assurances because of their immediacy to the planning process and (in)ability of people to alter their affairs prior to any change in legal consequences. Put another way, it is more reasonable to rely on a short-term assurance or policy than a longer-term policy. Obviously, the longer the horizon of the assurance, the greater the likelihood of changing circumstances requiring a change to the assurance. On this basis, the strength of temporal protection is greater with assurances of a short term duration; long-term assurances – including those which are likely span different administrations – have a weaker claim for protection

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Michael Taggart, “The Province of Administrative Law Determined?” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 20.

and therefore mitigate the extent to which the binding of successors becomes a problem. Of course, this does not mean a long-term assurance can never be treated as binding, for example, the assurance in *Coughlan* was a “home for life”; the weakness of the expectation due to its horizon may be overtaken by the strength expectation due to its individualised nature, significant detriment or prejudice, and the absence of countervailing public interest. In addition, the contestable “character” of some assurances may also be factored into the mix. The reasonableness of reliance on an assurance may depend on, amongst other things, whether the assurance is non-controversial or is inherently political. As with private law estoppel, “cynical reliance” – where a person relies on assurances knowing the assurance will not or is likely not to be honoured – is insufficient.⁵²⁰ For example, it may be less reasonable to rely on assurance of a political nature made immediately prior to an election when an opposition party has foreshadowed an intended change.

IV *Legal certainty vs the separation of powers: the proper functional role of the courts*

One of the classic statements of the scope of the courts’ supervisory jurisdiction under judicial review is found in Lord Brightman’s speech in *Chief Constable of the North Wales Police v. Evans*.⁵²¹

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power. ... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

The rationale behind this is clear. The constitutional framework allocates political and social decisions to the legislature or to persons assigned that task by the legislature, *i.e.* the executive.⁵²² It is not for the courts to substitute their views on those decisions for to do so would “entail a re-allocation of power from the legislature and bureaucracy to the courts”.⁵²³ In the *Quin* case, Brennan C.J. saw substantive legitimate expectation as violating the principle of the separation of powers.⁵²⁴

⁵²⁰ See note 37 above.

⁵²¹ *Supra* note 175 at 154-155.

⁵²² Craig, *Administrative Law*, *supra* note 64 at 579.

⁵²³ *Ibid.* at 579.

⁵²⁴ *Quin*, *supra* note 201 at 28.

[Substantive legitimate expectations] would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of the power which did not. A legitimate expectation not amounting to a legal right would be enforceable as though it were, and changes in government policy, even those sanctioned by the ballot box, could be sterilised by expectations which the superseded policy had enlivened

This proposition is occasionally also justified on the basis that the courts are restricted to policing “the bounds of the familiar principle of *ultra vires*”; if the decision is *intra vires* the actual or presumed intention of Parliament, then the courts have no mandate to interfere.⁵²⁵ From this comes the expressive concept of the “four corners of discretion”.⁵²⁶ The flip-side is that if a public body or official acts *within* their designated area or within the bounds of the power conferred on them, then the courts cannot interfere. After all, the courts are not sitting on appeal from the decision. They are exercising their supervisory jurisdiction and are not concerned merits of the case.

Put another way, the nature of the judicial system is better designed to determine “hard-edged” – rather than “soft-edged” – questions.⁵²⁷ That is, courts are readily able to determine whether questions of jurisdiction, questions of law, legality generally, and so forth because these are questions of interpretation capable of being determined on the (usually limited) material before the courts. In contrast, “soft-edged questions involve matters of “fact”, “judgment”, “discretion” where there may not be one “right” answer and may require the consideration of a broad range of material which is not amenable to forensic consideration”.⁵²⁸ See, for example, the comments of Richardson J. in *Wellington City Council v. Woolworths (NZ) Ltd. (No. 2)*:⁵²⁹

The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, and the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

⁵²⁵ Wade, *supra* note 423 at 347.

⁵²⁶ See Lord Greene in *Wednesbury*, *supra* note 382.

⁵²⁷ The term “hard-edged” was used by Lord Mustill in *South Yorkshire Transport Ltd. v. Monopolies and Mergers Commission* [1993] 1 All E.R. 289, while the complimentary term “soft-edged” was adopted by Fordham for contrast. See Michael Fordham, “Surveying the Grounds: Key Themes in Judicial Intervention” in Peter Leyland and Terry Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone Press, 1997), 184 at 190 [Fordham, “Surveying the Grounds”].

⁵²⁸ Fordham, “Surveying the Grounds”, *supra* note 527 at 190.

⁵²⁹ [1996] 2 N.Z.L.R. 537 at 546.

Opponents of estoppel and substantive legitimate expectation argue that the estoppel and substantive legitimate expectation doctrines extend the functional role of the court and requires the court to adjudicate on matters of substance. They say this is objectionable in principle. Any extension of its supervisory jurisdiction into substantive matters or the merits of cases usurps the role of the executive and undermines the separation of powers within the constitutional framework.

Poole says: "To reinvent the doctrine of legitimate expectation as a mechanism for compelling the delivery of a substantive benefit ... requires the courts to usurp the decision-maker's powers when a case appears meritorious".⁵³⁰ She rejects the extension of legitimate expectation beyond its procedure origins, describing it as "problematic" for an "individual to have the court review the overall merits of the case and determine what the outcome 'should' have been".⁵³¹ Instead, she champions "the ultimate right of the administration to determine substantive questions".⁵³² Similarly, Elliott rejects the idea that the supervisory jurisdiction of the courts should extend into matters of substance. Although he recognises the distinction between procedure and substance is difficult to draw, he says "the courts are better equipped – in both practical and constitutional terms – to adjudicate on procedural, rather than substantive, aspects of executive action".⁵³³ He endorses the sentiments of Hirst L.J. in *Hargreaves* that the *Wednesbury* irrationality test is the appropriate standard on matters of substance.

The idea that the courts should be involved in the balancing of substantive interests was dismissed by Hirst L.J. in *R. v. Secretary of State for the Home Department, ex parte Hargreaves*⁵³⁴ as "heresy".⁵³⁵ In his view, "[o]n matters of substance (as contrasted with procedure) *Wednesbury*

⁵³⁰ Poole, *supra* note 6 at 432.

⁵³¹ *Ibid.* at 440.

⁵³² *Ibid.* at 440.

⁵³³ Elliott, *supra* note 381 at 31.

⁵³⁴ [1997] 1 All E.R. 397 at 412 [*Hargreaves*].

⁵³⁵ *Ibid.* at 412. His comments came in criticism of Sedley J.'s approach in *Hamble*, *supra* note 507. Similarly sentiments are expressed in Pill L.J.'s judgment:

The court can quash the decision only if, in relation to the expectation and in all the circumstances, the decision to apply the new policy in the particular case was unreasonable in the *Wednesbury* sense. The claim to a broader power to judge the fairness of a decision of substance, which I understand Sedley J to be making in *Hamble*, is in my view wrong in principle.

Hargreaves, *supra* note 534 at 416 [citations omitted].

provides the correct test”.⁵³⁶ Similar warnings against the courts intruding into the merits of cases are prevalent in decisions which have considered the issue of substantive protection of expectation. In *Quin*, Mason C.J. said the substantive protection of expectations would “entail curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances”.⁵³⁷ In *Kurtovic*, Gummow J. said: “[T]he question where the balance lies between competing public and private interests in the exercise of a statutory discretion goes to the merits of the case, and thus is one for the decision-maker, not the courts.”⁵³⁸ Speaking on the strong desire of the courts. Binnie J. in *Mount Sinai* regarded substantive relief in legitimate expectation as “representing the greatest intrusion by the courts into public administration”⁵³⁹ which, to date, Canadian courts considered inappropriate absent a challenge under the *Canadian Charter of Rights and Freedoms*.⁵⁴⁰

A number of points can be made which cast doubt on the rigidity of the procedure-substance distinction and Hirst L.J.’s warning that on matters of substance *Wednesbury* unreasonableness provides the “correct test”.

First, the procedure-substance – or for that matter, the “hard-edged” and “soft-edged” questions – distinction is fuzzy and is not honoured by all the orthodox grounds of review. Quite obviously review for *Wednesbury* unreasonableness involves a review of the substance of the decision. Although *Wednesbury* review is sometimes justified on the basis of inferred but unidentified defect in the decision-making process or error of law, this “ingenious” but artificial explanation was stripped away by Lord Diplock in his famous speech in *C.C.S.U.*⁵⁴¹ As Allan notes,

⁵³⁶ *Hargreaves*, *supra* note 534 at 412.

⁵³⁷ *Quin*, *supra* note 201 at 23.

⁵³⁸ *Kurtovic*, *supra* note 208 at 546.

⁵³⁹ *Mount Sinai*, *supra* note 265 at para. 46.

⁵⁴⁰ Binnie J. said later:

Where Canadian law parts company with the developing English law is the assertion, which lies at the heart of the *Coughlan* treatment of *substantive* fairness, of the centrality of the judicial role in regulating government policy. ... In Canada at least to date, the courts have taken the view that it is generally the Minister who determines whether the public interest overrides or not. The courts will intervene only if it is established that the Minister’s decision is patently unreasonable in the sense of irrational or perverse ...

Ibid. at paras. 62-63.

⁵⁴¹ *C.C.S.U.*, *supra* note 8 at 951. Lord Diplock said:

“[t]he *Wednesbury* test for unreasonableness, though in a sense it focuses primarily on a minister’s process of thought rather than his ultimate decision, plainly blurs the distinction between procedure and substance”.⁵⁴² Similarly, it is questionable whether established defects such as improper purpose, a failure to consider relevant considerations, consideration of irrelevant considerations, bad faith, *etc* conceptually fall under the rubric of an error of law or are better regarded as being review for abuse of discretion (the latter clearly touching on substantive matters).⁵⁴³

Secondly, it is artificial to state that the administration has unrestricted discretionary powers. Even Lord Greene’s famous phrase – “within the four corners of discretion” – envisaged substantive limits being placed on decision-maker’s discretionary powers. Lord Greene recognised that the “four corners” were not defined simply by the boundaries of discretionary power, by “certain principles on which the discretion must be exercised”.⁵⁴⁴ He referred, as examples, principles such as relevant and irrelevant consideration, bad faith, dishonesty, “attention given to extraneous circumstances”, “disregard of public policy”, and – of course – unreasonableness.⁵⁴⁵ More recently, when discussing the concept of “deference” which pervades Canadian administration law, L’Heureux-Dubé recognised the substantive limitations placed on administrative discretion.⁵⁴⁶

[T]hough discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed by the statute, the

[R]esort is no longer needed to [the] explanation ... of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

⁵⁴² T.R.S. Allan, “Procedure and Substance in Judicial Review” [1997] C.L.J. 246 at 246. See also David Dyzenhaus, “Formalism’s Hollow Victory” [2002] N.Z. Law Rev. 525 [Dyzenhaus, “Formalism’s”].

⁵⁴³ See Dyzenhaus, “Formalism’s”, *supra* note 542 at 545-546.

⁵⁴⁴ *Wednesbury*, *supra* note 382 at 682.

⁵⁴⁵ *Ibid* at 682.

⁵⁴⁶ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para. 56 [*Baker*]. However, some commentators have questioned the reality of these abstract statements of principle. For example, Dyzenhaus suggests the later *Suresh* case (*Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3 [*Suresh*]) “largely pays lip service to *Baker* on review on substance, since it diminishes scrutiny of substance to a check list of factors which the minister has to take into account” and “puts forward an understanding of weight and the role of the courts on review that is driven by the ... formal understanding of the separation of powers”. David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” *Queens L.J.* 445 at para. 128-129.

principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

In addition to the “common law” principles of good administration, some bodies are subject to similar statutory restrictions.⁵⁴⁷ Such limitations necessarily involve the intervention of the courts on matters of substance because they all involve – to a greater or lesser degree – a substantive element.

Thirdly, the primacy of the *ultra vires* principle – on which some seek to base the restriction of the courts role to matters of law and procedure, rather than matters of substance – is contested and has been shown to have limitations.⁵⁴⁸

Fourthly, there is growing dissatisfaction with the *Wednesbury* test as the standard for intervention on matters of substance. For example, Jowell and Lester argue that the *Wednesbury* test is “unsatisfactory”.⁵⁴⁹ Instead, they suggest a three-pronged approach to substantive review: first, when decisions are “irrational”, *i.e.*, it display no intelligible reason or is obviously arbitrary; secondly, when decisions violate “accepted standards of administrative probity” (such as fraudulent decisions or those taken in bad faith) or “good administrative principles” (such as proportionality, certainty, and consistency); and finally, when decisions justifiably violate fundamental rights and

⁵⁴⁷ See, for example, section 80 of the *Local Government Act 2002* (N.Z.) imposes a number of (largely procedural) decision-making obligations on local authorities if a proposed decision “is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent” with any previous policy or plan.

⁵⁴⁸ See Chapter 5, Section C, Part I above.

⁵⁴⁹ Jowell and Lester, “Beyond *Wednesbury*” *supra* note 300 at 371. They suggest it is defective for three reasons:

- (a) It is inadequate (“The incantation of the word “unreasonable” does not provide sufficient justification for judicial intervention. ... Intellectual honesty requires a further and better explanation as to *why* the act is unreasonable. The reluctance to articulate a principled justification naturally encourages suspicion that prejudice or policy considerations may be hiding underneath *Wednesbury*’s ample cloak.” *Ibid.* at 371).
- (b) It is unrealistic. (“In practice, ... the courts are willing to impugn decisions that are far from absurd and are indeed often coldly rational. ... And public authorities which had take leave of their senses could use the language of rationality to circumvent judicial review.” *Ibid.* at 372).
- (c) It is confusing because it is tautologous. (“It allows the court to interfere with decisions that are unreasonable, and the defined an unreasonable decisions as one which no reasonable authority would take.” *Ibid.* at 372).

freedoms.⁵⁵⁰ The present discussion of estoppel and substantive legitimate expectation falls within their suggested intervention for the violation of good administrative principle – that is, certainty. They contend that rather than such a framework leading to the courts being “freer” than they are now to challenge officials on the merits of decisions, the contrary applies. In their view, “[t]he search for principle, based upon accepted standards of justice, fairness, and other dimensions of morality, steers the courts away from policy or personal preference”⁵⁵¹ and is preferable to the *Wednesbury* approach which, “because of its vagueness, allows judges to obscure their social and economic preferences”.⁵⁵²

Fifthly – driven, in part, by the concerns just expressed – the reality is that the *Wednesbury* standard is not the sole test applied by the courts on matters of substance. The level of scrutiny (or deference) applied by the courts has varied accordingly to the circumstances of the case – sometimes with a conscious rejection of the “irrationality” standard in *Wednesbury*, sometimes without. Laws says “the courts, while broadly adhering to the monolithic language of *Wednesbury*, have to a considerable extent in recent years adopted variable standards of review”.⁵⁵³ Similarly, Joseph suggests “the sliding scale of review is part of the legal tapestry.”⁵⁵⁴

There is now acceptance that the standard of scrutiny to be applied is greater where the decisions affects fundamental human rights.⁵⁵⁵ Following recognition of the principle that matters of fact and discretion ordinarily lie with the administration, Lord Bridge in *Bugdaycay v. Secretary of State for the Home Department* said:⁵⁵⁶

⁵⁵⁰ *Ibid.* at 374.

⁵⁵¹ *Ibid.* at 381.

⁵⁵² *Ibid.* at 381.

⁵⁵³ Sir John Laws, “*Wednesbury*” in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Oxford: Clarendon Press, 1998), 185 at 187. On a related point, Fordham notes the how the *Wednesbury* standard is capable of manipulation: “[I]t tends to be the language of *Wednesbury* ‘unreasonableness’ when a court is inclined toward intervening; and *Wednesbury* ‘perverse’ when disinclined”; Michael Fordham, “*Wednesbury* successes in 1995” [1996] J.R. 115 at 118.

⁵⁵⁴ Joseph, *Constitutional*, *supra* note 467 at 834.

⁵⁵⁵ See Fiona Donson, “Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights?” in Peter Leyland and Terry Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone Press, 1997), 347.

⁵⁵⁶ [1987] 1 All E.R. 940 at 952. See also *Brind v. Secretary of State for the Home Department* [1991] 1 All E.R. 720 where three House of Lords judges appeared to endorse an enhanced level of scrutiny in cases involving a human rights dimension; the case itself concerned an attempt to restrict the fundamental right to freedom of expression.

Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

Of course, direct human rights restrictions on the administration's discretion also apply by dint of the various (entrenched and non-entrenched) human rights instruments: for example, via the *Canadian Charter of Rights and Freedoms*, the (English) *Human Rights Act 1998*, and the *New Zealand Bill of Rights Act 1990*.

More generally though, there are indications the courts "have loosened the test [of *Wednesbury* unreasonableness] in cases which have nothing to do with fundamental rights".⁵⁵⁷ Craig points the assessment of reasonableness in a range of planning cases and industrial relation cases as being closer to whether the courts believed the exercise of discretion was unreasonableness *per se*.⁵⁵⁸ Lord Cooke – a long advocate of the replacement of the "tautologous and exaggerated" *Wednesbury* test⁵⁵⁹ – advocated a simpler, and less extreme, formulation of the test of reasonableness: "[Is] the decision in question ... one which a reasonable authority could reach[?]"⁵⁶⁰ In his view, such a formulation would still "give the administrator ample and rightful rein, consistently with the constitutional separation of powers".⁵⁶¹

The position in North American is similar. The simple view that judicial intervention on matters of substance is restricted to the worst cases of unreasonableness has been rejected in favour of a graduated scale. In Canada, the "pragmatic and functional" framework for review for abuse of discretion requires an initial assessment of the appropriate standard of review to be applied in any particular case.⁵⁶² Two standards ("correctness" and "reasonableness *simpliciter*") involve less "deference" than the Canadian equivalent to the *Wednesbury* test ("patent unreasonableness"). In the United States, the "hard look" doctrine was developed in response to a need to find a middle

⁵⁵⁷ Craig, *Administrative Law*, *supra* note 64 at 582.

⁵⁵⁸ *Ibid.* at 582.

⁵⁵⁹ Cooke, "Struggle", *supra* note 5.

⁵⁶⁰ *I.T.F.*, *supra* note 315.

⁵⁶¹ *Ibid.* at 157.

⁵⁶² The Supreme Court extended this framework – which had been applied for errors of law (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc* [1997] 1 S.C.R. 748) – to review of the substantive aspects of discretionary decisions in *Baker*, *supra* note 546.

ground between excessive deference to administrative and overly intrusive judicial activism.⁵⁶³ This doctrine has been endorsed – albeit in the abstract sense – by a number of Commonwealth judges.⁵⁶⁴

A comprehensive analysis of these developments or the debate that surrounds them is not feasible in this paper. However, it is sufficient to note that the *Wednesbury* standard is not immutable and there is an increasing theme of dissatisfaction with it as the sole test for abuse of discretion – quite independent of the present discussion of estoppel and substantive legitimate expectation.

Finally, even with the increasing number of moves away from the *Wednesbury* standard as a monolithic standard, it continues to be recognized that the courts' role is not a court of appeal, designed to assess whether the administration got the "right" answer. The courts remain adamant their role is not to assess the "correctness" or "wrongness" of the decision. The courts continue to recognize the "soft-edged" nature of substantive questions and the fact their may not be any one "right" answer. On any manifestation of the test for substantive review, the courts continue to accord decision-makers a "margin of appreciation", not simply intervening because they themselves disagree with the outcome that was reached. Speaking of the difference between reasonableness and patent unreasonable under Canada's sliding scale for substantive review, Iacobucci J. recently said:⁵⁶⁵

[T]here will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

The adoption of an alternative formulation to the *Wednesbury* test does not negate the underlying proposition that the courts' role is not to substitute their judgment for that of the decision-maker.

⁵⁶³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) and Stephen G. Breyer, Richard B. Stewart, *Administrative Law and Regulatory Policy* (Boston: Little, Brown, 1979) at 291-309.

⁵⁶⁴ See, for example, *Pharmaceutical Management Agency Ltd. v. Roussel Uclaf Australia Pty Ltd.* [1998] N.Z.A.R. 58 and *Waitakere City Council v. Lovelock* [1997] 2 N.Z.L.R. 385 (per Thomas J.) [Waitakere]. See also the endorsement of the approach by (now Chief Justice) Sian Elias, *supra* note 442 at 14. See recently Wild J.'s attempt to resolve the point once and for all in *Wolf v. Minister of Immigration* (7 January 2004), CIV 2002-485-106, (Wellington H.C.).

⁵⁶⁵ *Law Society of New Brunswick v. Ryan* [2003] 1 S.C.R. 247 at para. 51.

In addition to the doubt about the monolithic nature of the Wednesday test discussed above about functional concerns specifically. A number of comments can be made in the context of estoppel and substantive legitimate expectation.

First, the courts are not required to determine whether a decision made in breach of an expectation is meritorious. It is the transition to that new policy that is its primary concern. As the Court in *Coughlan* said:⁵⁶⁶

In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations. ... If it does not ... the court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations.

Similarly, Singh and Steyn contend the substantive protection of expectations does not involve intruding upon the merits of a decision:⁵⁶⁷

[I]n requiring a decision-maker to fulfil a promise or adhere to a practice the court is not concerned with the merits of different policies. The previous promise or policy was that of the decision-maker, not the court.

The courts' role needs to be more sophisticated than merely enquiring whether a public body has reneged on an assurance or changed a policy which frustrates the substantive expectations of citizens. It is clear that not all such occasions demand protection. As Lord Diplock said in *Preston*:⁵⁶⁸

There may be cases in which conduct which savours of breach of contract or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation.

The courts' analysis still involves a flexible assessment of the case. Within that assessment the merits of the substantive policy change or ultimate position is accorded the highest degree of deference. It is not for the courts' to second-guess the merits of that position. The flexible

⁵⁶⁶ *Coughlan*, *supra* note 103 at para. 66.

⁵⁶⁷ Rabinder Singh and Karen Steyn, "Legitimate Expectation in 1996: Where Now?" [1996] J.R. 17 at 19.

⁵⁶⁸ *Preston*, *supra* note 122 at 341.

assessment relates to the steps taken to transition between the old and the new position: has the impact of the new position been “softened” to take account of the previous expectations and the need for legal certainty? In the terms used earlier, a distinction is drawn between the *temporal* and *substantive*. The courts’ role is confined to the former.

Undoubtedly, this is not always an easy distinction to draw. For example, the court in *Coughlan* could be criticized for falling into this very trap. The Court was cautious that its scrutiny was limited to the recognition and accommodation of the assuree’s expectation, not an overall appraisal of the policy change.⁵⁶⁹

In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself.

However, the Court appeared to glide into an assessment of the merits of the ultimate policy position. The test posed by the Court was “whether the need which the health authority judged to exist to move Miss Coughlan to a local authority was such to outweigh its promise that Mardon House be her home for life”.⁵⁷⁰ It found “there was no overriding public interest which justified it” and “the health authority failed to weigh the conflicting interests correctly”.⁵⁷¹

The difficulty perhaps arises because the assessment contains three key elements:

- (a) the “strength” or legitimacy of the expectation based on the earlier assurance or policy;
- (b) the ability to accommodate the expectation or provide a transitional regime; and
- (c) the public interest requiring a “clean slate” approach or not making transitional provision for the previous expectations.

In the case of considering the relationship between (a) and (b), it is easier for the court to put aside questions about the merits of the new policy or position. However, when (c) is factored in, it is almost irresistible for the courts to slide into an assessment of the weight of the public interest.

⁵⁶⁹ *Coughlan*, *supra* note 103 at para. 89.

⁵⁷⁰ *Ibid.* at para. 83.

⁵⁷¹ *Ibid.* at para. 89.

Unfortunately, the phrase "public interest" is used rather loosely. There is no doubt the administration ought to be able to make changes which are in the public interest. But, in my view, it is not the public interest in the substantive change which is relevant in an estoppel and substantive legitimate expectation context. Public interest considerations should only arise where the public interest is inconsistent with the transitional recognition of expectations. That is, where the public interest demands a "clean slate" approach or accommodation of the expectation by compensation or temporary protection would not be in the public interest. This is a different conception of the public interest to the public interest mandating the new policy or position. The general public interest underlying the new policy or policy is not relevant to the courts' assessment. However, it follows that the general public interest cannot, in itself, be used by the administration to justify not accommodating previous expectations. Only if there is some distinct public interest against transitional protection do such matters become relevant. In such cases, an assessment of the weight of the public interest is necessary. Again, I stress it is not an assessment of the public interest of the substantive policy.

Within that assessment, the courts are able to, and should, apply a deferential standard when assessing the (anti-)transitional public interest. This means primacy will be given to the administration's assessment of the public interest and the balancing of it against the strength of previous expectations. The *Wednesbury* irrationality standard would seem to allow too much latitude. However, a reasonableness *simpliciter* standard would strike a balance between the functional concerns and the legal certainty interests. The important role for the courts is the policing of the framework for that balancing exercise. The courts must ensure the general public interest is not used to justify the lack of accommodation of expectations. In my view, only the (anti-)transitional public interest is relevant.

On this basis, the analysis of the public interest in *Coughlan* makes more sense. The defect in the administration's assessment was not its assessment of the public interest underlying the decision to close Mardon House. It was its failure to consider whether there was any public interest in not accommodating the previous expectations on a transitional basis. That is, providing similar services elsewhere or, if appropriate, financial compensation. The focus throughout the case on the question of whether an alternative placement was available seems to suggest the Court did in fact have the (anti-)transitional public interest in mind. The public interest of the health authority focussed on the costs of continuing to operate Mardon House, not the costs of accommodating its previous promise albeit by alternative means. The health authority misconceived the public interest by focussing on the substantive, not transitional, public interest. It may well have been that the costs

associated with accommodating the expectation on a transitional basis would have had a similar detrimental effect on the public interest, but the health authority failed to identify it on this basis. Arguably, the comments of the Court about the deficiencies in the public interest makes more sense in this context.

Secondly, the functional concerns can be mitigated by choice of the appropriate remedy. If it is found that the administration has inappropriately defeated a person's expectation, then it does not follow that the courts should give effect to that expectation. Nor does it follow that the courts need to quash any new policy in its entirety. Again, the transitional or temporal focus should be paramount. This means options such as temporarily staying the effect of the policy in respect the class of persons holding legitimate (substantive) expectations and referring the matter back to the decision-maker to consider and develop appropriate transitional provisions may be more appropriate.

This has a similar flavour to the "collaborative" model of policy development evident in *Charter* jurisprudence in Canada. The courts have the ability to strike down laws on substantive grounds if they are inconsistent with *Charter* rights and cannot be justified as "reasonable limits" on those rights. This creates a potential clash between the legislature (and, in some cases, the executive) and the courts on policy development. However, the Supreme Court of Canada has sought to develop "disciplinary practices" to avoid greater interference than is absolutely necessary with the legislatures' policy develop role.⁵⁷² For example, the courts commonly temporarily suspend any declaration of inconsistency to allow the legislature to develop an alternative policy. Many emphasize the view that *Charter* adjudication is "not simply a matter of judicial declaration and order, and governmental submission and compliance"; instead it is "a dynamic process involving all branches of government and citizenry in the eventual implementation of constitutional values".⁵⁷³ The collaborative process of fashioning a response to the constitutional defect is often described as "dialogue" between the courts and legislature.⁵⁷⁴ Functional concerns have not lead to rigid

⁵⁷² Beverley McLachlin "Charter Myths" (1999) 33 U.B.C. L. Rev. 23 at 31 [McLachlin, "Charter Myths"].

⁵⁷³ Oonagh E. Fitzgerald, *Understanding Charter remedies: a practitioner's guide* looseleaf (Scarborough, Ont.: Carswell, c1994-1996) at 3-26.

⁵⁷⁴ Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; B.M. McLachlin "The Charter: A New Role for the Judiciary?" (1991) 29 Alta. L. Rev. 540; McLachlin, "Charter Myths", *supra* note 572.

demarcation of roles; instead a “tradition of judicial restraint and judicial/legislative co-operation” has developed.⁵⁷⁵

The analogy with the present substantive expectations is apparent. Both are concerned with restrictions on policy development. In the case of the *Charter*, the restriction is substantive; in the case of substantive expectations, the restriction is only temporal. In both cases, there is a tension between the rights of individuals and the public interest of the wider community. In the case of the *Charter*, the administration is required to justify any limits on the rights of individuals and must demonstrate that those limits are proportionate to legislative aim (*i.e.*, there is a pressing and substantial purpose, the means are rationally connected to that purpose, and the means impairs the rights as little as possible). In the case of substantive expectations, the administration is asked to justify any omission to protect the expectations interests of individuals when introducing a new policy developed in the public interest. The Canadian experience demonstrates that, even where the restriction on policy development is greater (because *Charter* limitations are substantive), functional concerns can be appropriately dealt with by careful curial consideration and application of the role for the court. This role need not be impotent; a collaborative approach to legislative and policy development allows for bold steps to be taken by the courts to protect rights, while still providing room for continued legislative development by the legislature. In my view, the same ideals are similarly applicable to the respective roles for the courts and the executive for substantive expectations and policy development. Indeed, the concept of a law-making partnership between the courts and the legislature has also been suggested outside the Canadian *Charter* experience.⁵⁷⁶

V *Legal certainty vs. legal certainty: internal criticisms*

The recognition of legal certainty through the doctrine of estoppel and substantive legitimate expectation has been criticised by some as likely to be ineffective. That is, the recognition of these concepts further undermine, rather than enhance, the certainty or stability in the law. For example, Poole says to “reinvent the doctrine of legitimate expectation as a mechanism for

⁵⁷⁵ *Ibid.* at 554.

⁵⁷⁶ See, for example, Joseph refers to “collaborative enterprise” between the courts and the legislature (Philip A. Joseph, “A historicism of Ultra Vires” (Paper presented to the SPT conference, University College, London, September 2000) [unpublished], cited by Thomas J. in *R. v. Pora* [2001] 2 N.Z.L.R. 37), and Jaffe refers to the potential for a “fruitful partnership” between the legislature and the Courts as the two bodies who “are in the law business together and [who] should be continually at work on the legal fabric of our society” (Louis L. Jaffe, *English and American Judges as Lawmakers* (Oxford: Clarendon Press, 1969) at 75-76).

compelling the delivery of a substantive benefit gives new life to the old complaints of uncertainty and confusion".⁵⁷⁷ It is argued that doctrines of estoppel and substantive legitimate expectation introduce vague standards into the law, such as "legitimate" (or "reasonable") expectations,⁵⁷⁸ "abuse of power", and the like. It can be argued the inevitable balancing process involved in protected legal certainty while recognising the countervailing principles leads to a lack of predictability of judicial intervention. The pluralistic nature of protection of legal certainty makes it difficult for public bodies and officials to satisfy themselves that they have sufficiently recognized expectations such that they are insulated against court action. And once legal action is taken, it is unlikely to be resolved quickly; the lack of a coherent standard for intervention means contests about the failure to recognise expectations are unlikely to be resolved until determined by final appellate courts.

Similarly, if expectations are dealt with on a temporal basis, a greater use will be made of transitional provisions. Arguably, these types of provisions "introduce uncertainty due to their inherent complexity".⁵⁷⁹ New "clean slate" policies will become a thing of the past; dual (and perhaps multiple) policy systems will become common-place. Others argue the fear of inducing reliance based on policies and assurances and the consequential legal consequences that will flow will have a "chilling effect". Public bodies and officials will be less willing to establish good practices, public guidelines and to give informal advice.⁵⁸⁰ France asks rhetorically: "Is there a danger that administrators may pull back from establishing a practice of good administration lest it be turned on them in circumstances where they may believe it to be inappropriate?"⁵⁸¹ Consequentially, this diminishes the material available for individuals for planning purposes and leads to less certainty about the law.

I deal with each of those concerns. There is no doubt that vague standards are undesirable and undermine the rationale of legal certainty. However, the standards associated with legal certainty need not be regarded as vague. Undoubtedly, the initial manifestation of legal certainty in tangible terms will come with a degree of uncertainty as administrators and the courts take time to develop and refine a coherent group of standards. This process is nothing new in public law. Indeed,

⁵⁷⁷ Poole, *supra* note 6 at 432.

⁵⁷⁸ Schönberg, *supra* note 2.

⁵⁷⁹ *Ibid.* at 18.

⁵⁸⁰ *Ibid.* at 17-18.

⁵⁸¹ France, *supra* note 111 at 140.

it is the very challenge of the development of some guiding principles with which this thesis is presently concerned. Further, it is arguable that despite some courts' rejection of any formal and substantive concept of legal certainty in public law, decisions made in the name of other orthodox doctrines unquestionably are influenced by the values which imbue legal certainty. See, for example, the decisions of the Supreme Court of Canada in *Mount Sinai* and *C.U.P.E.* where although the substantive doctrine of legitimate expectations was rejected, in both cases the administrations' moves to resile from previous undertakings and policies was held to be "patently unreasonable". Surely it is better that legal certainty comes "out of the closet" and is applied in a conscious and principle manner, rather than being applied through the back door. Conscious development of the doctrine is more likely to provide certainty for all players involved. Of course, the development of legal principle is an organic process and sometimes "rocky". Legal adjudication – especially with the polycentric nature of public law – has been characterised by an "ebb and flow"⁵⁸² or the "swing of the pendulum".⁵⁸³ However, this need not necessarily lead to uncertainty within the law. As Thomas J. cautioned in *Waitakere City Council v. Lovelock*:⁵⁸⁴

Accepting the desirability, along with the inevitability, of evolution in administrative law, however, does not mean that arbitrary or extreme shifts in the Court's approach can be readily sanctioned. Judges' attitudes, of course, will vary and result in differing emphases, but the reasoning justifying the Judge's inclination needs to be plainly articulated. Otherwise, the consistency and coherence of the basic principles of administrative law will be prejudiced.

In any event, Schönberg argues that "even if the recognition of legitimate expectations does reduce certainty more permanently at a general level, the loss is offset by the gain in predictability and fairness in the treatments of individuals".⁵⁸⁵

Further, the difficulties presented by transitional provisions appears to be overstated. The use of transitional provisions is now common place in legislation.⁵⁸⁶ Administrators are frequently

⁵⁸² See, for example, Madame Justice Claire L'Heureux-Dubé, "The 'Ebb' and 'Flow' of Administrative Law on the 'General Question of Law'" in Michael Taggart (ed), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) at 308.

⁵⁸³ See Lord Wilberforce, "Foreword" in Michael Taggart, *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Auckland: Oxford University Press, 1986) ix at ix.

⁵⁸⁴ *Waitakere*, *supra* note 564 at 400 [*Waitakere*].

⁵⁸⁵ Schönberg, *supra* note 2 at 18.

required to confront preliminary issues about which regime applies to any particular situations but, at worst, that simply adds one additional level of fact-finding into the administrative process. Transitional provisions can, and ought to be, drafted with reasonable clarity. Any failure to do so it not a defect caused by the principle of legal certainty itself.

Any “chilling effect” arising from the recognition of estoppel and legitimate expectation would be problematic. Legal certainty depends on a degree of transparency in the relationship between individuals and the administration. However, Schønberg concludes there is no tangible evidence that such a “chilling effect” occurs. He says none of the jurisdictions which have recognised substantive legitimate expectations have had such problems.⁵⁸⁷ Despite similar concerns being expressed originally, nor was there such a problem in private law when the doctrine of negligent misstatement was extended.⁵⁸⁸ That is perhaps no big surprise. Transparency is an important principle in the modern administrative state and public bodies now recognise the importance of openness to the degree of trust between them and citizens. Freedom of information regimes are now common-place in most jurisdictions. Increasingly public bodies understand the benefits of empowering citizens through the provision of information and aiming for a collaborative approach their activities. If legal consequences is to have an effect on policies and informal advice, it is arguable it that even if the *quantity* of public body advice decreased, the *quality* of it will increase.⁵⁸⁹

VI *Legal certainty vs “unreasonable” expectations*

Earlier,⁵⁹⁰ I discussed the conceptual issues arising from expectations that have no reasonable foundation. The call for legal certainty implicitly relies on a rational life-planning processes. The law therefore should not protect expectations which have no rational basis. Similarly, an argument against protecting expectations in public law can be made where the expectation arises in two particular circumstances: where the legal regime provides a mechanism for

⁵⁸⁶ For the desirability of transitional provisions in legislation, see Legislation Advisory Committee, *Guidelines on Process & Content of Legislation* (Wellington: Ministry of Justice, 2001), online: <<http://www.justice.govt.nz/lac/index.html>> at para. 7.4.

⁵⁸⁷ Schønberg, *supra* note 2 at 19.

⁵⁸⁸ *Ibid.* at 19, n. 56.

⁵⁸⁹ Schønberg, *supra* note 2 at 20.

⁵⁹⁰ See Chapter 4, Section B above.

a person to “perfect” their expectation and where the administration disclaims or cautions against relying on certain representations, thereby warning against the dependability of such representations for planning purposes.

First, “perfection”. By this I mean the presence of a mechanism where the person can obtain, at law, the certainty required to proceed. Examples of formal *ex ante* mechanisms to “perfect” an expectation are commonplace in the planning field.⁵⁹¹ I accept that expectations theory is primarily concerned with protecting expectations which are necessary for life-planning purposes. The reliance on informal assurances when legal certainty is available elsewhere belies the very rationale for protecting expectations. In the absence of a compelling reason why it could not be utilised, a failure to utilise a mechanism designed to provide legal certainty suggests an unreasonable approach from the representee. The informal representation is not necessary to provide them with the legal certainty for the planning of their affairs; any consequential uncertainty is their own doing.

Of course, in cases of approvals and permits, it could be argued that anything short of formal approval would fall in this category – a grant of a permit or approval is a mechanism to “perfect” such questions of entitlement. On the other hand, this ought to be assessed on a realistic basis. The modern nature of administrative law and increasingly presence of broad administrative discretion means in many cases people will have often no but to rely on administrative assurances and policies for planning purposes, even though formal “perfection” mechanism are available.⁵⁹² These processes for formalising permissions or achieving legal certainty are not necessarily simple, instantaneous, or achievable in all circumstances. In some cases, a person may not be able to obtain the permit or approval (or otherwise “perfect” any uncertainty) when it is needed for planning (and conducting) one’s affairs. The permit or approval may take some period of time to obtain or a person

⁵⁹¹ For example, in *Reprotech*, the applicant could have obtained a formal “determination” of their existing-use rights rather than simply relying on the Council’s purported informal assurances; *Reprotech*, *supra* note 98.

⁵⁹² For example, Mullan argues for an expanded role for legitimate expectation because of the necessity of “*de facto*” law:

Given the very extensive use of various types of informal regulatory instruments ..., the extent to which this represents the really core *de facto* law of many departments and agencies, the degree to which reliance is predicated on the basis of these instruments, and the sheer operational imperatives of by and large adhering to the terms of these instruments, there is a strong case that can be made for the extension of legitimate expectations to protect substantive interests predicated on such informal but vital law.

Mullan, “Legitimate Expectation”, *supra* note 397 at 540.

may need to commit resources to ensure they are in a position to obtain such a permit. For example, an immigrant may need to enter the country with their family before they are entitled to be considered for immigration permits. Although it is not evident from the face of the Supreme Court's decision, this may be the reason why in *Mount Sinai* more significance was not placed on the hospital not regularizing its permits prior to fundraising and moving to Montreal. Ultimately, in my view, this needs to be assessed on a case-by-case basis.

Secondly, disclaimers. It is arguable that the presence of a disclaimer ought to put someone on notice that the representation is not to be relied on, therefore weakening any expectation based on such a representation, perhaps to the point of being an unreasonable expectation. However, in my view, the presence of a disclaimer should not be determinative. Ultimately, it needs to be assessed in any particular case, but can be reflected in the weight to be given to any expectation.

First, the courts' well-known cautious attitude to disclaimers in other areas of law such as contract and tort needs to be taken into account.⁵⁹³ The general reluctance to apply such clauses or, alternatively, to interpret them narrowly is driven by overall concerns about how fair such clauses are. In particular, in contract law, the courts have expressed concerns that they rely on a (fictitious) equality of bargaining power. Similarly, such clauses usually do not apply in equitable jurisdictions. By analogy, there is an argument that a similar approach should apply in the context of public law estoppel and the legitimate expectation.

Secondly, there is an even stronger case for arguing that a disclaimer should not be effective in situations involving public bodies. Unlike private law, a citizen often has no option but to engage with public bodies or officials. Often, only public bodies have information a person needs; it is not a situation where a person has a choice about whether to obtain the information if they do not want to the uncertainty created by a disclaimer. Applying disclaimers would effectively undermine the overall rationale for protecting expectations. The ability of citizens to plan their affairs and their relations with the state would be wholly undermined if simple disclaimers would be able to rebut any assurance given. In addition, the reliance on disclaimers offends the aim of trust in government and the associated legitimacy and dependability of the administration – an ideal that was earlier recognised as being important.

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See *Halsbury's Laws of England*, 4th ed., vol. 9(1), "Contract" (London: Butterworths, 1980-) at para. 800.

As a general rule, protecting expectations need not extend to protecting unreasonable expectations. However, this point can be taken into account in a case-by-case assessment and need not generally oust the protection of expectations. The availability or non-availability of other means to achieve legal certainty or situations where reliability had been disclaimed can be dealt with in the assessment of the strength of any expectation. Those which are wholly unreasonable need not be protected – with the reasonableness of reliance to be assessed on the necessity of reliance on assurances for planning purposes, particularly in the light of the availability of other mechanisms to achieve the necessary certainty.

D Reconciling expectations and countervailing concerns

In my view, the preceding discussion demonstrates that the countervailing principles which have been relied on to argue there is no room in public law for estoppel or substantive legitimate expectation are not as impenetrable as have been intimated. Undoubtedly, the principles underlying those objections – individually and collectively – present some hurdles to the recognition of legal certainty but none of those hurdles is insurmountable. Legal certainty does not pretend to be an absolute concept – applicable at the expense of everything else. Instead, the delivery of legal certainty is capable of being sensitive to its factual context and the legal tensions within which it operates.

In my view, this means there is a strong case for the general recognition of expectation interests in public law. However, the countervailing concerns need to be considered in a more sophisticated way and on a case-by-case basis. I suggest therefore a more detailed assessment or balancing process is required to determine whether the expectations should be protected. The question of whether courts should intervene is more involved than simple considerations of assurance and detrimental reliance or notions of “abuse of power”. I suggest a number of “touchstones” – drawn from the earlier conceptual discussion – to help focus the analysis on the truly important aspects of expectations and public law theory.

First, it is necessary to assess the strength of the expectation interest. The strength of the expectation interest needs to be assessed to establish whether it passes the initial threshold about whether society considers it necessary for such expectations to be protected. In that sense, the focus should be whether it was “reasonable” to form the expectation based on a particular representation. In my view, the linguistic move away from “reasonable” expectation to “legitimate” expectation was

an error because the sense of this threshold was lost.⁵⁹⁴ While, as a matter of law, it can be argued the concept of a legitimate expectation includes both a requirement that it be reasonably held and the requirement that the legal system acknowledges the expectation,⁵⁹⁵ the former requirement seems to become more obscure than the latter. In addition, over and above this threshold, it is necessary to consider how strong the expectation interest is to feed into any later balancing process. Unlike the initial threshold for protection, this is better seen as a question of degree rather than a binary element.

I suggest that “touchstones” relevant to the assessment of the strength of the expectation interest including the following:

- (a) Does the expectation arise from an *individualized assurance* or a *general policy*?
- (b) Is the assurance analogous to a *contractual promise*?
- (c) Is the assurance *specific and unqualified*?
- (d) Was the assurance made after the consideration of the *individual merits* of an individual’s or group’s case or is it an *abstract statement of policy*?
- (e) What is the *horizon* of the expectation – *short-term or long-term*?
- (f) Was there any realistically available means for an individual to “*perfect*” the expectation?
- (g) Was the assurance made subject to a *disclaimer*?
- (h) Has the individual *detrimentally relied* on the assurance?

Specific, individualized and unqualified assurances (more like a contractual promise) are more likely to convey an impression of reliability and are reasonable to rely on. Similarly, a representation made after individualised assessment of the merits is more likely to be dependable because it has to be tailored to the circumstances of any particular case. In addition, it avoids some of the conceptual concerns raised about fettering discretions in advance. The shorter the horizon of the representation, the more reasonable it is to depend on it; in terms of both the reasonableness of reliance and the interference with policy developed, there is less chance of circumstances arising that

⁵⁹⁴ This preference was noted by Lord Diplock in *C.C.S.U.*, *supra* note 8 at 949.

⁵⁹⁵ Schönberg, *supra* note 2 at 6.

necessitate any alteration. These touchstones seek to highlight the conceptual elements from the legal certainty/Rule of Law theory underlying the protection of expectations.

Secondly, having determined the strength of the relevant expectation interest, it is then necessary to weigh that interest against other countervailing interests. The touchstones relevant highlight these interests and the extent to which they weigh against recognising the expectation in any particular case:

- (a) Is the assurance *ultra vires* the decision-maker? If so:
 - (i) Is the assurance within the *actual or ostensible authority* of the public official?
 - (ii) Has the public body *deliberately* exceeded its authority?
 - (iii) Is the illegality *internal* to the decision-maker?
 - (iv) How *grave* is the illegality?
 - (v) Are others *prejudiced* by the illegality?
- (b) Are there other *countervailing interests* underlying the change:
 - (i) How *strong* are the countervailing interests?
 - (ii) Can the relevant objective be achieved while still *accommodating* the expectation? For example:
 - How long is the “*lead-time*” before the new policy takes effect?
 - Does it allow sufficient time for individuals to plan *alternative responses*?
 - Can the prejudice to an individual be *compensated* in monetary terms?
- (c) Is the effect of the change on the individual *serious or significantly disproportionate* to the need for the change?

In some cases, the question of whether the assurance was *ultra vires* will arise. In these cases, it is suggested that the nature and degree of the illegality must be considered to determine whether the illegality cannot be condoned. The earlier discussion suggested that illegality which is technical and internal the decision-maker or is insignificant or trivial is less likely to cause an

impediment with the protection of expectations – balanced against a strong expectation and/or significant prejudice to the person relying on the expectation, such illegality can be tolerated. However, toleration of illegality is less likely to be acceptable where the decision-maker has deliberately exceeded their authority or where there is significant prejudice to third parties.

In most cases, the real contest will be about whether the disappointment of the expectation can be justified because of some countervailing governance or public interest which is incompatible with the protection of the expectation interest. In these cases, the objective justifying the change of position need be identified. A reasoned justification must be advanced, although the separation of powers principle concerns suggests that the highest level of deference be given to the advanced objective or justification. Instead, the focus is on whether the objective can still be achieved while still accommodating the expectation. The focus, as highlighted in the discussion of the *Coughlan* case and the conceptual basis for protecting expectations, is on the *temporal* or transitional aspects, not the substantive merits of the objective.

Lastly, in this balancing approach, it is useful to consider the relative (dis-)proportionality between the strength of the expectation interest and the objective being pursued. This mitigates these concerns that any degree of expectation and trifling prejudice can effectively hamper policy development and the public interest. The prejudice to a person's ability to plan their affairs must be serious, or alternatively, the effect on them disproportionate to the relevant public interest, before protection is justified.

Overall, these touchstones do not in themselves resolve the difficult issues which must be confronted in any particular. However, I suggest they help focus the analysis on the essential elements: on the one hand, the need for legal certainty in planning one's affairs, and, on the other hand, the core public law principles which may in some situations be undermined if a particular expectation is upheld.

Chapter 6 Conclusion

In 1948 Lord Denning in *Robertson* recognised that injustice and inequity would result if the Crown was “at liberty to revoke [its assurances] at its pleasure and without cause”.⁵⁹⁶ Some years later in *Schmidt*, he highlighted the similarity between the revocation of a right and disappointment of an expectation when he suggested that fairness dictated that natural justice should be applied in both situations.⁵⁹⁷ Since then, the courts have struggled to reconcile instances of apparent unfairness where the state has reneged on an assurance or otherwise disappointed expectations it has induced and the public interest principles which suggest the public law framework will be undermined if the courts intervene in this situation. There has been occasional resort to the doctrine of estoppel, as well as pressure to extend legitimate expectation to substantive protection. In addition, undoubtedly estoppel and expectation principles have also been recognised as part of the more general scrutinisation of administration discretion under the reasonableness, abuse of power, and substantive fairness doctrines.

Most recently we have seen the House of Lords suggest public law has now absorbed “whatever is useful from the moral values” underlying the estoppel doctrine that Lord Denning borrowed from private law.⁵⁹⁸ However, their Lordships also emphasised the obvious proposition that public law remedies must take into account the interests of the general public which the public body or official exists to promote. The House of Lords, endorsed the holistic “abuse of power” assessment applied by the Court of Appeal in *Coughlan* – a case which represented one of the high points in the debate about protections expectations or applying estoppel principles in public law cases.

The case-law over this period had demonstrated that there is an inherent tension in applying estoppel or estoppel principles in public law. On the one hand, the Rule of Law provides a strong foundation for the protection of expectations. Legal certainty is needed for people to be able to plan their affairs conscious of the consequences that follows. On the other hand, the public law landscape presents some difficulties to achieve the legal certainty desired by citizens. Various objections have been raised to the protections of expectations by estoppel or doctrines applying estoppel principles.

⁵⁹⁶ *Robertson*, *supra* note 47 at 770.

⁵⁹⁷ *Schmidt*, *supra* note 59.

⁵⁹⁸ *Reprotech*, *supra* note 98 at para. 35.

In this thesis, I have argued those objections are overstated and do not present an insurmountable impediment to the (substantive) recognition of expectations. Many of the objections are not as absolute as the critics suggest; the conceptual underpinnings of these objections are not inherently incompatible with the theoretical foundation for protecting expectations. In particular, the inherently temporal nature of expectations theory means any conflict is much less significant than suggested.

I do not dismiss the objections entirely though; many of the objections are based on concepts which are important to public law. However, I argue their importance should not be overstated, particularly, when balanced against the importance of legal certainty. I suggest estoppel and estoppel principles can be applied on a case-by-case basis in a way sensitive to those concerns. Undoubtedly, that is a much more challenging task and requires a more sophisticated analysis that has previously taken place.

In my view, though, it is time for the analysis and debate to move beyond the sloganisation that has been largely common-place to date. Simple assertion that the special nature of public law makes protecting expectations impossible cannot be maintained. Nor can protection be justified solely on the basis of an administrative assurance and detrimental reliance. The conceptual underpinnings of the competing sides signal that, in real terms, a direct contest only comes into play in some circumstances. The challenge for the courts is to begin to deconstruct the claims for protection and generalised objections and to robustly reconcile the purportedly competing interests. I have attempted to critique the public law objections, to distil the reality of the purported objections, and to place the extent of those objections that remain in context. I have also identified a range of “touchstones” from each of the theories to provide a basis for this reconciliation or balancing process.

Further, I have argued that the particular doctrinal approach adopted – estoppel, substantive legislative expectation, “abuse of power”, reasonableness, substantive fairness – in reality does not provide an instant answer to this challenge. Despite the House of Lords recent rejection of public law estoppel in favour of the “abuse of power” brand of substantive legitimate expectation, it has been my contention that none of the doctrines are any better or worse at protecting expectations or responding to the public law objections. Each of them have the inherent flexibility to allow for the more sophisticated analysis required for the consideration of whether expectations should be protected. Whether the approach adopted as one of “overall evaluation” or a more structured “justificatory approach”, there remains an essential balancing of the countervailing factors for and

against protecting the expectations and a need to recognise the theoretical underpinnings of those factors.

It is over 50 years since estoppel began to “spill-over” from private law into public law. The time has come for the analysis to grow further and mature beyond its simplistic beginnings. It is also important that the “moral values which underlie the private law concept of estoppel” – which the House of Lords suggest have already been absorbed by public law – are not forgotten in the case-by-case assessment of whether expectations ought to be protected.

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