A COMMENT ON "LEGITIMATE EXPECTATIONS" AND THE DUTY TO GIVE REASONS IN ADMINISTRATIVE LAW*

BY DAVID PHILLIP JONES**

I. INTRODUCTION

The decision by McDonald J. in *Hutfield* v. *Board of the Fort Saskatchewan General Hospital District No. 98*[1] involves three areas of administrative law: (i) the availability of certiorari, with particular reference to the relationship between the doctrine of "legitimate expectations" and the more generalized "duty to be fair"; (ii) the relationship between the right to reasons for administrative decisions and procedural fairness; and (iii) the problem of characterizing legislative requirements as being "mandatory" or merely "directory".

II. FACTS

Dr. David Hutfield initially requested hospital privileges at the Fort Saskatchewan General Hospital in March 1984.

The Hospitals Act[2] and the applicable by-laws require the Hospital first to ask the College of Physicians and Surgeons to appraise the applicant's qualifications. The by-laws of the Hospital then require the Chief of Staff to prepare a written report with its recommendations to the Board of Governors. The Board then decides whether to grant or deny the privileges. The Hospitals Act further provides in section 36(1) that a doctor who has been accorded privileges in the past and is now being denied privileges has the right of appeal to the Hospital Privileges Appeal Board. (However, this was Dr. Hutfield's first application, so no appeal lay to the Hospital Privileges Appeal Board.)

In October 1984, Dr. Hutfield's first application was denied.

In December 1985, Dr. Hutfield re-applied to the Hospital for privileges. Although the Credentials Committee met, the College of Physicians and Surgeons was not asked to do a new appraisal because the Chief of Staff believed that the previous positive recommendations of the College were recent enough. Dr. Hutfield's solicitor requested notice of the meeting of the Board so that he could make personal representations; however, he was not given notice of the hearing, and the Board denied Dr. Hutfield's second application. Although Dr. Hutfield asked for reasons to be given for this decision, the Hospital declined to provide them. As a result, Dr. Hutfield applied for certiorari to quash the decision and mandamus to compel the Hospital to grant him privileges.

Dr. Hutfield's application proceeded on three grounds. The first was that he had a legitimate expectation of either receiving the privileges applied for or that he would be afforded a hearing. The second ground was

* The author acknowledges the assistance of his research assistant, Grant Sprague, in the preparation of this comment.

** of the Faculty of Law, University of Alberta.

1. (1986) 49 Alta. L.R. 256. The case has been appealed to the Court of Appeal.
2. R.S.A. 1980, c. H-11, as amended.

that the Hospital Board had breached natural justice by failing to give reasons for their decision. The third ground was that the Hospital Board had failed to observe the mandatory procedures set out in the Hospitals Act and in their own by-laws.

III. THE CONCEPT OF "LEGITIMATE EXPECTATIONS" AND ITS RELATIONSHIP TO THE DUTY TO BE FAIR

The use of "legitimate expectations" in an application for judicial review was first articulated by Lord Denning, M.R. in *Schmidt* v. *Secretary of State for Home Affairs.*[3] The doctrine has subsequently been considered and used successfully in a number of cases.[4] The leading case in England is a 1984 decision of the House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service,*[5] which it is convenient to consider briefly now.

It appears from their Lordships' judgments in *C.C.S.U.* that the doctrine can be broken down into a number of component parts. First, the doctrine only applies where there is no right to obtain the benefit (or privilege or interest, etc.) involved in the statutory proceedings. Legitimate expectations should arise, therefore, solely in cases where the aggrieved citizen has no right to whatever he may be seeking.[6]

The expectation, itself, may be of many things. Lord Roskill[7] is quite explicit that a legitimate expectation is closely related to the right to be heard. He acknowledges that this expectation could, however, take many forms. There would, therefore, appear to be no closed lists of subject matter that relate to legitimate expectations.

While an expectation may take many forms, there is one qualification. The expectation must be legitimate. An expectation that has no basis, save that in the applicant's mind, is not sufficient. Likewise, "reasonable" expectations will not give rise to judicial review. Lord Diplock gives two reasons for distinguishing between "legitimate" and "reasonable" expectations. The first is that the term "reasonable" could easily generate confusion and difficulties between the private law and the public law meanings of that term. His second reason is that merely reasonable expectations need *not* give rise to the judicial consequences that flow from legitimate expectations.[8] Lord Fraser, who had earlier referred to legitimate expectations as "reasonable expectations" in *A. G. Hong Kong* v. *Ng Yien Shiu,*[9] similarly goes to pains in *C.C.S.U.* to emphasize that the expectations must be legitimate and not "reasonable" in the private law sense of that word.[10]

---

3. [1969] 2 Ch. 149.
4. *A.G. Hong Kong* v. *Ng Yuen Shiu* [1983] 2 All E.R. 346; *O'Reilly* v. *Mackman* [1982] 3 All E.R. 1124; *McInnes* v. *Onslow-Fane* [1978] 1 W.L.R. 1520.
5. [1984] 3 All E.R. 935.
6. *Id.* at 944, *per* Lord Fraser.
7. *Id.* at 954.
8. *Id.* at 949.
9. [1983] 2 All E.R. 346.
10. *Supra* n. 5 at 944.

The question remains, then, as to what is a legitimate expectation or how it evolves. Lord Diplock indicates that legitimate expectations will be grounds for review when the applicant is deprived of:[11]

> . . . some benefit 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 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.

Lord Fraser expresses his opinion that legitimate expectations will arise:[12]

> . . . 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.

It would appear then that legitimate expectations will arise either from assurances by the authority that a certain practice will continue (best seen in *A. G. Hong Kong* [13]) or from the past practice of the authority. There does appear to be a difference between Lords Diplock and Fraser with respect to the ambit of past practice. Lord Diplock's view seems to restrict the applicant to any past practice by the authority as between the authority and the applicant somewhat akin to privity in contract law. Such an interpretation would preclude initial applicants (in the absence of prior public announcements from the authority) from having a legitimate expectation, whereas another person who had dealt with the authority at least once might have an expectation that the past practice would continue.

Lord Fraser, in his decision, appears to adopt a broader view. The authority would be bound by his procedure not just vis-a-vis this applicant, but by his procedures with all applicants. The legitimate expectation could therefore arise by an applicant's knowledge of the authority's practice.[14]

The English view of legitimate expectations may therefore be expressed as this: when a person has an expectation of receiving or continuing to enjoy a benefit, to which he has no right in private law, due to express assurances from the granting authority or from the past practice of the granting authority (in their dealings with *any* person), the courts will enforce this expectation as a matter of public law.

Mr. Justice McDonald in *Hutfield* does not refer to the House of Lord's decision in *C.C.S.U.*[15] The argument advanced to him was that Dr. Hutfield had a legitimate expectation of receiving a hearing or, in the alternative, a legitimate expectation of receiving the privilege sought.

McDonald, J. starts by considering the availability of judicial review when the applicant does not have a "right" (i.e., the very circumstance in which the doctrine of "legitimate expectations" has been held to arise in England). After considering earlier cases,[16] His Lordship concludes that

---

11. *Id.* at 949.
12. *Id.* at 944.
13. *See* n. 5.
14. *O'Reilly* v. *Mackman supra* is an example.
15. *See* n. 4.
16. *Esp. Alliance des Professeurs* and *Martineau.*

certiorari is available where the applicant already has a mere privilege or an interest (short of a legal right), and quotes Dickson, C.J.C. in *Martineau (No. 2)*:[17]

> In my opinion, certiorari avails as a remedy wherever a public body has power to decide any matter affecting the rights, interest, property, *privileges*, or liberties of any person.

His Lordship then proceeds to examine cases where certiorari is available in instances involving initial applications, as opposed to the termination of privileges or a state of affairs which is already in existence. This takes him to the English cases on legitimate expectation. His Lordship does not appear, however, to comment on the precise nature of legitimate expectations because he held that Dr. Hutfield did not *have* a legitimate expectation of receiving hospital privileges, he merely had a hope.[18]

McDonald, J. does not go into a deep review of legitimate expectations even though he does mention a number of the more important cases. He concludes that:[19]

> A distinction *in kind* between the scope of judicial review and the expected standards of procedural fairness in the case of the modification or extinguishment of existing rights and interests[,] and the scope of judicial review and the expected standards of procedural fairness in the case of an application for a permission or consent not previously enjoyed[,] is a distinction that is not founded in principle.

His Lordship also states that:[20]

> . . . the distinction drawn in the recent English cases cited . . . do not reflect a principle that can withstand scrutiny in the light of the object of judicial review by *certiorari*.

In summary, it appears that Mr. Justice McDonald's view of judicial review is extremely broad in scope and surpasses the view of Lord Fraser in *C.C.S.U.* As stated by His Lordship, judicial review will be available whenever an interest (or, in Lord Diplock's term, a benefit) is adversely affected. Legitimate expectations on the part of the applicant could be used as grounds for review, but such grounds would be superfluous given the duty to be fair. If a conclusion is to be drawn from McDonald, J.'s dicta, it is that legitimate expectations, while available as a ground for judicial review, are truly overshadowed in Canada by the general availability of certiorari for breaches of the duty to be fair. Therefore, in any application for privileges or benefits, to which the applicant does not have a private law right, it will be of no consequence if the application is an initial one or a subsequent one: the granting authority must adopt a fair procedure for both applicants.

IV. THE RELATIONSHIP BETWEEN THE RIGHT TO REASONS FOR ADMINISTRATIVE DECISIONS AND PROCEDURAL FAIRNESS

Mr. Justice McDonald also held that the refusal of the Hospital to issue reasons could, even in the absence of statutory provisions, serve as grounds for judicial review as a result of procedural unfairness.

---

17. [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385 (emphasis added).

18. *Supra* n. 1 at 272.

19. *Id.* at 266.

20. *Id.* at 267.

His Lordship accepted the general view that at common law there is no obligation, on the part of either judges or administrative tribunals, to issue reasons for their decisions. This expression of the law was given by Lord Denning in *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida,*[21] He also noted that there have been various encroachments on the common law by the legislature requiring reasons to be given by certain tribunals, for example the Administrative Procedures Act.[22]

His Lordship then considered the failure to give reasons in the instant case. His Lordship decided that, while there is no general rule requiring reasons, reasons must be given if failure to do so would deprive the applicant of a fair hearing.[23] McDonald, J. viewed the whole proceedings and determined that because the applicant had no knowledge of the case to be met by him and was faced with "sphinx-like inscrutability",[24] reasons were necessary to provide the applicant fairness. McDonald, J. makes it quite clear that the failure to give reasons *per se* does not create unfairness, but it is the failure to give reasons coupled with total silence throughout the proceedings that gives rise to unfairness.[25] In other words, the failure to give reasons here was part and parcel of a much larger denial of procedural fairness.

One of the problems with failing to provide reasons is that, particularly when coupled with an absence of notice, etc., the proceedings acquire an air of secrecy. His Lordship comments that such an air ". . . opens the door to suspicions, however unfounded they might be if the reasons were given, that the reasons are based on irrelevant considerations, bad faith, misconceived policy considerations, or errors of fact".[26] It appears that Mr. Justice McDonald is alluding to the inference that when there are no reasons, it is because there are no good reasons for the decision. This is the current state of the law in England following the decision of *Padfield* v. *Minister of Agriculture, Fisheries and Food.*[27] There, the Minister of Agriculture, Fisheries and Food was asked to hold an inquiry into a price differential in milk. The Minister refused to establish an inquiry and refused (*inter alia*) to give reasons therefore. Lord Denning, M.R. states:[28]

> If the Minister is to deny the complainant a hearing — and a remedy — he should at least have good reasons for his refusal: and, if asked, he should give them. If he does not do so, *the court may infer that he has no good reason.* [Emphasis added.]

In the House of Lords, Lord Upjohn stated:[29]

> [the Minister] is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly.

---

21. [1970] 2 Q.B. 417 and even though not expressly referred to by McDonald, J.
22. R.S.A. 1980, c. A-2, s. 7.
23. *Supra* n. 1 at 274.
24. *Id.* at 273.
25. *Id.* at 274.
26. *Id.* at 273.
27. [1986] A.C. 997 (both the C.A. and the H.L.).
28. *Id.* at 1007.
29. *Id.* at 1061.

The "right circumstances" in which the failure to give reasons in itself would be grounds for review are discussed as follows by D. C. McDonald, J.:[30]

> . . . if the refusal to give reasons is accompanied, as is here the case, by a failure to disclose, before the decision is reached, the grounds upon which the decision-making body arrived at its decision, the refusal to give reasons after the decision will be fatal to the validity of the decision on the ground of unfairness of procedure.

In other words, where there is a failure to disclose the grounds upon which the decision will be based prior to the decision, the failure to give reasons will be *of itself* grounds for review due to a breach of procedural fairness. Does this imply the converse — that articulating proper reasons *after* the hearing necessarily means that the hearing has been procedurally correct, or that any procedural impropriety has been cured by the mere subsequent stating of proper reasons? Surely not.

However, Mr. Justice McDonald has taken the view that if after a fair hearing, as in a courtroom,[31] reasons are not required, then the reverse also must be true. With respect to His Lordship, this is a *non sequitur.*

Of what benefit can reasons be to an applicant for a decision that has already been made? The delegate making the decision is, after pronouncing the decision, *functus officio,* and generally unable to alter the decision. From the point of view of the applicant, being provided with reasons after a decision does *not* afford him any *retroactive* fairness.

The duty to be fair applies to the proceedings as they take place. The applicant generally has the right to know the case to be met, he has the right to make submissions. The rules of procedural fairness are to ensure not only that justice will be done but that it will manifestly and undoubtedly appear to be done. Reasons given *after* a decision cannot in any way affect the fairness of what went on previously. The procedure before the Board was either fair or not as it occurred. If it was not fair, then no amount of reasons could ever make it fair.

Furthermore, it is submitted that an unfair procedure will invalidate any decision made by a delegate. It is difficult then to see how "fair" reasons for a decision can alter the nature of the decision, i.e. make it valid. Certainly it does not follow that the reasons for a void decision can alter the nature of the decision. A breach of natural justice is a breach of jurisdiction. Once the delegate has crossed the Rubicon of jurisdiction, his bridges are burned — and cannot be rebuilt by giving reasons.

V. THE FAILURE TO OBSERVE MANDATORY PROCEDURAL REQUIREMENTS

The final ground upon which certiorari was sought was that the Board of the Hospital had failed to comply with two mandatory provisions found in the Hospitals Act and in the Hospital's bylaws.

The Hospitals Act and the bylaws of the Hospital required that the Chief of Staff submit all applications to the College of Physicians and Surgeons for their advice. The Chief of Staff felt that they had received, on an earlier

30. *Supra* n. 1 at 274.

31. *Id.* at 274.

application, recommendation for approval and, as Dr. Hutfield could receive no greater recommendation, the advice was not required again, two years later.[32]

The second failure to follow mandatory requirements was that the Chief of Staff and the Staff Committee set up for the purpose of reviewing qualifications failed to deliver a written report to the Board of Governors at a general meeting. There was no evidence of a written report.[33] His Lordship stressed the importance of the written report containing all of the considerations required by the bylaws to be considered.[34]

The failure by the Board to follow the mandatory requirements as determined by the Act and the bylaws result in the Board leaving their jurisdiction. Therefore, their purported decision is a nullity.

VI. SUMMARY

Mr. Justice D. C. McDonald has considered two important areas in the field of administrative law and judicial review: the availability of judicial review for legitimate expectations and the requirement of giving reasons for administrative decisions.

It is submitted that in *Hutfield* McDonald, J. recognizes that, in principle, judicial review for legitimate expectations is available but that the ambit of the duty to be fair is sufficiently wide so as to eclipse the use of legitimate expectations. This result is very important as it expands the availability of judicial review in an even more encompassing fashion than the English view and also reaffirms the *Martineau* and *Nicholson* principle that interests in addition to rights are protected by judicial review.

It is submitted further that McDonald, J. has made an unfortunate and, in principle, erroneous conclusion that unfair processes will be validated by proper reasons. It is one thing if His Lordship intended to incorporate *Padfield* type of thinking into our jurisprudence, it is quite another to say that proper reasons will validate improper procedures.

It is hoped that the ambit of judicial review can be broadened by the use of *Hutfield* but it is even more strenuously hoped that administrators will not feel that they can avoid proper procedures by impeccable reasons.

32. *Id.* at 275.
33. *Id.* at 276.
34. *Id.* at 277.