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LICENSING AND THE LEGITIMATE EXPECTATION

(1) INTRODUCTION

The past few decades have witnessed an increasing propensity on the part of governments to subject various activities to some form of governmental control. Such control is assured through the issue of licences[1] the purposes of which vary. Control may be considered desirable in order to ensure that the particular activity is pursued in a manner which is consistent with the protection of public health and safety, or the nature of the activity may be such that it is deemed desirable in the public interest to restrict the numbers who carry it on.[2] Today, the exercise of licensing functions may well involve what Professor Wade has called "powers of commercial life or death" over a wide field of human endeavour ranging from the provision of financial services, liquor, music, dancing and entertainment to bookmaking, pawnbroking, and taxi driving.

It is proposed to consider the extent to which the rules of natural justice bind licensing tribunals in relation to initial applications for a licence, licence renewal applications and cases where a licence is being revoked. In particular, in view of the recent adoption of the "legitimate expectation" doctrine by the Privy Council in *Attorney General of Hong Kong* v *Ng Yuen Shiu*[3] and by the House of Lords in *O'Reilly* v *Mackman,*[4] an attempt will be made to assess the doctrine's potential in relation to its possible application to the licensing cases.[5] In the context of the implication of the rules of natural justice, the notion that the possession of a legitimate expectation will found a right to a hearing is a relatively recent development attributed to a dictum of Lord Denning MR in the 1969 English Court of Appeal decision in *Schmidt* v *Secretary of State for Home Affairs.*[6] In the intervening years, the legitimate expectation has expanded the ambit of operation of the *audi alteram partem* rule into the licensing field but it is still not altogether clear in what circumstances a licensing tribunal will be held bound to accord a hearing on the basis of a legitimate expectation.

(2) RIGHTS v EXPECTATIONS

Until as recently as two decades ago, courts looked for a recognised right in determining whether an authority was bound to comply with the *audi alteram partem* rule. In order to secure the procedural protection afforded by the rules of natural justice, an applicant for relief had to

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1 The term "licence" is defined in *The Oxford Companion to Law* (1980) to mean "a permission to do what is otherwise restricted, prohibited or illegal". *Black's Law Dictionary* (5th edn 1979) defines the term to include a "permission or authority to do a particular thing, to exercise a certain privilege or to carry on a particular business or to pursue a certain occupation".

2 For a fuller account, see Garner, *Administrative Law* (5th edn 1979) 7-8.

3 [1983] 2 All ER 346.

4 [1982] 3 All ER 1124.

5 Legitimate expectations have been invoked in, inter alia, immigration, disciplinary and employment cases as well.

6 [1969] 2 Ch 149.

establish that his property, liberty or livelihood was being interfered with.[7] Although originally definitive of the sphere of operation of the prerogative writs of certiorari and prohibition, the "Atkin formula" [8] developed into a test to determine the applicability of the rules of natural justice. The common law rule that a statutory authority which has a power to affect the rights of a person is bound to hear him before exercising such power nevertheless excluded from its ambit those cases where a complainant could establish substantial hardship even though no right recognised by law was involved. Moreover, the necessary "right" received a narrow interpretation in a number of cases including *Nakkuda Ali* v *Jayaratne*[9] where the Privy Council held that in cancelling a textile dealer's licence on the ground of unfitness, the Controller of Textiles had been under no legal duty to afford the dealer a hearing on the ground, inter alia, that the Controller was not determining a question affecting the dealer's rights but was merely "taking executive action to withdraw a privilege" [10] when cancelling the licence. To the same effect is *R* v *Metropolitan Police Commissioner; Ex parte Parker*[11] where Lord Goddard CJ perceived a London cab driver's licence as "nothing but a permission" [12] the revocation of which was not qualified by an obligation to comply with the *audi alteram partem* rule, even though the Commissioner had power to revoke such licence on the ground of unfitness.[13]

In response to the rigours of an approach which insisted on Hohfeldian[14] "rights" in the face of increasing governmental intervention in the activities of citizens,[15] and in their desire to circumvent the rights-

7 See the early leading case of *Cooper* v *Wandsworth Board of Works* (1863) 14 CB (NS) 180 (CP).

8 "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." : per Atkin LJ in *R* v *Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 205 (CA). By corollary, then, an obligation to comply with the requirements of natural justice was not imposed upon those tribunals exercising legislative or administrative functions.

9 [1951] AC 66 (PC).

10 Ibid 78.

11 [1953] 1 WLR 1150 (DC).

12 Ibid 1154.

13 Other authorities to the effect that a licence is a privilege and thus does not attract a hearing either in relation to initial grant or revocation include *Modern Theatres (Provincial) Ltd* v *Peryman* [1960] NZLR 191 (*Nakkuda Ali* relied on to hold that the exercise of a statutory licensing power to issue an exhibitor's licence constitutes the grant of a dispensation from the general statutory prohibition; in other words, a privilege); *Ex parte Fanning; Re Commissioner for Motor Transport* [1964] NSWR 1110; *Randall* v *Northcote Corporation* (1910) 11 CLR 100; *Metropolitan Meat Industry Board* v *Finlayson* (1916) 22 CLR 340. See also *R* v *Betting Control Board; ex parte Stone* [1948] Tas SR 4, where the Full Supreme Court held that the Betting Control Board, a statutory tribunal, acts as an administrative or executive body when dealing with an application for registration as a bookmaker (regardless of whether or not the applicant has previously been registered as such). Gibson AJ held (at 20) that "a refusal to create a right in favour of the applicant cannot be said to affect any right of his."

14 Professor Hohfeld had been particularly concerned with the confusion arising from the use of legal terms such as "right" which have multiple or indefinite connotations without proper differentiation, and stressed the need for precise and accurate use of terms in legal discourse (hence, his right-privilege-power trichotomy).

15 Sykes, Lanham and Tracey, *General Principles of Administrative Law* (2nd edn 1984) 142.

privileges dichotomy in relation to occupational licences, the courts adopted a more liberal policy in the 1960s by construing "rights" broadly and abandoning a strict insistence on the existence of a right. In *Banks* v *Transport Regulation Board (Vic)* [16] Barwick CJ did not feel constrained by *Nakkuda Ali* in holding that a taxi-cab licence is not a mere privilege but property which provides its holder with a means of livelihood.[17] One year earlier, the Divisional Court had demonstrated its willingness to intervene to protect against action which did not directly affect enforceable legal rights in *R* v *Criminal Injuries Compensation Board; Ex parte Lain.*[18] This was the judicial atmosphere in which Lord Denning MR in *Schmidt's* case confronted the policy issue whether an expectation should be accorded the same protection in law as a legal right in terms of natural justice. The breakthrough provided by Lord Denning's judgment was the express acknowledgement that the possession of a legitimate expectation could give rise to a right to be accorded natural justice, with the underlying policy reason therefor appearing to be the necessity to ensure fairness and justice. Schmidt was an alien student of Scientology who had been granted leave to enter the United Kingdom pursuant to the then Home Office policy of allowing aliens entry for the purpose of full-time study at a recognised educational establishment. Application was made some months later to the Home Office for an extension of Schmidt's stay to enable him to complete his studies, but the Home Secretary rejected the application on the basis that the Government no longer regarded Scientology institutions as recognised educational establishments for the purposes of the policy. Schmidt claimed declarations that, inter alia, the Home Secretary was obliged to consider his application for extension of stay in accordance with the principles of natural justice. In rejecting Schmidt's submission that the Home Secretary ought to have given him a hearing before refusing to extend his stay, Lord Denning MR stated:

> "I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf. But in the case of aliens, it is rather different: for they have no right to be here except by licence of the Crown . . . The speeches in *Ridge* v *Baldwin* [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, *or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.*" [19]

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16 (1968) 119 CLR 222 (HC).

17 Ibid 233-234. The licence in issue was valued at at least $9,000. See *Trivett* v *Nivison* [1976] 1 NSWLR 312, 319, where Rath J considered the plaintiff's trainer's licence to be a right of property (following *Banks*), the revocation of which would amount to deprivation of property.

18 [1967] 2 All ER 770 (QB). Lord Parker CJ stated (at 777): "I cannot think that Atkin LJ intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights." See as well Lord Parker's approach in *In re HK (An Infant)* [1967] QB 617 (DC).

19 *Schmidt* v *Secretary of State for Home Affairs,* supra n 6 at 170. Emphasis supplied. The adjective "legitimate" is defined in *Black's Law Dictionary* (5th edn 1979) to mean

Schmidt, however, had no right or legitimate expectation which was being interfered with by the Home Secretary since he was being allowed to remain in the United Kingdom for the period originally granted. It is significant to note that Lord Denning was not prepared (in Schmidt's circumstances at least) to apply the legitimate expectation doctrine to extension or renewal of permission, which appears inconsistent with the recent judicial trend in licensing cases.[20] Nevertheless, Lord Denning's dictum that a legitimate expectation has the same effect in law as a legal right in the limited context of implying a duty to accord natural justice has thrived in recent years particularly (and perhaps not surprisingly) in immigration and licensing cases.

(3) LICENSING, LEGITIMATE EXPECTATION AND NATURAL JUSTICE

Whether or not a person is entitled to a right to be heard in licensing cases prior to a decision being taken may depend on whether the applicant is applying for the particular licence for the first time or whether an existing licence is being revoked or expires by way of non-renewal. Different considerations may apply and it is therefore proposed to deal with these three situations separately with a view to determining to what extent the legitimate expectation concept may reasonably apply to each.

(a) First Applications

As we have seen, English courts until very recently regarded a licence as a mere privilege or permission revocable virtually at the pleasure of the grantor.[21] Accordingly, little, if any, distinction was drawn between the grant, revocation or renewal of a licence — the rules of natural justice simply did not apply. The recent judicial trend even in respect of initial licence applications, however, appears to be in the direction of implying a duty to accord natural justice. In *R* v *Gaming Board for Great Britain; Ex parte Benaim,*[22] Lord Denning MR considered that the *Nakkuda Ali* and *Parker* cases were no longer authority for the proposition that the principles of natural justice do not apply to the grant or revocation of licences.[23] Six years later, Lord Denning remarked by way of obiter in the case of *R* v *Herrod; Ex parte Leeds City District Council*[24] that a refusal to grant a licence without hearing the applicant would seem to be contrary to natural justice, even in the case of an application for the initial grant of a permit.[25] Recent academic opinion would appear to incline to this view.[26]

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19 *Cont.*
"that which is lawful, legal, recognized by law, or according to law." *Jowitt's Dictionary of English Law* (2nd edn 1977) and *The Concise Oxford Dictionary* (5th edn 1964) also define the term to include the connotation of "lawfulness".

20 See eg *FAI Insurances Ltd* v *Winneke* (1982) 56 ALJR 388 (HC); *McInnes* v *Onslow-Fane* [1978] 1 WLR 1520 (Ch).

21 See n 13 supra, and the text relating thereto.

22 [1970] 2 All ER 528 (CA).

23 Ibid 533.

24 [1976] 1 QB 540 (CA).

25 Ibid 560. See also *Perre Brothers* v *Citrus Organization Committee* (1975) 10 SASR 555 (SC).

26 Wade, *Administrative Law* (5th edn 1982) 496. Whitmore and Aronson appear in principle to accept that natural justice applies to the initial grant of a licence but that

In relation to first or initial applications for a licence, the conventional view adhered to by the courts was that the applicant was devoid of any legal right to it. Burbury CJ stated in *In re Holden*[27] that "as a determination to grant or refuse an original licence involves only the conferring or withholding of a privilege and not an adjudication upon any existing right," [28] the authority there concerned was under no duty to comply with the requirements of natural justice. This type of reasoning was based on the notion that a difference existed between taking away an existing right and refusing one which the applicant has never enjoyed. The former reluctance of courts to insist upon the observance of natural justice when a decision is taken to grant or refuse an initial application for a licence can be attributed to a number of factors. Apart from the fact that nothing is being taken away from the applicant, an initial application for a licence often raises general issues such as the fitness or suitability of the applicant for the licence in question which often do not involve charges[29] or allegations of specific instances of past misconduct necessitating an opportunity to be heard in answer thereto.[30] Initial applications also frequently involve public policy issues not necessarily related to the conduct or character of the applicant as well as wide discretions which courts regard as rendering the rules of natural justice less appropriate.[31]

With the advent of the legitimate expectation arose the question whether the doctrine could apply not only to non-renewal and revocation cases but to initial applications as well for the purpose of implying a duty to accord a hearing. Although it is not in general correct to say that the *audi alteram partem* rule is inapplicable to decisions to grant a licence,[32] nevertheless a duty to observe the rule will be more readily implied where an existing licence is not renewed or is revoked in

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26 *Cont.*
the content or standard to which the licensing authority will be held is correspondingly lower (eg, where numbers are large or where a major policy element is involved): Whitemore and Aronson, *Review of Administrative Action* (1978) 78-79.

27 [1957] Tas SR 16 (Sup Ct).

28 Ibid 18.

29 Professor Wade maintains, however, that it is not correct that in first application cases there are no charges and so no requirement of an opportunity to be heard in answer thereto, since applicants are often prejudiced by unfavourable information possessed by the licensing authority (as *Gaming Board* so well illustrates): Wade, supra n 26 at 496-497.

30 Where a refusal of an initial licence application does cast a slur on the applicant's reputation, some sort of hearing would seem appropriate.

31 *FAI Insurances Ltd* v *Winneke,* supra n 20 at 13 per Mason J. The late Professor de Smith argued that a decision to require a licensing authority to adhere to natural justice when policy factors are at play (as in export and import licensing) ought to be taken by parliamentarians rather than by judges: de Smith, *Judicial Review of Administrative Action* (4th edn 1980) 222. Professor Wade, on the other hand, argues that where Parliament has not prescribed statutory procedural standards in the case of wide powers of commercial and industrial regulation, there is, in principle, no reason why the courts should not "supply the omission of the legislature", reasoning that the interests of an applicant for an import licence may be no less important than those of an applicant for, say, a taxi licence: Wade, supra n 26 at 464-465.

32 Semble there is an implied duty to observe the rule if the licensing authority is constituted and functions like a tribunal, or if it determines questions of law and fact and exercises a limited and not unfettered discretion in relation to matters of minimal policy significance, or if its determinations have the effect of denying persons a right to their livelihood or otherwise entail onerous consequences: 1 *Halsbury's Laws of England* (4th edn) 90-92.

circumstances where the licensee had a reasonable expectation that it would be retained than where a person is making an original application for a licence,[33] particularly where the exercise of a wide discretion is involved. Whether or not a first-time applicant for a licence can be said to possess a legitimate expectation of its grant so as to entitle him to be heard prior to a decision will depend largely on the circumstances of each case and the nature of the particular licensing scheme involved.

A first-time applicant cannot be said to have an expectation sufficient to merit the application of the rules of natural justice where the statutory licensing scheme limits the number of licences which may be granted and fails to provide guidelines or criteria governing the approval of applications. Where large numbers of applicants are competing for scarce resources, it may well be impracticable to afford each applicant a hearing. Moreover, the wider the discretion (and, correspondingly, the fewer the criteria), the less willing courts will be to imply a right to be heard, and where the grant of a licence is completely in the discretion of the licensing authority, there can be no basis for arguing the existence of a legitimate expectation.[34] In such circumstances, the applicant would not be entitled to be heard prior to a decision being taken on his application.[35] On the other hand, where there is no restriction as to the number of licences that may be granted, arguably an applicant may have a stronger basis for arguing legitimate expectation[36] and the right to be heard particularly where virtually all of the applications received are approved.

The introduction of objective criteria into the statutory licensing scheme may or may not assist the applicant, depending upon whether

33 1 *Halsbury's Laws of England* (4th edn) 90-92. See, eg, the recent case of *Ralkon Agricultural Company Pty Limited* v *Aboriginal Development Commission* (Federal Court of Australia (SA) — Fisher J, 29 February 1984, No G50 of 1981, unreported at writing) where the Court rejected (at 44) the applicant's contention that it possessed a legitimate expectation that it would be granted a lease, and adopted as appropriate what was said in *Cole* v *Cunningham* (1983) 49 ALR 123 at 132: "Even if one were to draw on the licence cases, the present case was to be likened to those involving the grant of a new licence where relief is seldom given and not to those involving the renewal of licences, which are in a different category."

34 See the remarks of Ellicott J in *Cunningham* v *Cole* (1982-83) 44 ALR 334, 341 (Fed C), and those of Burbury CJ in *In re Holden* [1957] Tas SR 16, 17-18. *McInnes* v *Onslow-Fane,* supra n 20 illustrates the equation of wide discretionary power with absence of a duty to accord natural justice.

35 See eg *FAI Insurances Ltd* v *Winneke,* supra n 20 at 402, where Alckin J commented: "It requires most unusual circumstances to warrant the view that upon an initial application for a licence which is not one which the relevant authority must issue as of course upon the compliance with specified procedures, there is a duty to provide a hearing. Such licences rest in the discretion of the licensing authority and are not often the subject of clearly prescribed criteria upon satisfaction of which the grant of a licence must follow as of right . . . In a case where the criteria are not prescribed in detail, and where matters of policy may be involved, the situation is unlikely to warrant the drawing of the inference that there is some entitlement to a licence or some entitlement to a hearing before a licence is refused." Wilson J (at 410) was of opinion that on an initial application for approval to carry on a workers' compensation liability insurance business, an applicant could not entertain any "legitimate expectation of approval" since the statute failed to contain criteria compliance with which would lead automatically to approval.

36 Nevertheless, courts may still be reluctant to recognise a legitimate expectation in this type of situation where the licensing authority is vested with an absolute discretion: *McInnes* v *Onslow-Fane* supra n 20 (non-statutory tribunal regulating entry to membership through the grant of licences).

there is an upper limit on the number of licences that may be granted. For example, where the statutory scheme lays down criteria which applicants must first satisfy but fails to restrict the number of licences that the licensing authority may grant – as in motor vehicle licensing and entry to certain professions – an applicant who prima facie satisfies the criteria may justifiably expect that his application will be approved.[37] If the licensing authority entertains doubts as to whether the applicant does satisfy the criteria, fairness would seem to require that the applicant be apprised of these doubts and be given an opportunity by way of rebuttal to establish that he indeed possesses the requisite qualifications and to otherwise argue his case before his application is rejected.[38] Where, however, applications are not automatically granted upon satisfaction of objective criteria, as when a ceiling is placed on the number of licences that the authority may grant, the applicant may not justifiably expect his application to be successful even if he satisfies the criteria. The taxi-cab industry typifies this situation where qualified applicants far exceed the available licences resulting in a high rejection rate based in numerous cases on considerations other than the failure to meet the requisite qualifications. In this type of situation, an applicant cannot have any grounds for entertaining a legitimate expectation of success even if he satisfies all of the criteria.[39]

Apart from implying natural justice on initial applications from a consideration of the nature of the licensing scheme involved, the courts may be willing to insist on a right to be heard where the licence applied for is a statutory precondition to the continuation of the carrying on of an existing business activity as in *R* v *Gaming Board for Great Britain; Ex parte Benaim.*[40] Where a licensing system is superimposed on a previously unregulated activity, the practical effect of a refusal to permit the activity to continue under the new licensing scheme may well be the same as the revocation of an existing licence, particularly where considerable sums have been invested previously. Accordingly, the Court of Appeal held that the applicants for the commercial licence in question were entitled to be informed of the substance of the allegations made against the application and an opportunity to respond thereto. The *Gaming Board* case represents a realistic judicial attitude in respect of the relationship between commercial licenses and the requirements of natural justice, and it is submitted that the case could also have been decided on the basis of the applicants' legitimate expectation that their application for a licence would not be rejected until they had been afforded an opportunity to be heard on the issue whether their business activity should be permitted to continue under the new licensing scheme.[41] The New Zealand case of *Smitty's Industries Ltd* v *Attorney-*

37 The expectation would be strongest where the licensing authority has no discretion but to issue a licence once all the terms of the statute have been complied with, or where applicants have good grounds for believing that they fall within published policy guidelines and are thus entitled to the benefit they are seeking. See *In re HK (An Infant)* supra n 18.

38 If the applicant does possess the requisitie qualifications, then the licence can only be refused if the licensing authority has something against him. A refusal to issue an initial licence on such a ground raises similar considerations to revocation and arguably should therefore be governed by the same principles.

39 Sykes, Lanham and Tracey, supra n 15 at 162.

40 Supra n 22.

41 It would be otherwise where an applicant has no existing interest at all in relation to the activity in respect of which he seeks the licence.

General[42] exemplifies a judicial willingness to imply a right to be heard on the basis of a legitimate expectation where the licence applied for is an additional statutory precondition to the continuation of the carrying on of an existing and (unlike *Gaming Board*) licensed business. The applicant for judicial review operated a mobile shop business along a certain State highway pursuant to a licence issued by the relevant local authority under bylaws authorised by the Municipal Corporations Act 1954 and the Counties Act 1956. During the currency of the licence, the National Roads Board, constituted under the National Roads Act 1953, promulgated a bylaw under the said Acts to the effect that no person could carry on business on any State highway as keeper of a mobile shop without having first obtained a licence from the Board to do so. The applicant duly applied for a licence under the Board's new bylaw but was refused without reasons and any opportunity to make representations. In upholding the applicant's contention that the Board was bound by, and had breached, the *audi alteram partem* rule, Vautier J held that the applicant had a legitimate expectation that its application for the new licence would be granted on the following basis:

> "The situation in this case is . . . that the applicant had already applied for and obtained licences under the bylaws made by the local authority in terms of s 401 (27A) of the *Counties Act* and it was thus carrying on a licensed business which it simply sought to continue to carry on pursuant to the additional licensing requirement imposed upon it by this new bylaw. The provision referred to, it will be noted, provided for an annual fee and a grantee would accordingly assume that unless circumstances changed he would be able to renew his licence from year to year by paying the annual fee."[43]

Moreover, the practical effect from the applicant's standpoint of a failure to obtain the additional licence would have been the same as the revocation of the previous licences.

Although an important authority in respect of discussion of the legitimate expectation concept, the English case of *McInnes* v *Onslow-Fane*[44] illustrates judicial unwillingness to imply a right to be heard on such a basis in relation to an initial application. The plaintiff had applied to the British Boxing Board of Control, a non-statutory licensing body, for a boxers' manager's licence and requested an oral hearing and prior notification of anything that might militate against the grant of the licence. The plaintiff had made five previous unsuccessful applications for the same licence btween 1972 and 1975 and, in fact, had never held such a licence. The Board refused the instant application without giving him an oral hearing or reasons for the refusal. In an action for a declaration that the Board had acted in breach of the rules of natural justice, Sir Robert Megarry V-C held that the Board were under no duty either to provide the plaintiff with even the gist of their reasons or grant him an oral hearing. In the course of his judgment, Sir Robert identified three categories of decision:

> "First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or

42 [1980] 1 NZLR 355 (SC).
43 Ibid 369.
44 Supra n 20.

position, as where a member of an organisation is expelled or a licence is revoked. Secondly, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority . . ." [45]

Since the plaintiff had never before held the licence applied for, clearly the case was not one of forfeiture of an existing right or benefit. Nor could he bring himself within the expectation cases in view of his five recent unsuccessful applications for a manager's licence. In the Vice-Chancellor's opinion, "the case is plainly an application case in which the plaintiff is seeking to obtain a licence that he has never held and had no legitimate expectation of holding; he had only the hope . . . which any applicant for anything may always have." [46]

A similar case in some respects to *McInnes* v *Onslow-Fane* is that of *Stininato* v *Auckland Boxing Association (Inc)*,[47] where a refusal to grant a discretionary licence without affording a prior opportunity to be heard was held capable of amounting to a breach of natural justice. The appellant had twice been granted a professional boxer's licence from the respondent, a domestic tribunal. Pursuant to certain complaints concerning the appellant's conduct of which he was given no notice, the respondent decided to allow the appellant's licence to expire rather than cancelling it. Five subsequent applications for a new licence were made by the appellant without success or reasons. Woodhouse J refused to accept the respondent's argument that cancellation of a current licence would carry with it much more serious consequences than a mere refusal at a later stage to grant a new licence. His Honour stated:

> "If a man had been granted a licence by the [respondent] and then at the beginning of the new year he was unsuccessful in obtaining a further licence, the effect upon him would seem to be every bit as serious, certainly in terms of status, as a cancellation of the existing licence made a few months earlier. What will concern a man who is ousted as a licence holder is not whether the technical process applied to him happened to be cancellation on the one hand or the withholding of the status for the new period on the other. It is the end result that matters; and in either case the

45 Ibid 1529. This passage was recently applied in *R* v *Secretary of State for the Environment; Ex parte Brent London Borough Council* [1983] 3 All ER 321, 354 (QB), and by Vautier J in *Smitty's Industries Ltd*, supra n 42 at 366-367, where his Honour stated: "It has long been recognised that in respect of applications to duly constituted private or public authorities for permission to carry on some activity . . . the extent of the duty will greatly vary according to the nature of the particular applicant."

46 Ibid 1530.

47 [1978] 1 NZLR 1 (CA).

> opportunity to actively participate will have been withdrawn and his standing adversely affected. Similar considerations apply, in my opinion, in the case of a man whose initial application has been refused."[48]

Cooke J was prepared to imply a right to be heard on the basis of the potential for interference with the applicant's status, reputation and right to work in his chosen occupation,[49] while Richmond J was concerned with the respondent's "monopolistic powers" which gravely affected employment prospects for professional boxers.[50] Apart from the resemblance of this case to a licence revocation in terms of the practical consequences involved, it can arguably be distinguished from *McInnes* v *Onslow-Fane* on the ground that Stininato had a legitimate expectation that his application for a new licence would be granted, founded upon his previous two successful applications for the same licence. Although effectively a licence renewal case, the judgments in *Stininato* seemed prepared to apply the same principles to initial application cases. The South Australian case of *Sobey* v *Commercial and Private Agents Board*[51] follows *McInnes* v *Onslow-Fane* in terms of a judicial reluctance to find a legitimate expectation on an initial application. There, the board constituted under the Commercial and Private Agents Act 1972 refused an application by the appellant for licences as a process server and a commercial sub-agent, a decision against which the appellant exercised his right of appeal under the Act on the ground, inter alia, that the board had acted contrary to the principles of natural justice. As in *Stininato's* case, the appellant had held up until five months before the date of the application in issue the same type of licences applied for which had been renewed once but which had subsequently been allowed to lapse. Notwithstanding a stronger expectation on the facts than in *McInnes,* Walters J preferred to treat the case as a fresh application as opposed to one of renewal, and held that the fact that the appellant had held licences previously as a process server and a commercial sub-agent did not by itself suffice to give him a legitimate expectation that his most recent application would be successful.

An indication of when a court might be prepared to invoke the legitimate expectation doctrine in the case of an initial application is provided by the decision of the Full Court of the Queensland Supreme Court in *R* v *Murphy; Ex parte Clift.*[52] The prosecutor had applied for a firearms licence under the Firearms Acts 1927 to 1967, for the purpose of carrying on a security business, but was refused at first instance without reasons and again on appeal to the Minister without a hearing. Although s 4 of the Acts vested in the Inspector of Police an "absolute discretion" to issue or refuse to issue the licence in question, it required

48 Ibid 13.
49 Ibis 24.
50 Ibid 6. The learned President relied (ibid) on the following passage taken from the judgment of Lord Denning MR in *Breen* v *Amalgamated Engineering Union:* "[D]omestic bodies . . . control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to admit him as a member; or, it may be, by a refusal to grant a licence or to give their approval." : [1971] 1 All ER 1148, 1153-1154.
51 [1979] 22 SASR 70 (SC).
52 [1980] Qd R 1.

him to direct his mind to whether the applicant had good reason for acquiring the licence applied for and whether the grant of a licence would pose any danger to the public. On an application for certiorari to quash the decision dismissing the prosecutor's appeal on the ground of breach of natural justice, the Full Court made absolute the order nisi. Although acknowledging that "cases of revocation and refusal to renew periodic licences may obviously stand on a different footing from a refusal to grant a licence in the first instance",[53] the Court concluded that an applicant such as the prosecutor who prima facie has good reason for requiring the licence, is a fit person to carry a firearm without danger to the public, and does not fall within any of the statutory disqualifications, has a legitimate expectation that the licence will be granted.[54] As the Minister possessed the statutory power to affect such legitimate expectation, he was under a duty to receive representations from the prosecutor before arriving at a decision. Despite the "absolute discretion" reposed in the licensing authority, the result is not surprising in view of the nature of the licensing scheme involved, which laid down criteria and failed to limit the number of licences.[55]

The recent English decision of *R* v *Huntingdon District Council; Ex parte Cowan*[56] is significant in so far as it is direct authority for the propostion that the *audi alteram partem* rule extends in principle to cases of an initial application for a licence.[57] The applicants for judicial review were lessees of certain premises and holders in respect thereof of a liquor licence and a music and dancing licence granted under legislation formerly in force. The latter licence had been renewed each year although in fact there was no music or dancing at the premises. The lessees later decided to open a discotheque on the premises and duly applied to the local authority for the issue of a public entertainments licence under new legislation. The authority received objections to the application from the police and members of the public in respect of which the applicants were neither informed nor given any opportunity to reply. In granting certiorari to quash the authority's decision to refuse the application for breach of natural justice, Glidewell J held that "the exercise of a licensing function . . . by any authority, is one to which the rules of natural justice (including the requirement of giving notice of the substance, at least, of objections, and giving some opportunity for the applicant to respond to those objections) would normally apply."[58] The *Cowan* case exhibits notable similarities with *Gaming Board* and especially *Smitty's Industries Ltd,* and it is arguable that Glidewell J could have decided the case on the basis that the applicants would have had a legitimate expectation that their music and dancing licence held under the former licensing scheme would be continued under the new licensing scheme. A refusal to grant a new licence would raise the question of what it is that has happened to make the applicants unsuitable for a licence for which they were previously deemed suitable. Such an imputation of unfitness would necessitate the application of the

53 Ibid 7.
54 Ibid 9.
55 See, supra nn 37 and 38, and the text relating thereto.
56 [1984] 1 All ER 58 (QB).
57 Thereby affirming the views of Lord Denning MR in the *Herrod* and *Gaming Board* cases supra nn 24 and 22.
58 *R* v *Huntingdon District Council; Ex parte Cowan,* supra n 56 at 64.

audi alteram partem rule. Although Glidewell J's proposition that the exercise of a licensing function will normally attract the rules of natural justice even in the case of initial licence applications may appear to be intemperately wide and unsupported by direct authority,[59] it does seem to be in line with the current judicial trend in extending the operation of the rules of natural justice. Indeed, it will be interesting to see whether higher English Courts will pursue this approach to initial licence applications, and the extent to which they will adopt the language of legitimate expectation in implying a right to a hearing in such situations.[60]

(b) Licence Renewals

The legitimate expectation concept is particularly well suited to licence renewal cases and its development since *Schmidt's* case has facilitated the application of the rules of natural justice to this area of the law. This was only made possible, however, by the rejection of a strict, technical approach that perceived the renewal of a licence as nothing more than a fresh grant of an expired licence. *Sharp* v *Wakefield*[61] concerned the hearing of an application for the renewal of a licence previously granted under the Intoxicating Liquor Licensing Acts, 1828, 1872 and 1874. The Law Lords were unanimous in the view that the same legal and discretionary considerations prevail whether the application is an original application or one by way of renewal. Although Lord Bramwell equated a "renewal" with a new licence, he nevertheless did concede that different practical considerations might operate in the minds of licensing justices in so far as "the hardships of stopping the trade of a man who is getting an honest living in a lawful trade, and has done so, perhaps, for years, with probably an expense at the outset, may well be taken into consideration . . ." [62] *Weinberger* v *Inglis*[63] similarly illustrates the earlier attitude of the courts. Members of the London Stock Exchange were elected on an annual basis and the plaintiff, a member since 1895, applied unsuccessfully to the appropriate committee in 1917 for re-election. The House of Lords held that a court had no jurisdiction to interfere in such circumstances. The views of Lord Atkinson were typical of those of their Lordships:

> "He [the plaintiff] simply gets a licence to enter the building of . . . the Stock Exchange undertaking, . . . during the year mentioned to transact the business named. There is, in my view,

59 It was stated by way of obiter in *R* v *London County Council; Ex parte Akkersdyk; Ex parte Fermenia* [1892] 1 QB 190, at 195 (DC) that the London County Council in determining applications for music and dancing licences is acting judicially, and that if it adjudicated in such a matter against an applicant without hearing him, its decision could not stand. Academic support is also forthcoming from Professor Wade who asserts (supra n 26 at 496-497) that no distinction is drawn in terms of the applicability of natural justice between initial applications for the grant of licences on the one hand, and the revocation or non-renewal of licences already granted on the other.

60 Academic opinion seems to have outstripped judicial thinking in this context. Professor Wade argues that an applicant for a licence, though devoid of any legal right to it, is, as a general rule, entitled to a fair hearing and an opportunity to deal with any allegations against him, and that such an application may involve a legitimate expectation: Wade, supra n 26 at 464-465.

61 [1891] AC 173 (HL).

62 Ibid 183.

63 [1919] AC 606 (HL).

no continuity or connection whatever between the membership of a member for one year and his membership for a succeeding year. An existing member has no legal or equitable right or claim to be re-elected for the year succeeding his year of actual membership, though no doubt he may hope or expect that he will be re-elected".[64]

In the result, the possession of a mere hope or expectation of re-election did not suffice to warrant judicial intervention. Indeed, until fairly recently, the view that the renewal of an annual licence is but a fresh grant of a new licence rather than the continuance of the old, continued to manifest itself in the cases.[65] Gradually, however, courts discarded the legalistic assimilation of a renewal with a fresh grant of an expired licence as they began to recognize that different considerations might well apply as between an initial application for a licence and its subsequent renewal. In 1956, the English Court of Appeal had occasion to consider in the case of *R* v *Flintshire County Council County Licensing (Stage Plays) Committee; Ex parte Barrett,*[66] the distinction, if any, between an application for renewal and an application for the grant of a licence for the first time. The Queen's Theatre had been continuously licensed on an annual basis for the sale of intoxicating liquor since its opening in 1901, but its most recent renewal application was rejected by the licensing authority for reasons which were later held by the Court of Appeal to be bad in law. In granting mandamus requiring the authority to hear and determine the application according to law, the Court unanimously held that proper regard should have been had to the fact that the Theatre had for over fifty years been licensed for the sale of liquor. Jenkins LJ stated:

"It seems to me that notwithstanding *Sharp* v *Wakefield,* which shows that the grant of a licence by way of renewal is a matter

64 Ibid 622. See also *Gerraty* v *McGavin* (1914) 18 CLR 152, 163-164, (HC), per Isaacs J where the strict approach that a renewal of a licence does not differ from the grant of a new licence was illustrated by the view that the renewal of a lease constitutes the grant of a new lease.

65 *Ex parte Fanning; Re Commissioner for Motor Transport,* supra n 13 at 1112 (SC-Full C), per Sugarman J (with whom Herron CJ and Walsh J agreed). This case concerned a refusal to renew a taxi-cab licence upon its expiry. After conceding the existence of practical differences between the initial grant of a licence and subsequent grants of new licences in respect of the same subject-matter, Sugarman J continued (at 1112): "These, however, are merely practical differences; and, in the absence of express provision in the Statute, do not import any difference in the applicable legal principles or in the discretionary character of the grant. It is only because licensing bodies, taking a sensible and practical view of their functions, are usually prepared to renew a license [*sic*], once granted, in the absence of countervailing cause, that renewal may often appear to be less a matter of discretion, and something more approximate to a matter of right, than initial grant." See also *R* v *Betting Control Board; Ex parte Stone,* supra n 13, where the applicant had been granted a certificate of registration as a bookmaker on an annual basis for a number of years prior to the Board's decision to refuse the instant application. Clark J construed the relevant Act as providing "for the creation by the Board of a right to engage in bookmaking; and this is so whether the applicant has been registered during the previous year or not . . ." (at 14). Nevertheless, Gibson AJ did point out (at 20) that "a bookmaker's certificate of registration is granted only for a year or less, and there is no legal right of renewal, although, no doubt, the fact that an applicant had previously held a certificate, and had given satisfaction, would be in his favour on applying for a subsequent certificate."

66 [1957] 1 QB 350.

> for the exercise of discretion just as is the grant of an original licence, it cannot be right in this case wholly to ignore . . . the circumstance that for more than half a century the Queen's Theatre had enjoyed a wholly blameless and useful existence as a theatre licensed for the sale of intoxicating liquor; or to ignore the fact that . . . there has been no relevant change of circumstance whatsoever . . ." [67]

Thus courts began to treat a refusal to renew as being more akin to revocation than to a refusal of an initial application in view of the similar practical consequences entailed for the licensee.

An early case acknowledging the utility of such a distinction was that of *In re Holden*[68] which involved an appeal against the refusal to grant an application for the renewal of a licence under the Estate Agents Act 1926. Burbury CJ held the view that in the case of a renewal of an existing estate agent's licence, the applicant's ability to continue to carry on a business organisation he had established under the initial licence could not be adversely affected unless a proper enquiry had been conducted by the licensing authority in accordance with the rules of natural justice.[69] Widgery LJ relied in *Schmidt's* case on the notion of a legitimate expectation in accepting that a renewal of a licence may raise different considerations from the initial grant of the licence:

> "In some of the licensing cases there is an indication that a renewal of a licence raises different considerations from the first grant of the licence, and I fully accept that that may be so in cases where renewal is something which can reasonably be expected by the possessor of the licence and where the facts are such that a refusal of renewal is tantamount to the withdrawal of a right which the applicant legitimately expected to hold . . ." [70]

These views were consistent with the development of the notion that a licence holder might well have a reasonable or justifiable expectation that his licence will be renewed at its expiry in the absence of some countervailing case,[71] especially where the licensing authority has developed a regular practice of renewal. As Lord Denning MR pointed out in argument in *R* v *Liverpool Corporation; Ex parte Liverpool Taxi*

67 Ibid 368. It would seem that the legitimate expectation doctrine would have been appropriate had this case concerned natural justice.

68 Supra n 27.

69 Ibid 18.

70 *Schmidt* v *Secretary of State for Home Affairs,* supra n 6 at 172-173. If *Schmidt's* case is perceived as a renewal of licence case (in referring to the case of aliens, Lord Denning MR states at [1969] 2 Ch 149, 170 that "they have no right to be [in the United Kingdom] except by licence of the Crown"), arguably Schmidt may have had a reasonable expectation that his entry permit would be extended in view of the fact that his permission to stay had previously been renewed once (albeit for a short period of time) and the absence of evidence to indicate that Schmidt had been told not to expect renewal when he was first issued with his entry permit.

71 See *Salemi* v *Minister for Immigration and Ethnic Affairs (No 2)* (1977) 137 CLR 396 (HC) (a deportation matter), where Barwick CJ stated (at 405): "Where a licence or permit is given for a fixed term in relation to a subject matter and in circumstances which carry the implication that if the licensee or permittee has fulfilled the obligation of the licence he may expect a renewal of the licence or permit, the grant will be construed as importing a term that at least the interests of the existing licensee will be considered before a renewal is refused."

Fleet Operators' Association,[72] "A person who has a licence has a settled expectation of having it renewed, and that it is a thing of value." [73] Lord Denning stated subsequently in *R* v *Herrod; Ex parte Leeds City District Council*[74] that a hearing must be accorded to the applicant where the authority proposed to refuse to renew an existing licence, since the applicant may have invested much money in his venture and such refusal may cause him serious economic loss.[75] In *Salemi* v *Minister for Immigration and Ethnic Affairs,*[76] Stephen J explained the underlying policy reasons for the abandonment by the courts of the legalistic approach to renewal cases as follows:

> "When the discretionary grant of a licence, permit or the like carried with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard and this no doubt as much to aid those who exercise discretions in pursuing the goal of a just result as to safeguard the interests of the expectant party." [77]

In an oft-cited passage, the late Professor de Smith posited reasons why the rules of natural justice should be applied to licence renewal cases:

> "Non-renewal of an existing licence is usually a more serious matter than refusal to grant a licence in the first place. Unless the licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans; cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, *even though no such duty is implied in the making of the original decision to grant or refuse the licence.*"[78]

As we have already seen,[79] the distinction between the case of an initial application for a licence and that of an application for its renewal was accepted and applied by Megarry V-C in *McInnes* v *Onslow-Fane*, where the differences between "expectation cases" (which include renewal of licences) and the "application cases" (where the applicant is denied the benefit applied for) were noted. The Vice-Chancellor observed that "the

72 [1972] 2 QB 299.
73 Ibid 304.
74 Supra n 24.
75 Ibid 560.
76 Supra n 71.
77 Ibid 439. See also the judgment of Jacobs J who also acknowledges the distinction between the grant and renewal of a licence. In his Honour's view, although a statute providing for the grant of annual licences may be said, technically speaking, to require new licences each year, nevertheless if a person has been granted a licence in the previous year, "he may be entitled to be heard and otherwise to have the rules of natural justice applied before he is refused a new licence for the next year.": (1977) 137 CLR 396, 452.
78 de Smith, supra n 31 at 223-224. Emphasis supplied. That portion of the passage in respect of which emphasis has been supplied may be too dogmatic in view of the previous discussion. This passage was cited with approval by Scarman LJ in *R* v *Barnsley Metropolitan Borough Council; Ex parte Hook* [1976] 1 WLR 1052, 1058 (CA), and by Mason J in *FAJ Insurances Ltd* v *Winneke,* supra n 20 at 395.
79 See supra n 45, and the text relating thereto.

legitimate expectation of a renewal of the licence . . . is one which raises the question of what it is that has happened to make the applicant unsuitable for the . . . licence for which he was previously thought suitable."[80] In relation to issues of character and conduct of the applicant, licence renewal cases would therefore appear to be more analogous to licence revocation cases than they would to initial application cases (where as a general rule the issues are not as narrowly confined) and, consequently, would more often necessitate a right to be heard on these issues. Economic and moral considerations, therefore, are the two major reasons put forward to justify the application of the rules of natural justice to the licence renewal cases via the legitimate expectation doctrine.

The leading Australian decision on the application of the legitimate expectation doctrine to an attempted renewal of approval is that of the High Court in *FAI Insurance Ltd* v *Winneky.*[81] Pursuant to regulations promulgated under the Workers Compensation Act 1958 (Vic), companies desiring to carry on any insurance business against workers' compensation liability were prohibited from doing so unless they had previously secured the approval of the Governor-in-Council. Such an approval operated for a period of one year and was renewable on application for a further one-year period in the discretion of the Governor-in-Council, having particular regard to the financial position of the applicant. The appellant insurance company had carried on a workers' compensation insurance business for 20 years, having obtained all the necessary approvals. In late 1980, the appellant applied for renewal of its annual approval as an insurer and requested that it be given notice of any matter that might result in its approval not being renewed and an opportunity to make appropriate submissions. The appellant's request had been prompted by concern previously expressed by the Minister of Labour and Industry over the appellant's substantial investments in related bodies. The appellant's application was ultimately refused by the Governor-in-Council pursuant to the Minister's recommendation on, inter alia, this ground without any opportunity having been provided to the appellant to make appropriate representations. The appellant thereupon instituted proceedings under the Administrative Law Act 1978 (Vic) seeking a declaration that the decision to refuse renewal was void upon the ground, inter alia, that the Governor-in-Council failed to give the appellant a reasonable opportunity to be heard and thereby breached the rules of natural justice. The central issue raised on these facts was whether the Governor-in-Council was under a legal duty when deciding whether to renew such approval to observe the rules of natural justice. Six out of the seven High Court justices[82] held that the appellant had a legitimate expectation that its approval would be renewed and supported the proposition that licence renewal cases should be treated on the same footing as revocation cases.

Gibbs CJ was primarily concerned with the economic hardship that an adverse decision would work on the appellant company:

80 *McInnes* v *Onslow-Fane,* supra n 20 at 1529.
81 Supra n 20.
82 Murphy J dissented on the ground that Parliament had not intended the decision in question to be subject to judicial review (ibid 401).

> "The refusal to renew an approval may have a seriously adverse effect on a company which was previously an approved insurer. In these circumstances, a company which becomes an approved insurer has a legitimate expectation that its approval will be renewed unless some good reason exists for refusing to renew it. It would not be fair to deprive a company of the ability to carry on its business without revealing the reason for doing so, and, . . . without allowing the company a full and fair opportunity of placing before the authority making the decision its case . . ." [83]

Therefore, the exercise of the statutory power to grant or refuse a renewal of the approval must be qualified by the common law right to be heard prior to the reaching of a decision in view of the considerable extent to which the appellant would be affected in its business by an adverse decision.

Mason J[84] recognised that the rules of natural justice are not limited in their application to cases where the exercise of a statutory power affects rights in the strict sense but that they extend to an exercise of power which deprives a person of a legitimate expectation.[85] Having cited with approval the above-quoted passage[86] of Professor de Smith, Mason J concluded that an applicant for renewal of a licence generally has a legitimate expectation that his licence will be renewed[87] and that in the circumstances, "the appellant had a legitimate expectation that its approval would be renewed or at the very least that it would not be refused without its having an opportunity of meeting objections raised against it." [88]

Although Wilson J [89] did not consider that the statute in question conferred on an applicant a legal right to be approved in a renewal case any more than it did in one of initial application, his Honour was prepared to imply natural justice on the basis of a legitimate expectation in the case of renewal of the approval even though he was not prepared to do so in the case of an initial application therefor. In light of the views[90] expressed by several members of the High Court in *Salemi's* case concerning the distinction between the grant and the renewal of a licence, Wilson J had no doubt that the appellant might have entertained a legitimate expectation that a renewal of approval would not be withheld. Aickin J [91] thought it now clear that in the absence of a contrary legislative intention, the refusal to renew a licence to carry on a particular business activity must comply with the rules of natural justice.[92]

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83 Ibid 390.

84 Stephen J agreed with the judgment of Mason J on the aspect of the applicability of the rules of natural justice on the basis of the appellant's legitimate expectation of its approval being renewed (ibid 391).

85 Ibid 395.

86 See supra n 78.

87 *FAI Insurances Ltd* v *Winneke,* supra n 20 at 396.

88 Ibid 399.

89 Ibid 410.

90 See supra nn 71 and 77.

91 Ibid 402.

92 Brennan J did not think that a hearing would be necessary where (unlike the instant case) the licence "is of such an exceptional kind that non-renewal of it is unlikely to affect adversely the licensee's proprietary or financial interests or . . . his reputation.": (1982) 56 ALJR 388, 418. Although his Honour did not provide examples, he might

Current judicial and academic opinion would appear more willing to favour the application of the rules of natural justice on the basis of the possession of a legitimate expectation to licence renewal applications than to initial applications, although, as we have already seen, the recent trend is towards the narrowing of this gap. The differentiation in treatment rests primarily on considerations of economic hardship and damage to reputation associated with refusal to renew,[93] which are regarded as sufficient to rouse in the licence holder an expectation that the renewal application will not be refused unless for good cause and until the applicant has received prior notification by the licensing authority of its reasons for refusal and been granted an opportunity to make appropriate representations.

(c) Licence Revocations

Although the revocation of occupational and trading licences used to be considered an administrative act unqualified by any obligation to accord a hearing.[94] it is now authoritatively established that the exercise of a statutory power revoking a licence will attract the rules of natural justice when revocation results in the loss of a right to earn a livelihood or to carry on a financially rewarding activity,[95] or is based on the misconduct of the licence-holder.[96] In all of these cases, a valid revocation decision must be preceded by notice of the allegations made against the licence-holder and a sufficient opportunity to reply to them.

The practical consequences of revocation for the licence-holder will be at least as serious as those associated with the refusal to renew an expiring licence. As in the non-renewal cases, revocation may involve a stigma or slur on the reputation of the licensee[97] or economic hardship

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92 *Cont.*
well have had in mind non-occupational licences the grant and renewal of which involve a substantial policy element.

93 This is not to say, of course, that such considerations are always absent when an initial licence application is refused.

94 See *R* v *Metropolitan Police Commissioner; Ex parte Parker, supra; Nakkuda Ali* v *Jayaratne,* supra nn 11 and 9. Lord Denning Mr expressed the view in *Gaming Board,* supra n 22 at 430, that these two decisions are no longer authority for such a proposition. Barwick CJ also agreed with the approach taken in these two cases in *Banks,* supra n 16 at 231 and 234.

95 *FAI Insurances Ltd* v *Winneke,* supra n 20 at 395 per Mason J; see also *McInnes* v *Onslow-Fane,* supra n 20 at 1529, *R* v *Barnsley Metropolitan Borough Council; Ex parte Hook,* supra n 78; *Gardiner* v *Land Agents Board* (1976) 12 SASR 458; *Banks* v *Transport Regulation Board (Vic),* supra n 16 at 233-234 where Barwick CJ regarded the nature of the power given to the Board (revocation of a taxi-cab licence) and the consequences of its exercise (deprivation of the means of livelihood of the licence-holder) as sufficient to warrant the conclusion that the Board was bound to act judicially.

96 de Smith, supra n 31 at 160-161. Even the exercise of a non-statutory licence revocation power may attract the rules of natural justice where misconduct is alleged. In *Trivett* v *Nivison,* supra n 17, a domestic body was empowered by its governing rules to cancel any licence at any time without assigning any reason therefor. Rath J was prepared to imply into these rules a provision that the person to be affected by a decision to revoke his licence on the ground of unfitness should have an opportunity of meeting the case against him before such decision is made, where, as here, he had already held a trainer's licence for a number of years, had built up his business, and expended money in it (at 319).

97 Numerous statutes provide for revocation of licences on the ground of "misconduct". See eg *R* v *Metropolitan Police Commissioner; Ex parte Parker,* supra n 11 (statutory power of revocation for "unfitness"); *Gardiner* v *Land Agents Board,* supra n 95 (statutory power of revocation for misconduct).

in the form of loss of livelihood or failure of the business enterprise. Such consequences have been deemed by the courts to be serious enough to warrant, as a matter of fairness, the requirements of prior notice of the case against the licensee and an opportunity to meet that case. Indeed, the distinction that courts have drawn between a decision to refuse a renewal of a licence and a decision to refuse an initial application may not be as pronounced as that existing between a decision of the latter type and a decision to revoke a licence. In *R* v *Barnsley Metropolitan Borough Council; Ex parte Hook,*[98] Scarman LJ, after citing with approval the de Smith passage[99] dealing with the adverse consequences flowing from a refusal to renew, stated: "The author [de Smith] is there dealing with non-renewal, but everything that he said about non-renewal applies with even greater force to revocation." [100] This is true in so far as non-renewal does not entail forfeiture of an existing benefit but merely an unsuccessful attempt at reacquiring a benefit that has expired. *Hook's* case involved an attempted revocation for misconduct of a market stall-holder's trading licence which enabled him to earn his living. Both Lord Denning MR and Scarman LJ [101] regarded the licence as regulating the common law right of members of the public to sell in a market, the revocation of which could only be effected by a prior observance of the rules of natural justice.[102] On the basis that the attempted revocation interfered with the exercise of such common law right, the Court of Appeal had no need to resort to the language of legitimate expectation. Could the Court of Appeal, however, have achieved the same result by finding the appellant in possession of a legitimate expectation that his licence on which his livelihood depended would not be revoked before its stated duration on the ground of his misconduct without his first receiving adequate notice and an opportunity to make representations against the proposed revocation? To restate the question, do the rules of natural justice apply to revocation cases on the basis of the loss of a right, privilege, liberty or property, or do they so apply on the basis of a legitimate expectation? The answer is that the rules may apply to the revocation cases on both bases. Although Megarry V-C in *McInnes* v *Onslow-Fane* regarded the revocation of a licence as properly belonging to the forfeiture cases involving the taking away of some existing right,[103] some judges have treated recovation as falling within the expectation cases as well.[104] Indeed, it was Lord

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98 Supra n 78.

99 See ibid.

100 Ibid 1058. Indeed, de Smith himself asserts (supra n 31 at 224) that to equate a decision summarily to revoke a licence with a decision not to grant a licence in the first instance may even be more unrealistic than to equate a decision to refuse a renewal with a decision to refuse an initial licence application.

101 Scarman LJ considered that the attempted revocation of the applicant's licence was "something very like dismissing a man from his office, very like depriving him of his property" and that the appellant "was . . . on trial for his livelihood". (Ibid 1061).

102 Ibid 1056-1057; 1059-1060.

103 See supra n 45.

104 Eg the statement of Stephen J in *Salemi* v *Minister for Immigration and Ethnic Affairs (no 2),* supra n 71 at 439: "When the discretionary grant of a licence, permit or the like carried with it a *reasonable expectation of,* although no legal right to, renewal or *non-revocation,* summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard . . ." Emphasis supplied. See also *Heatley* v *Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, infra.

Denning who first expressed the obiter view that a duty to accord natural justice will arise where an exercise of power frustrates a person's legitimate expectation that a licence or permission would not be revoked. According to the Master of the Rolls:

> "If such be the law for a Commonwealth immigrant, it is all the more so for a foreign alien. He has no right to enter this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right — and, I would add, no legitimate expectation — of being allowed to stay. He can be refused without reasons given and without a hearing." [105]

The doctrine of legitimate expectation has been relied on in implying an obligation to comply with the rules of natural justice in cases involving the revocation of licences that indirectly affect the holder's livelihood. In *Heatley* v *Tasmanian Racing and Gaming Commission,*[106] the applicant was served by the respondent Commission with a written "warning-off notice" pursuant to a broad discretionary power contained in sub-s 39(3) of the Racing and Gaming Act 1952 (Tas) [107] requiring him to refrain from entering any racecourse in Tasmania until such time as the notice was rescinded. The applicant was given no notice by the Commission of its intention to issue the notice nor of the grounds for its issue and he was not afforded any opportunity to make prior representations. On appeal from the discharge by the Supreme Court of Tasmania of an order nisi for a writ of certiorari to quash the notice on the ground of the Commission's failure to comply with the rules of natural justice, the High Court held that the Commission was bound to observe such rules in the exercise of its power to issue warning-off notices, whose effect was to deprive their subjects of a legitimate expectation of being allowed to enter racecourses on payment of the entry fee. The new ground broken by *Heatley's* case was that for the first time a majority of the High Court accepted that it was sufficient for the complainant to have merely a legitimate expectation of an entitlement to a benefit, as opposed to a right or privilege, so as to attract the operation of the rules of natural justice in relation to the exercise of a statutory power.

Aickin J delivered the majority judgment[108] in which he described the concept as one of "a 'reasonable expectation' of some entitlement, *i.e.* an expectation that some form of right or liberty will be available, or will not be taken away without an opportunity for the subject to put his case

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105 *Schmidt* v *Secretary of State for Home Affairs,* supra n 6 at 171.

106 Supra n 104.

107 Sub-s 39(3) is as follows: "The [Tasmanian Racing and Gaming] Commission may, by notice in writing, require a person to refrain from entering any racecourse or racecourses specified in the notice, or from racecourses generally, on any specified day or days, or generally, while the notice is in force."

108 Stephen and Mason JJ concurred with Aickin J while Murphy J did not deal with the legitimate expectation aspect of the case.

to the relevant governmental authority . . ." [109] On the particular facts, a member of the public entering a racecourse with its owner's consent possessed a mere revocable licence vis-a-vis the owner which at law entitled the former to remain at the racecourse subject to the overriding statutory exception contained in sub-s 39(3). However, in his Honour's views:

> "It is also true to say that any member of the public has a legitimate expectation that upon payment of the appropriate charge he will be admitted to racecourses. They are in a practical sense 'open to the public' and indeed by announcements and advertising their owners invite and seek to encourage the public to attend. This is not an expectation that the Commission will act in some particular way but an expectation by members of the public that they will be able to enjoy the right or liberty granted to them by the owner to go onto the racecourse, *i.e.* that they will be permitted to enter along with other members of the public in response to the owner's implied invitation. That expectation exists by reason of the nature of the premises and the fact that members of the public are invited to attend and freely admitted on payment of a stated charge." [110]

Accordingly, the rules of natural justice were attracted on the basis that the issue of a warning-off notice pursuant to sub-s 39(3) would defeat the applicant's legitimate expectation as a member of the public that he would be admitted to racecourses on payment of the requisite charge. [111]

Legitimate expectations have not enjoyed the same degree of success in licence revocation cases as they have in those relating to licence renewal, due primarily to a deeply entrenched judicial preoccupation with identifying some right, privilege, liberty or proprietary interest that is allegedly being interfered with. [112] However, it is submitted that the

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109 Supra n 104 at 508. Aickin J referred in his judgment to Scarman LJ's judgment in *Hook's* case wherein his Lordship considered that the factors listed by Professor de Smith favouring the implication of natural justice in renewal cases applied with even greater force to revocation cases (Ibid 509).

110 Ibid 507-508.

111 In a lone dissenting opinion, Barwick CJ refused to concede to the legitimate expectation concept any independent or utilitarian operation (Ibid 491). Cf *Forbes* v *New South Wales Trotting Club Ltd* (1979) 143 CLR 242 (HC), wherein Gibbs J (as he then was) applied *Heatley's* case to a similar fact situation to uphold the appellant's submission that he could not validly be warned off racecourses under the respondent's control without first being afforded an opportunity to be heard on the basis of his legitimate expectation of admission as a member of the public. *Forbes* is distinguishable from *Heatley* in so far as the warning-off notice was not issued in pursuance of the exercise of a statutory power (but rather under private club rules) nor was it issued by a governmental authority but rather by the racecourse proprietor itself. Barwick CJ dissented once again.

112 See, eg, the recent case of *Borenstein* v *Commissioner of Business Franchises* [1983] 1 VR 634 (SC), where King J held that the Commissioner must afford a hearing to a holder of a retail tobacconist's licence before exercising a statutory power to revoke a prior determination to grant such licence on the ground that such revocation would alter a "privilege". His Honour preferred to decide the case on this basis rather than on that of an alleged frustration of a legitimate expectation held by the applicants. King J's decision was reversed on appeal to the Full Supreme Court of Victoria ([1984] VR 375) on the ground that the enabling Act evinced a legislative intention that the Commissioner was not obliged to comply with the rules of natural justice before exercising the revocation power in question.

licence holder will normally have an interest which will be seriously affected by revocation whether that interest is characterized as a property right, privilege or liberty, and, in the absence of special circumstances, he will have a legitimate expectation that the licence (and the benefits conferred thereunder) will remain in full force throughout its stated term. It is therefore to be hoped that judges will exhibit an increasing tendency to utilize the legitimate expectation doctrine in extending the operation of the rules of natural justice to licence revocation cases in order to avoid the somewhat artificial "classification of the interest". Henceforth, they will be preoccupied instead with identifying some "benefit" which the licensee legitimately expected to enjoy for a definite period.

(5) CONCLUSION

Formerly, courts refused to qualify the exercise of discretionary licensing powers with an implied duty to observe the *audi alteram partem* rule on the ground that such powers did not interfere with recognised rights. As judges became more sensitive to the drastic nature of licensing powers from the standpoint of the economic effect upon the citizen, this conceptualist appoach was abandoned in favour of a more sophisticated analysis of the procedural obligations of licensing bodies. Latterly, courts have demonstrated a marked inclination towards insisting that licensing powers be exercised fairly, and it is likely that they will become increasingly more reluctant to hold that a licensing authority is not bound to adhere to basic procedural safeguards, even in the case of initial licence applications. Proceeding hand in hand with this trend has been the development of the legitimate expectation concept which has been perceived from the outset as a medium to attain fairness and justice. Legitimate expectations have repeatedly exposed to judicial scrutiny decisions relating to matters in respect of which persons affected had in the past been denied relief even in cases of substantial hardship, and it is for this very reason that the concept has a promising future particularly in relation to initial licence and licence renewal applications. Indeed, the legitimate expectation concept is now firmly ensconced in terms of securing procedural protection for the applicant for licence renewal. As we have already seen, the concept is also readily adaptable to initial applications in appropriate (and perhaps more limited) circumstances. However, it may be some time before judges imply a duty to accord natural justice to licence revocation cases on such a basis in view of the fact that procedural protection has by and large been perceived to have been satisfactorily extended in the past to licensees, albeit in terms of an arbitrary hierarchy of affected interests.