2001 CarswellQue 1272, 2001 SCC 41, 200 D.L.R. (4th) 193, 271 N.R. 104, [2001] 2 S.C.R. 281, 36 Admin. L.R. (3d) 71, 2001 CarswellQue 1273, 2 S.C.R. 281, [2001] S.C.J. No. 43, REJB 2001-24843, J.E. 2001-1280

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Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)

Minister of Health and Social Services, Appellant v. Mount Sinai Hospital Center, Respondent and Elliot L. Bier, Howard Blatt, Peter Erenyi, Ruth Kovac, Mary Likoudis, Avrum P. Orenstein, Charles Roth (in their capacity as directors of the Mount Sinai Hospital Center), Respondents and Maimonides Hospital Geriatric Centre, Respondent

Supreme Court of Canada

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: December 12, 2000
Judgment: June 29, 2001
Docket: 27022

Proceedings: Affirmed 1998 CarswellQue 961, 9 Admin. L.R. (3d) 161, [1998] R.J.Q. 2707, [1998] Q.J. No. 2982 (Que. C.A.)

Counsel: Patrice Claude, Anne-Marie Brunet and Jean-François Jobin, for appellant

Gilles Poulin and Elliot L. Bier, for respondents Mount Sinai Hospital Center and Elliot L. Bier et al.

No one for repspondent Maimonides Hospital Geriatric Centre

Subject: Public; Civil Practice and Procedure

Administrative law --- Prerogative remedies — Mandamus — Performance of public duty — General

Minister of Health and Social Services' promise to issue altered permit to hospital resulted in Minister having exercised discretion conferred by s. 138 of former An Act respecting health and social services — Conduct of Minister after refusing to grant promised permit did not allow for conclusion that he had validly reversed prior exercise of discretion — Minister's reasons for refusing permit modification were neither legitimate nor in accord with reality — Minister's refusal was not valid exercise of discretion — Because Minister did not act in accordance with prior exercise of discretion, requirements for issuance of mandamus were met and Minister had to issue modified permit — An Act respecting health and social services, R.S.Q., c. S-5, art. 138.

Administrative law --- Discretion of tribunal under review — Abuse of discretion — General

Minister of Health and Social Services' promise to issue altered permit to hospital resulted in Minister having exercised discretion conferred by s. 138 of former An Act respecting health and social services — Conduct of Minister after refusing to grant promised permit did not allow for conclusion that he had validly reversed prior exercise of discretion — Minister's reasons for refusing permit modification were neither legitimate nor in accord with reality — Minister's refusal was not valid exercise of discretion — Because Minister did not act in accordance with prior exercise of discretion, requirements for issuance of mandamus were met and Minister had to issue modified permit — An Act respecting health and social services, R.S.Q., c. S-5, art. 138.

Droit administratif --- Recours de prérogative — Mandamus — Exécution d'un pouvoir public — En général

Comportement du ministre, soit de promettre de délivrer au centre hospitalier le permis modifié, lui a fait exercé son pouvoir discrétionnaire qui lui était dévolu par l'art. 138 de l'ancienne Loi sur les services de santé et les services sociaux — Comportement subséquemment adopté par le ministre ne lui a pas permis de validement infirmer l'exercice de son pouvoir discrétionnaire — Motifs de refus du ministre n'étaient ni légitimes ni conformes à la réalité — Refus du ministre de délivrer le permis ne constituait pas un exercice valide de son pouvoir discrétionnaire — Ministre n'ayant pas agi conformément à l'exercice antérieur de son pouvoir discrétionnaire, les conditions pour délivrer le mandamus étaient remplies, et le ministre devait délivrer le permis — Loi sur les services de santé et les services sociaux, L.R.Q., c. S-5, art. 138.

Droit administratif --- Pouvoir discrétionnaire du tribunal faisant l'objet d'une révision — Abus du pouvoir discrétionnaire — En général

Comportement du ministre, soit de promettre de délivrer le permis modifié, lui a fait exercé son pouvoir discrétionnaire qui lui était dévolu par l'art. 138 de l'ancienne Loi sur les services de santé et les services sociaux — Comportement adopté par le ministre ne lui a pas permis de validement infirmer l'exercice de son pouvoir discrétionnaire — Motifs de refus du ministre n'étaient ni légitimes ni conformes à la réalité — Refus du ministre ne constituait pas un exercise valide de son pouvoir discrétionnaire — Ministre n'ayant pas agi conformément à l'exercice antérieur de son pouvoir discrétionnaire, les conditions pour délivrer le mandamus étaient remplies, et ministre devait délivrer le permis — Loi sur les services de santé et les services sociaux, L.R.Q., c. S-5, art. 138.

Originally, the respondent, a long-term care facility (center), dealt primarily with tuberculosis patients. The center had been located in Sainte-Agathe, Quebec, for many decades, but when the focus of its services changed, it decided to move to Montreal. In 1984, the center and the Minister of Health and Social Services began negotiating the center's potential move to Montreal. Because the center had at that time, and for the preceding 10 years, both short-term and long-term beds, it wanted to alter its permit to reflect its reality. The ministry promised to alter the permit after the center moved to Montreal. Between 1984 and 1991, the successive Ministers of Health and Social Services reaffirmed that promise. The center moved in 1991 and then applied to the ministry to have its permit put in order. The Minister denied the promised permit and told the center that it would have to operate under its old permit. The Minister refused on the basis that it was no longer in the public interest to have short-term beds, because they would cost more money and the ministry could not afford any additional costs.

The center brought a mandamus application, requesting that the Minister be ordered to issue the promised permit. The trial judge allowed the application in part on the ground that the Minister had created a "legitimate expectation" on the part of the center that the permit would be issued following the move. She ordered the Minister to hear the center before deciding whether it was in the public interest to alter the permit, and she ordered the re-

newal of the old permit. The center appealed. The Court of Appeal unanimously allowed the appeal and ordered the Minister to issue the promised permit. The judge speaking for the Court of Appeal concluded that the trial judge did not err in her appreciation of the evidence. While affirming the trial judge's conclusion that the doctrine of legitimate expectation is limited to procedural remedies, the Court of Appeal judge concluded that promissory estoppel was the remedy that should be used in this case to issue the promised permit. The Minister appealed.

Held: The appeal was dismissed.

Per Bastarache J. (L'Heureux-Dubé, Gonthier, Iacobucci, Major JJ. concurring): The Court of Appeal was right to say that the Minister had to issue the promised permit. Promissory estoppel of public law did not, however, need to be used to issue the permit.

The center's request was not a permit renewal request under s. 139.1 of the former An Act respecting health and social services. The documents submitted by the parties showed that all considered the center's application to be a request to alter the permit, and not to renew it. The parties intended to alter the permit to reflect the center's current situation, a facility offering long- and short-term care. The evidence showed that the Minister knew that the center would continue to offer the same services and receive the same funding. The entire mechanism of s. 139.1 did not apply in cases in which the party requesting to alter a permit was not the Minister. The trial judge erred in emphasizing the Minister's "natural justice" concerns that arose from the obligation under s. 139.1 to hear the center. Section 139.1 did not apply. It was thus unnecessary to question whether the legitimate expectation created could result in a substantive remedy, like the issuance of the permit.

Section 138 of the Act applied to the request made by the center in January 1991. The center did not, in fact, possess the altered permit. Having a right to a permit is different from possessing a permit. The Court of Appeal properly concluded that it was difficult to say that the center had "acquired" the permit by offering short-term care services, which the government not only tolerated but also funded. The center has been operating outside the boundaries of its permit for several years and that illegality might have been the reason for the center not acquiring its permit. Clearly, an activity can be authorized in the absence of an implied or acquired permit. In any case, the center's activities had been authorized but the related permit did not exist. Regarding the legality or illegality of its operation, the center had been operating under its long-term care facility permit with government approval. It was not operating under an altered permit, implied or acquired.

Section 138 gives the Minister the discretionary power to decide whether it is in the public interest to issue a permit. The Minister exercised discretion in promising to issue the permit following the center's move. The Minister decided, by his conduct, that it was in the public interest, under s. 138, to issue a permanent permit for long- and short-term care, and therefore exercised discretion. The grant of the permit was deferred only until after the move. The Minister was therefore bound when the center requested the issuance of the permit. Because the Minister did not require any modifications to the center's operations, this conclusion was reasonable. The conduct of the parties and the evidence showing their relationship were important. The conduct of the ministry's officials between 1984 and 1991, encouraging the move and promising the permit, resulted in the Minister exercising discretion under s. 138.

A Minister's discretionary power has an ongoing nature. Until a Minister has issued a permit, he or she can re-evaluate and change his or her original decision to grant the permit. Section 138 does not, however, call upon the two-stage process of authorizing and issuing permits. Instead, it is concerned with the issuance of a permit or

with modifying an existing permit. Thus, the Minister of Health and Social Services does not have a period within which to change his or her mind. Even if the Minister in this case did have such power, the refusal of the Minister did not constitute a valid exercise of discretion. The public interest concern he claimed to have in his October 1991 refusal was not fair or appropriate: he continued to fund the center's short-term services and, in his relationship with others, he considered the centre to be a short- and long-term care facility. The concern claimed was neither legitimate nor in accord with reality. The Minister could not promise to issue the permit, deny the permit, and then treat the center as if the permit had been issued.

The ministry's officials never raised the issue of additional funding to the center. In any event, the center never requested additional funds. Nothing indicated that the center would have to make modifications to satisfy the requirements of the permit, and thus need to request more funds. The center always operated within its budget, even with the short-term beds it has had since 1974. Negotiations between the parties always took into account the move not creating a budgetary increase. The conduct of the Minister after his 1991 refusal did not allow for the conclusion that he had validly reversed his prior exercise of discretion.

The Minister had to acknowledge the center's long- and short-term vocation. Because the Minister did not act in accordance with his prior exercise of discretionary power, the conditions to issue a mandamus order were met. The Minister had to issue the 1991 to 1993 modified permit.

Per Binnie J. (McLachlin C.J.C. concurring): The dismissal of the appeal by Bastarache J. was agreed with, as was his conclusion that the center did not possess the altered permit at the time of the move. In government, nothing is done until it is done.

The communications of the Minister of Health and Social Services showed his state of mind and were the bases of the entitlement of the center to the order it was seeking. The center was helped by the successive Ministers of Health and Social Services having opined that the addition of short-term care was in the public interest and by its reliance on those declarations and communications. The Minister attached little importance to the consequences of his breach of promise to the center.

Section 138 grants the Minister a large discretionary power that must be exercised according to public interest. Even if the section's wording was general, the Minister must still exercise his discretion for the purposes for which it was granted. While considering the interest of the center in its permit application, the Minister must respect procedural fairness.

The center did not have the right to the issuance of the permit. The mere expectation of a favourable outcome to its application, even if sustained by the Minister's conduct, is nothing but an expectation. The center did not request the permit before moving.

Although the center did not have the "right" to an altered permit, it did have a direct financial interest sufficient to trigger a procedural fairness obligation. The center already possessed the permit that it had requested be altered. Any public body that makes administrative decisions that affect a person's rights, privileges, or assets must respect fairness. The center was entitled to procedural fairness, regardless of the existence of the Minister's declarations or letters. The nature of the center's interest was sufficient. The content of procedural fairness depends on the nature of the decision to be made, the relations between the decision-maker and the individual, and the effect of the decision on the individual's rights. The Minister did not inform the center that he was going to renege on his promise, neither did he indicate why he had changed his mind. Furthermore, the center did not have the opportunity to explain why the Minister's previous opinion should prevail. These faults allowed for the

annulment of the Minister's decision to deny the permit.

The availability and content of procedural fairness generally depends on the nature of the applicant's interest and the nature of the power exercised by the public authority in regard to that interest. The doctrine of legitimate expectation is related to the public authority's conduct in exercising that power, and especially to established practices, conduct, or representations that are clear, unambiguous, and unqualified. The expectations must not conflict with the public authority's statutory remit. An applicant claiming the doctrine of legitimate expectation can, but does not have to, show that he or she was aware of the conduct or that he or she relied on it to his or her detriment. Only procedural, and not substantive, remedies can be obtained by legitimate expectation. For the court to grant a substantive remedy, stricter conditions must be met than those currently allowed by the doctrine of legitimate expectation. Public bodies exercising statutory duties cannot be subject to judicial review. The issuance of the permit was a substantive remedy.

In this case, the Minister's decision was annulled by applying the general rules of procedural fairness; it was not necessary to use the doctrine of legitimate expectation.

The Court of Appeal properly concluded that estoppel could be invoked against a public authority, like a Minister. The person who claims estoppel must meet more severe evidential requirements than those for legitimate expectation. In this case, the elements of estoppel would have been found if this case had fallen within private law. There was enough evidence for procedural fairness or the doctrine of legitimate expectation to apply. This case did not, however, fall within private law. Public law promissory estoppel clearly requires a determination of the intent of the legislature when it granted the power whose exercise is sought to be estopped. There can be no estoppel with regard to an explicit statutory provision.

The Minister has been mandated in broad terms to act in the public interest. If the Minister believed that issuing the permit would go against the public interest, it was not for the court to prevent him from doing what he considered to be his duty. The legislature intended for the Minister, not the courts, to decide the necessary transitional measures to go from the previous to the new policy. The estoppel rule must take into account the factual and legal contexts, which were, in this case, the wording of s. 138 and the Minister's status. The Court of Appeal could not apply estoppel the way it did.

Whether the Minister's decision was patently unreasonable had more to do with the merits of the decision than the way it was made. Courts must give deference to discretionary ministerial decisions. The appropriate standard of review in this case was patent unreasonableness, the standard that is generally applied to decisions made by Ministers when exercising discretionary power in administrative contexts. The question to be asked was whether the public body gave sufficient weight to the consequences of the breach of promise. The Minister decides whether public interest prevails. The courts interfere only if it is established that the Minister's decision was patently unreasonable. In this case, the requirement was met, as the Minister failed to take into account the serious consequences his change in opinion would have on the center. The decision of the Minister was patently unreasonable because his predecessors had defined for many years what was in the public interest by encouraging the center and making promises. Because the Minister neither tried to justify his new definition of public interest nor refute the evidence, the court did not consider any serious policy reasons he could have given. "At the very least, [the Minister's decision] must correspond to the reality of the situation." The Minister could not start now to favour a new concept of public interest that contradicted all that has previously been said and done. The Minister had only one choice - to issue the 1991 to 1993 modified permit. He would later be able to assess, in light of the law and the current circumstances, the status of the center and to what it was entitled.

L'intimé, un établissement de soins de longue durée (le Centre), s'occupait principalement de personnes atteintes de tuberculose. Le Centre était établi à l'extérieur de Montréal depuis plusieurs décennies, mais il a décidé déménager à Montréal. En 1984, le Centre et le ministère de la Santé et des Services sociaux ont entrepris des négociations en vue de l'éventuel déménagement du Centre à Montréal. Ayant ajouté depuis plusieurs années des lits de courte durée à ses lits de longue durée, le Centre a voulu modifier son permis pour le rendre conforme à la réalité. Le ministère a promis au Centre de modifier son permis après son déménagement. Entre 1984 et 1991, tous les ministres de la Santé et des Services sociaux ont réitéré cette promesse. Le Centre a déménagé en 1991 et a ensuite présenté une demande au ministère pour régulariser son permis. Le ministre a refusé au Centre le permis promis et l'a informé que celui-ci devrait fonctionner sous son ancien permis. Le ministre a refusé sous prétexte qu'il n'était plus dans l'intérêt public d'avoir des lits de courte durée parce que ces derniers coûteraient plus cher au Centre et que le ministère ne pouvait en supporter les coûts supplémentaires.

Le Centre a présenté une requête en mandamus, dans laquelle il demandait qu'il soit ordonné au ministre de délivrer le permis promis. La juge de première instance a accueilli la requête en partie au motif que le ministère avait par ses promesses et son comportement créé une « expectative légitime » que le Centre obtiendrait le permis à la suite de son déménagement. Elle a ordonné au ministre d'entendre le Centre avant de décider s'il était dans l'intérêt public de modifier le permis et a ordonné le renouvellement de l'ancien permis. Le Centre a interjeté appel. La Cour d'appel a accueilli à l'unanimité le pourvoi et a ordonné au ministre de délivrer le permis promis. Le juge s'exprimant pour la Cour d'appel a conclu que la juge de première instance n'avait commis aucune erreur dans son appréciation de la preuve. Tout en confirmant la conclusion de la juge selon laquelle la théorie de l'expectative légitime se limite aux réparations procédurales, le juge de la Cour d'appel a conclu que la préclusion promissoire était le moyen qui devait être utilisé en l'espèce pour accorder le permis promis. Le ministre a interjeté appel.

Held: Le pourvoi a été rejeté.

Bastarache, J. (L'Heureux-Dubé, Gonthier, Iacobucci, Major, JJ., souscrivant) : La Cour d'appel avait raison de dire que le ministre devait délivrer le permis promis, mais il n'était pas nécessaire d'utiliser la préclusion promissoire en droit public pour le faire.

La demande du Centre ne constituait pas une demande de renouvellement de permis en vertu de l'art. 139.1 de l'ancienne Loi sur les services de santé et les services sociaux. Les différents documents soumis par les parties indiquaient que tous considéraient la demande du Centre comme une demande de modification du permis et non comme une demande de renouvellement. Les parties avaient l'intention de modifier le permis pour le rendre conforme à la réalité du Centre: un établissement offrant des soins de longue et de courte durée. La preuve démontrait que le ministre savait que le Centre allait continuer à offrir les mêmes services et à toucher le même financement. L'article 139.1 ne s'applique pas intégralement dans les cas où c'est la partie qui demande la modification du permis plutôt que le ministre lui-même. La juge de première instance a commis une erreur lorsqu'elle a mis l'accent sur les préoccupations de « la justice naturelle » qui découlait de l'obligation d'entendre le Centre, obligation imposée par l'art. 139.1. L'article 139.1 ne s'appliquait pas. Il était donc inutile de se demander si l'expectative légitime pouvait donner lieu à une réparation substantielle, telle la délivrance du permis.

C'était plutôt l'art. 138 de la loi qui s'appliquait à la demande présentée en janvier 1991 par le Centre. Dans les faits, le Centre ne possédait pas le permis modifié. Avoir droit au permis est différent du fait de le posséder. La Cour d'appel avait raison de conclure qu'il était difficile de dire que le Centre avait « acquis » le permis en offrant des soins de courte durée, lesquels étaient tolérés et financés par le gouvernement. Pendant toutes ces

années, le Centre a excédé les limites de son permis, et cette illégalité pouvait être la raison ayant fait que le Centre n'avait pas « acquis » son permis. Il est clair qu'une activité peut être autorisée même en l'absence de permis implicite ou acquis. De toute façon, les activités du Centre étaient autorisées, mais le permis s'y rapportant n'existait pas. Le Centre agissait en vertu de son permis d'établissement de soins de longue durée et avec l'assentiment du gouvernement en ce qui a trait à la légalité ou illégalité de ses activités. Il n'agissait pas en vertu d'un permis modifié acquis ou implicite.

L'article 138 attribue au ministre le pouvoir discrétionnaire de décider s'il est dans l'intérêt public de délivrer un permis. Lorsqu'il a promis au Centre de lui délivrer le permis à la suite de son déménagement, le ministre a exercé son pouvoir discrétionnaire. Par son comportement, le ministre a décidé, selon l'art. 138, qu'il était dans l'intérêt public qu'un permis permanent soit délivré pour des soins de longue et courte durée, et a donc épuisé son pouvoir discrétionnaire. La délivrance elle-même n'a été que retardée à la fin du déménagement. Le ministre était lié lorsque le Centre lui a demandé de lui délivrer le permis. Il s'agissait d'une conclusion raisonnable puisque le ministre n'a exigé aucune modification des activités du Centre. En l'espèce, c'est le comportement des parties, ainsi que la preuve démontrant leur relation, qui était important. Le comportement des fonctionnaires du ministère entre 1984 et 1991, soit avoir encouragé le déménagement et promis le permis, a eu pour effet que le ministre s'est trouvé à exercer son pouvoir discrétionnaire en vertu de l'art. 138.

Le pouvoir discrétionnaire d'un ministre a un caractère constant. Tant et aussi longtemps que le ministre n'a pas délivré le permis, il peut réévaluer sa décision initiale d'autoriser le permis et revenir sur celle-ci. Par ailleurs, l'art. 138 ne fait pas appel aux étapes de l'autorisation et de la délivrance du permis. Le ministre n'a donc pas de délai pour changer d'idée. Même s'il disposait d'un tel pouvoir, son refus en l'espèce ne pouvait constituer un exercice valide de son pouvoir discrétionnaire. La préoccupation d'intérêt public qu'il a invoquée dans son refus d'octobre 1991 n'était ni équitable ni appropriée, vu qu'il continuait à financer les services de courte durée offerts par le Centre et que, dans ses rapports avec les autres, il considérait le Centre comme étant un établissement de soins de longue et courte durée. La préoccupation invoquée n'était ni légitime ni conforme à la réalité. Le ministre ne pouvait promettre au Centre de lui délivrer le permis, pour ensuite lui refuser ce permis et continuer de le traiter comme s'il le lui avait délivré.

Les fonctionnaires du ministère n'ont jamais soulevé la question du financement supplémentaire auprès du Centre. Ce dernier n'a d'ailleurs jamais demandé de fonds supplémentaires. De plus, rien n'indiquait que le Centre aurait à faire des modifications pour respecter le permis et ainsi devoir demander plus d'argent. Le Centre a toujours fonctionné à l'intérieur de son enveloppe budgétaire, même avec les lits de courte durée qu'il avait depuis 1974. Les négociations entre les parties ont toujours tenu compte du fait que le déménagement n'entraînerait aucune hausse budgétaire. De plus, le comportement adopté par le ministre depuis son refus de 1991 ne permettait aucunement de conclure qu'il avait validement infirmé l'exercice antérieur de son pouvoir discrétionnaire.

Le ministre devait reconnaître la vocation à longue et courte durée du Centre. Le ministre n'ayant pas agi conformément à l'exercice antérieur de son pouvoir discrétionnaire, les conditions pour délivrer le mandamus étaient remplies. Le ministre devait délivrer le permis pour la période de 1991-1993.

Binnie, J. (McLachlin, J.C.C., souscrivant) : Le rejet du pourvoi par le juge Bastarache était partagé. L'était également sa conclusion que le Centre ne possédait pas encore le permis modifié lors du déménagement. Au gouvernement, une mesure ne se concrétise que lorsqu'elle est prise.

Les communications du ministre témoignaient non seulement de son état d'esprit, mais elles étaient aussi à l'origine du droit du Centre. Le Centre était aidé par le fait que les différents ministres de la Santé et des Services sociaux avaient exprimé l'opinion que l'ajout des soins de courte durée était dans l'intérêt public, et aussi par le fait qu'il s'était fié à ces déclarations et communications. Le ministre n'a accordé aucune importance aux conséquences pour le Centre de son manquement à ses promesses.

L'article 138 confère au ministre un large pouvoir discrétionnaire qui doit être exercé dans « l'intérêt public ». Même si l'article est libellé de façon générale, le ministre doit tout de même exercer ce pouvoir aux fins pour lequel il lui a été conféré. Le ministre devait respecter l'équité procédurale lors de l'examen de l'intérêt du Centre dans sa demande de permis.

Le Centre n'avait pas droit à la délivrance du permis. La simple attente d'un dénouement favorable concernant la demande, même si elle est alimentée par le comportement du ministre, n'est toujours qu'une attente. Le Centre n'avait pas demandé le permis avant de déménager.

Même si le Centre n'avait pas « droit » au permis modifié, il avait quand même un intérêt financier direct suffisant pour déclencher une obligation d'équité procédurale. Il possédait déjà le permis dont il demandait la modification. Tout organisme public qui rend des décisions administratives qui touchent les droits, les privilèges ou les biens d'une personne doit respecter l'équité. Le Centre avait donc droit à l'équité procédurale, indépendamment de l'existence des déclarations et lettres émanant du ministre. La nature de l'intérêt du Centre était suffisante. Le contenu de l'équité procédurale dépend de la nature de la décision devant être rendue, des rapports existant entre le décideur et le particulier et de l'effet de la décision sur les droits du particulier. Le ministre n'a ni avisé le Centre du fait qu'il allait revenir sur sa promesse ni indiqué les motifs de ce changement de cap, et le Centre n'a pas eu l'occasion d'expliquer pourquoi l'opinion préalable du ministre devait prévaloir. Ces défauts permettaient d'annuler la décision du ministre de refuser le permis.

La possibilité d'invoquer l'équité procédurale et son contenu dépend généralement de la nature de l'intérêt du demandeur et du pouvoir exercé par l'autorité publique relativement à cet intérêt. La théorie de l'expectative légitime s'attache à la conduite de l'autorité publique dans l'exercice de ce pouvoir et notamment aux pratiques établies, conduites ou affirmations claires, nettes et explicites. Les expectatives ne doivent pas entrer en conflit avec le mandat légal de l'autorité publique. Le demandeur qui invoque la théorie de l'expectative légitime peut démontrer qu'il était au fait de la conduite en cause ou qu'il s'y est fié à son détriment, mais ne doit pas nécessairement le faire. Par contre, l'expectative légitime ne permet d'obtenir que des réparations procédurales, et non substantielles. Pour que la Cour accorde une réparation substantielle, il faut remplir des conditions plus strictes que celles dictées en ce moment par la théorie de l'expectative légitime. On ne peut soumettre un organisme exerçant des fonctions de nature législative à la surveillance des tribunaux. La délivrance du permis constituait une réparation substantielle.

En l'espèce, la décision du ministre était annulée par l'application des règles ordinaires de l'équité procédurale. Il n'était pas nécessaire d'avoir recours à la théorie de l'expectative légitime.

La Cour d'appel a conclu à bon droit que la préclusion pouvait être invoquée contre une autorité publique, tel un ministre. Celui qui invoque la préclusion doit cependant satisfaire à des exigences plus strictes en matière de preuve que dans le cas de l'expectative légitime. En l'espèce, les éléments de la préclusion auraient été présents si cette affaire avait relevé du droit privé. Il y avait assez de preuve pour que l'équité procédurale ou l'expectative légitime s'applique. Mais l'affaire ne relevait pas du droit privé. La préclusion en droit public exige

clairement qu'il soit déterminé quelle était l'intention du législateur lorsqu'il a conféré le pouvoir dont on cherchait à empêcher l'exercice. Il ne peut y avoir de préclusion à l'égard d'une disposition législative explicite.

En l'espèce, le ministre avait été mandaté en termes larges pour qu'il agisse dans l'intérêt public. Si le ministre jugeait qu'il était contraire à l'intérêt public de délivrer le permis modifié, ce n'était pas au tribunal de l'empêcher de faire ce qu'il considérait être son devoir. Le législateur voulait que ce soit le ministre, et non les tribunaux, qui décide des mesures transitoires nécessaires pour passer de l'ancienne à la nouvelle politique. La règle de la préclusion doit tenir compte du contexte factuel et juridique, soit en l'espèce le libellé de l'art. 138 et le statut du ministre. La Cour d'appel ne pouvait utiliser la préclusion comme elle l'a fait.

La question de savoir si la décision du ministre était manifestement déraisonnable touchait plus au fond de celle-ci qu'à la façon dont elle a été prise. Les décisions ministérielles de nature discrétionnaire font généralement l'objet de retenue de la part des tribunaux. En l'espèce, la norme de contrôle appropriée était celle du caractère manifestement déraisonnable, celle-ci étant généralement appliquée aux décisions prises par le ministre lorsqu'il exerce des pouvoirs discrétionnaires en contexte administratif. Il faut notamment se demander si l'organisme public a accordé suffisamment d'importance aux conséquences du manquement à la promesse. C'est le ministre qui décide si l'intérêt public l'emporte. Les tribunaux n'interviennent que si l'on établit que la décision du ministre est manifestement déraisonnable. En l'espèce, l'exigence était respectée, car le ministre n'a pas du tout tenu compte des conséquences graves que pouvait avoir son revirement d'opinion sur le Centre. La décision du ministre était manifestement déraisonnable, parce que ses prédécesseurs ont défini l'intérêt public, pendant plusieurs années, en encourageant le Centre et en lui faisant des promesses. Le ministre n'ayant ni tenté de justifier sa nouvelle définition de l'intérêt public ni contredit le dossier, la Cour n'a pas tenu compte de tout motif de politique sérieux qu'il aurait pu mettre de l'avant. La décision prise par le ministre « doit à tout le moins être conforme à la réalité ». Le ministre ne pouvait préconiser maintenant une nouvelle vision de l'intérêt public qui contredisait tout ce qui avait été dit et fait précédemment. Le ministre actuel n'avait qu'un choix: délivrer le permis modifié pour 1991-1993. Il pourra ensuite évaluer, à la lumière de la loi et des circonstances actuelles, le statut du Centre et ce à quoi il a maintenant droit.

Cases considered by/Jurisprudence citée par Binnie J. (McLachlin C.J.C. **concurring):**

Administrator, Transvaal v. Traub, 1989 4 S.A. 731 (South Africa C.A.) — referred to

Apotex Inc. v. Canada (Attorney General) (1993), 51 C.P.R. (3d) 339, 162 N.R. 177, [1994] 1 F.C. 742, 18 Admin. L.R. (2d) 122, (sub nom. Apotex Inc. v. Merck & Co.) 69 F.T.R. 152 (note) (Fed. C.A.) — referred to

Apotex Inc. v. Canada (Attorney General), (sub nom. Apotex Inc. v. Merck & Co.) 176 N.R. 1, [1994] 3 S.C.R. 1100, 29 Admin. L.R. (2d) 1, 59 C.P.R. (3d) 82 (S.C.C.) — considered

Apotex Inc. v. Canada (Attorney General), 188 D.L.R. (4th) 145, 255 N.R. 319, 6 C.P.R. (4th) 165, 24 Admin. L.R. (3d) 279, [2000] 4 F.C. 264, 180 F.T.R. 278 (Fed. C.A.) — referred to

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. (1947), [1948] 1 K.B. 223, [1947] 2 All E.R. 680 (Eng. C.A.) — considered

Attorney General for New South Wales v. Quin (1990), 64 A.L.J.R. 327, 170 C.L.R. 1, 93 A.L.R. 1, 33 I.R. 263 (Australia H.C.) — considered

Aurchem Exploration Ltd. v. Canada (1992), 7 Admin. L.R. (2d) 168, 91 D.L.R. (4th) 710, (sub nom. Aurchem Exploration Ltd. v. Whitehorse Mining District (Mining Recorder)) 54 F.T.R. 134 (Fed. T.D.) — considered

Baker v. Canada (Minister of Citizenship & Immigration), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — followed

Barry v. Barchi (1979), 99 S.Ct. 2642, 61 L.Ed.2d 365, 443 U.S. 55 (U.S. S.C.) — referred to

Bawolak c. Exroy Resources Ltd. (1992), 11 Admin. L.R. (2d) 137, [1993] R.D.J. 192 (Que. C.A.) — referred to

Bendahmane v. Canada (Minister of Employment & Immigration), 8 Imm. L.R. (2d) 20, 39 Admin. L.R. 1, 61 D.L.R. (4th) 313, 95 N.R. 385, 26 F.T.R. 622n, [1989] 3 F.C. 16 (Fed. C.A.) — considered

Bloomfield v. Saskatchewan (Minister of Health) (October 20, 1986), Doc. Saskatoon Q.B. 2913/85 (Sask. Q.B.) — referred to

Calgary Power Ltd. v. Copithorne (1958), 16 D.L.R. (2d) 241, 78 C.R.T.C. 31, [1959] S.C.R. 24 (S.C.C.) — referred to

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), 37 Admin. L.R. (2d) 260, 136 D.L.R. (4th) 449, [1996] 3 F.C. 259, (sub nom. Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada) 115 F.T.R. 81 (Fed. T.D.) — referred to

Canada (Attorney General) v. Purcell (1995), 40 Admin. L.R. (2d) 40, 96 C.L.L.C. 210-010, 192 N.R. 148, [1996] 1 F.C. 644 (Fed. C.A.) — referred to

Canadian National Railway v. Fraser-Fort George (Regional District) (1996), 26 B.C.L.R. (3d) 81, 35 M.P.L.R. (2d) 177, 140 D.L.R. (4th) 23, 43 Admin. L.R. (2d) 262, 83 B.C.A.C. 153, 136 W.A.C. 153 (B.C. C.A.) — referred to

Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co., [1970] S.C.R. 932, (sub nom. Canadian Superior Oil Ltd. v. Hambly) 74 W.W.R. 356, 12 D.L.R. (3d) 247 (S.C.C.) — referred to

Cardinal v. Kent Institution, [1985] 2 S.C.R. 643, [1986] 1 W.W.R. 577, 24 D.L.R. (4th) 44, 63 N.R. 353, 69 B.C.L.R. 255, 16 Admin. L.R. 233, 23 C.C.C. (3d) 118, 49 C.R. (3d) 35, 1985 CarswellBC 402 (S.C.C.) — considered

Cleveland Board of Education v. Loudermill (1985), 105 S. Ct. 1487, 470 U.S. 532, 84 L. Ed. 2d 494, 53 U.S.L.W. 4306, 118 L.R.R.M. 3041, 23 Educ. L. Rep. 473, 1 I.E.R. Cases 424 (U.S. S.C.) — referred to

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), 142 D.L.R. (4th) 193, 206 N.R. 363, 31 C.C.L.T. (2d) 236, 43 Admin. L.R. (2d) 1, [1997] 1 S.C.R. 12 (S.C.C.) — referred to

Gilbert Steel Ltd. v. University Construction Ltd. (1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (Ont. C.A.) — referred to

Gingras v. Canada, 69 D.L.R. (4th) 55, [1990] 2 F.C. 68 (Fed. T.D.) — referred to

Granger v. Canada (Employment & Immigration Commission), 29 D.L.R. (4th) 501, [1986] 3 F.C. 70, 69 N.R. 212 (Fed. C.A.) — referred to

Granger v. Canada (Employment & Immigration Commission), 91 N.R. 63, [1989] 1 S.C.R. 141 (S.C.C.) — considered

Haoucher v. Minister for Immigration & Ethnic Affairs (1990), 169 C.L.R. 648, 64 A.L.J.R. 357, 11 A.A.R. 50, 93 A.L.R. 51, 19 A.L.D. 577 (Australia H.C.) — considered

Hill v. Nova Scotia (Attorney General), 142 D.L.R. (4th) 230, 206 N.R. 299, [1997] 1 S.C.R. 69, 157 N.S.R. (2d) 81, 462 A.P.R. 81, 60 L.C.R. 161 (S.C.C.) — distinguished

Hutfield v. Fort Saskatchewan General Hospital District No. 98 (1986), 74 A.R. 180, 24 Admin. L.R. 250, (sub nom. Hutfield v. Fort Sask. General Hospital District No. 98 Bd.) 49 Alta. L.R. (2d) 256 (Alta. Q.B.) — referred to

Hutfield v. Fort Saskatchewan General Hospital District No. 98 (1988), 31 Admin. L.R. 311, 60 Alta. L.R. (2d) 165, 52 D.L.R. (4th) 562, 89 A.R. 274 (Alta. C.A.) — referred to

Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd., (sub nom. Hydro Electric Commission of Kenora (Town) v. Vacationland Dairy Co-operative Ltd.) 162 N.R. 241, [1994] 1 S.C.R. 80, (sub nom. Hydro Electric Commission of Kenora (Town) v. Vacationland Dairy Co-operative Ltd.) 68 O.A.C. 241, 18 Admin. L.R. (2d) 1, 110 D.L.R. (4th) 449 (S.C.C.) — referred to

Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010, 43 Admin. L.R. 157, 83 Sask. R. 81, 106 N.R. 17, 1990 CarswellSask 146, 1990 CarswellSask 408 (S.C.C.) — considered

Lazarov v. Canada (Secretary of State), [1973] F.C. 927, 39 D.L.R. (3d) 738 (Fed. C.A.) — referred to

Lever Finance v. Westminister London Borough Council (1970), [1971] 1 Q.B. 222, [1970] 3 All E.R. 496 (Eng. C.A.) — referred to

MacMillan Bloedel Ltd. v. British Columbia (Minister of Forests), [1984] 3 W.W.R. 270, 51 B.C.L.R. 105, 4 Admin. L.R. 1, 8 D.L.R. (4th) 33 (B.C. C.A.) — referred to

Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2, 44 N.R. 354, 137 D.L.R. (3d) 558, 1982 CarswellNat 484, 1982 CarswellNat 484F (S.C.C.) — referred to

Maracle v. Travellers Indemnity Co. of Canada, [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, (sub nom. Travellers Indemnity Co. of Canada v. Maracle) [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 3 O.R. (3d) 510 (note) (S.C.C.) — considered

Martineau v. Matsqui Institution (No. 2) (1979), [1980] 1 S.C.R. 602, 13 C.R. (3d) 1 (Eng.), 15 C.R. (3d) 315 (Fr.), 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 (S.C.C.) — considered

Mathews v. Eldridge (1976), 96 S. Ct. 893, 47 L. Ed. 2d 18, 424 U.S. 319 (U.S. S.C.) — referred to

Minister for Immigration & Ethnic Affairs v. Teoh (1995), 183 C.L.R. 273, 69 A.L.J.R. 423, 128 A.L.R. 353, 39 A.L.D. 206 (Australia H.C.) — referred to

Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications) (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (Ont. C.A.) — considered

Nenn v. R., [1981] 1 S.C.R. 631, (sub nom. Nenn v. Canada) 36 N.R. 487, 122 D.L.R. (3d) 577 (S.C.C.) — referred to

Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 78 C.L.L.C. 14,181, 23 N.R. 410, 1978 CarswellOnt 609 (S.C.C.) — referred to

North Western Gas Board v. Manchester Corp., [1963] 3 All E.R. 442 (Eng. C.A.) — referred to

Nova Scotia Forest Industries v. Nova Scotia (Pulpwood Marketing Board) (1975), 12 N.S.R. (2d) 91, 61 D.L.R. (3d) 97 (N.S. C.A.) — referred to

Office of Personnel Management v. Richmond (1990), 110 S.Ct. 2465, 110 L.Ed.2d 387, 58 U.S.L.W. 4771, 496 U.S. 414 (U.S.S.C.) — referred to

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) (1990), 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134, [1990] 3 S.C.R. 1170 (S.C.C.) — considered

Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997, [1968] 1 All E.R. 694 (U.K. H.L.) — referred to

Perry v. Sniderman (1972), 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (U.S.S.C.) — referred to

Québec (Sous-ministre du Revenu) c. Transport Lessard (1976) Ltée, [1985] R.D.J. 502, [1985] R.D.F.Q. 191 (Que. C.A.) — considered

R. v. Board of Inland Revenue (1989), [1990] 1 All E.R. 91, [1990] 1 W.L.R. 1545 (Eng. C.A.) — considered

R. v. Dominion of Canada Postage Stamp Vending Co., [1930] S.C.R. 500, [1930] 4 D.L.R. 241 (S.C.C.) — referred to

R. v. Ministry of Agriculture, Fisheries & Food (1994), (sub nom. Hamble (Offshore) Fisheries Ltd., Ex parte) [1995] 2 All E.R. 714 (Eng. Q.B.) — referred to

R. v. North & East Devon Health Authority (1999), (sub nom. Coughlan, Ex parte) [2000] 3 All E.R. 850 (Eng. C.A.) — followed

R. v. Secretary of State for the Home Department, (sub nom. Khan, Ex parte) [1984] 1 W.L.R. 1337, [1985] 1 All E.R. 40, [1984] Imm. A.R. 68, 14 Fam. Law 278, 81 L.S. Gaz. 1678 (Eng. C.A.) — referred to

R. v. Secretary of State for the Home Department (1986), (sub nom. Ruddock, Ex parte) [1987] 2 All E.R. 518 (Eng. Q.B.) — referred to

Reference re Canada Assistance Plan (Canada), 58 B.C.L.R. (2d) 1, 1 Admin. L.R. (2d) 1, (sub nom. Reference re Constitutional Question Act (British Columbia)) 1 B.C.A.C. 241, 1 W.A.C. 241, (sub nom. Reference re Constitutional Question Act (British Columbia)) 127 N.R. 161, [1991] 6 W.W.R. 1, (sub nom. Reference re Canada Assistance Plan (British Columbia)) [1991] 2 S.C.R. 525, (sub nom. Reference re Canada Assistance Plan (British Columbia)) 83 D.L.R. (4th) 297, 1991 CarswellBC 168, 1991 CarswellBC 920 (S.C.C.) — considered

Robertson v. Minister of Pensions (1948), [1949] 1 K.B. 227, [1948] 2 All E.R. 767 (Eng. C.A.) — referred to

Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.) — referred to

Sheehan v. Ontario (Criminal Injuries Compensation Board) (1974), 5 O.R. (2d) 781, 20 C.C.C. (2d) 167, 52 D.L.R. (3d) 728 (Ont. C.A.) — referred to

St. Ann's Island Shooting & Fishing Club Ltd. v. R., [1950] S.C.R. 211, [1950] 2 D.L.R. 225 (S.C.C.) — considered

United States v. Asmar, 827 F.2d 907, 60 A.F.T.R.2d 87-5525, [1987] 2 U.S.T.C. 9488 (U.S. C.A. 3rd Cir.) — referred to

United States v. Pennsylvania Industrial Chemical Corp. (1973), 93 S.Ct. 1804, 36 L.Ed.2d 567, 100 P.U.R.3d 163, 3 Envtl.L.Rep. 20,401, 411 U.S. 655 (U.S. S.C.) — referred to

Webb v. Ireland, [1988] I.R. 353 (Ireland S.C.) — referred to

Webb v. Ontario Housing Corp. (1978), 22 O.R. (2d) 257, 93 D.L.R. (3d) 187 (Ont. C.A.) — referred to

Cases considered by/Jurisprudence citée par Bastarache J. (L'Heureux-Dubé, Gonthier, Iacobucci, Major JJ. **concurring):**

Apotex Inc. v. Canada (Attorney General) (1993), 51 C.P.R. (3d) 339, 162 N.R. 177, [1994] 1 F.C. 742, 18 Admin. L.R. (2d) 122, (sub nom. Apotex Inc. v. Merck & Co.) 69 F.T.R. 152 (note) (Fed. C.A.) — considered

Apotex Inc. v. Canada (Attorney General), (sub nom. Apotex Inc. v. Merck & Co.) 176 N.R. 1, [1994] 3 S.C.R. 1100, 29 Admin. L.R. (2d) 1, 59 C.P.R. (3d) 82 (S.C.C.) — referred to

Baker v. Canada (Minister of Citizenship & Immigration), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — distinguished

C.W.C. v. Canada (Attorney General) (1988), 34 Admin. L.R. 8, [1989] 1 F.C. 643, (sub nom. C.W.C. v. Canada (A.G.) (No. 2)) 21 F.T.R. 56, (sub nom. S.T.C. c. Canada) 1988 CarswellNat 737, 1988 CarswellNat 677 (Fed. T.D.) — referred to

Charles Bentley Nursing Home Inc. c. Québec (Ministre des Affaires sociales), [1978] C.S. 30 (Que. S.C.) — referred to

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), 142 D.L.R. (4th) 193, 206 N.R. 363, 31 C.C.L.T. (2d) 236, 43 Admin. L.R. (2d) 1, [1997] 1 S.C.R. 12 (S.C.C.) — distinguished

Morin c. Driscoll College Inc. (1978), [1979] R.P. 198 (Que. C.A.) — referred to

Québec (Procureur général) c. Laurendeau, [1985] R.D.J. 513, [1985] C.A. 494 (Que. C.A.) — referred to

Statutes considered by/Législation citée par Binnie J. (McLachlin C.J.C. concurring):

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général — referred to

Immigration Act/Immigration, Loi sur l', R.S.C./L.R.C. 1985, c. I-2

s. 114(2) — referred to

Law Enforcement Compensation Act, R.S.O. 1970, c. 237

s. 5 — referred to

Public Highways Act, R.S.N.S. 1954, c. 235

s. 21 — referred to

Services de santé et les services sociaux, Loi sur les, L.R.Q., c. S-5

art. 138 — considered

art. 139.1 [ad. 1981, c. 22, art. 92] — considered

Statutes considered by/Législation citée par Bastarache J. (L'Heureux-Dubé, Gonthier, Iacobucci, Major JJ. concurring):

Code de procédure civile, L.R.Q., c. C-25

art. 100 — considered

art. 844 — referred to

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

Generally/en général — referred to

Fisheries Act/Pêcheries, Loi sur les, R.S.C./L.R.C. 1985, c. F-14

Generally/en général — referred to

Services de santé et les services sociaux, Loi sur les, L.R.Q., c. S-5

en général — considered

art. 136 — considered

art. 137 — considered

art. 138 — considered

art. 139 [abr. et rempl. 1981, c. 22, art. 92] — considered

art. 139.1 [ad. 1981, c. 22, art. 92] — considered

art. 140 — considered

art. 141 [abr. et rempl. 1981, c. 22, art. 92] — considered

Services de santé et les services sociaux, Loi sur les, L.R.Q., c. S-4.2

en général — considered

art. 81 — considered

art. 83 — considered

art. 119 — considered

art. 126 — considered

arts. 437-443 — referred to

arts. 441 — referred to

art. 442.1 [ad. 1995, c. 28, art. 4] — referred to

art. 444 — considered

APPEAL by Minister of Health and Social Services from judgment reported at 1998 CarswellQue 961, [1998] Q.J. No. 2982, 9 Admin L.R. (3d) 161, [1998] R.J.Q. 2707 (Que. C.A.), ordering Minister to issue promised permit to center and allowing center's appeal from judgment allowing in part center's mandamus application.

POURVOI du ministre à l'encontre du jugement publié à 1998 CarswellQue 961, [1998] Q.J. No. 2982, 9 Admin L.R. (3d) 161, [1998] R.J.Q. 2707 (C.A. Qué.), qui a ordonné au ministre de délivrer au Centre le permis qu'il lui avait promis et a accueilli le pourvoi du Centre à l'encontre du jugement qui avait accueilli en partie la requête en mandamus du Centre.

Binnie J. (McLachlin C.J.C. **concurring**):

1 I agree with my colleague Justice Bastarache that this appeal should be dismissed. I also agree with his rejection of the respondents' claim that they already possessed the modified permit at the time of the Mount Sinai Hospital Center's move from Ste-Agathe to Montreal and that all that remained was to bring the wording of the

permit into line with the legal reality. As my colleague points out in para. 97, being entitled "to the permit is different than actually holding it." In government, nothing is done until it is done.

2 My colleague Bastarache J. puts the focus on the Minister of Health and Social Services and concludes that the Minister had, in fact, exercised his discretion under s. 138 of An Act respecting health and social services, R.S.Q., c. S-5 (now s. 441 of An Act respecting health and social services, R.S.Q., c. S-4.2), culminating in the Center's move to Montreal in January 1991 (para. 105). The various actions and communications by the Minister with the respondents are considered as evidence of how and when the discretion was exercised (para. 101). The issue, on this view, is whether the original exercise of the s. 138 discretion was validly reversed in the October 3, 1991, decision to deny the modified permit (para. 107).

3 There is, of course, a distinction between the making of a decision and the documentation of it, but to apply that distinction here raises serious practical problems. When, precisely, did the Minister cross the boundary between deliberation and decision? How is the citizen and, importantly, how is the Minister to know when his or her decision-making power has been exercised? Is the allegation of an exercised power sufficient to expose the Minister to pre-trial discovery on his state of mind? How much mental commitment by the Minister will be held to be enough to lock in a "decision"?

4 I prefer the approach of the Quebec Court of Appeal, which rested its decision on an analysis of the relationship between the respondents and the Minister. The communications from the Minister are not simply evidence of the state of the Minister's mind, but are the source of the respondents' entitlement. In other words, if the successive Ministers had gone through the same cogitations and deliberations as they did between 1984 and 1991, but kept their thoughts to themselves, I think it unlikely the respondents would succeed in obtaining the order they seek.

5 What is crucial to the respondents' case is that successive Ministers not only communicated their view that the Center's change of operations to include short-term care was in the public interest (in terms which amounted to a promise that the modified permit would be issued) but the respondents relied on those representations and communications. Inexplicably, once the respondents applied for the modified permit as promised, the ministerial wind shifted without notice. The Minister simply announced that short-term beds must be coupled with enhanced diagnostic and treatment facilities, which the respondents had not proposed and which the Minister, despite his insistence, was not prepared to fund. This is what the Minister wrote:

> [TRANSLATION] The excellence achieved by this hospital in so-called intermediate care of respiratory illnesses was developed within the framework of a permit for 107 long-term beds. If 50 of those beds were now reclassified to become short-term beds, as you are asking, it would be necessary to strengthen the establishment's capacity to deal with more acute and more complex clinical problems than at present. It would be necessary for that purpose to grant it additional resources, something which the Government is not able to do.
>
> The review of the case conducted by my Department concludes that Mount Sinai Hospital's permit should remain what it is, namely 107 long-term beds, an opinion which I share.

6 It is evident on the face of the letter that no weight whatsoever was placed by the Minister on the implications for the respondents of the broken promises.

I. The Legal Issues

7 The wording of s. 138 of the old Act is crucial:

> 138. Every person applying for a permit must send his application to the Minister in accordance with the regulations.
>
> The Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest. [Emphasis added.]

Accordingly, if the Minister forms the opinion, as a matter of policy, that the public interest would be served by the modified facility, then he shall (mandatory) issue the permit. There are thus three stages to the respondents' challenge: (1) the October 3, 1991, decision is to be quashed, (2) the Minister is to be fixed with the conception of the public interest he and his predecessors agreed upon with the respondents between 1984 and October 2, 1991, and (3) based on that conception of the public interest, mandamus is to issue to enforce the mandatory duty under s. 138 ("shall") to issue the modified permit.

8 This case is not the simple scenario of an application for a permit followed by a refusal "in the public interest." From 1984 onwards the respondents worked closely with Ministry regulators. A web of understandings and incremental agreements came into existence with the concurrence indeed encouragement of successive Ministers. What perhaps began with an abstract notion of "the public interest" became, through private initiative and ministerial response, a specific embodiment of the public interest in terms of bricks and mortar, facilities and location. Not only did successive Ministers subscribe to this embodiment of the public interest, they encouraged the respondents to act on it. If this were a private law situation there would likely be a breach of contract. This is not, of course, a private law situation.

II. The Case for the Appellant Minister

9 Counsel for the Minister emphasized that s. 138 clearly shows a legislative intent that the public interest is to be determined by the Minister, not by the courts. The validity of the legislation is unchallenged. The Minister was entirely familiar with the Center and, over the course of seven years, had heard whatever the respondents had to say. Ministerial decisions in such circumstances command deference: Calgary Power Ltd. v. Copithorne (1958), [1959] S.C.R. 24 (S.C.C.), Nenn v. R., [1981] 1 S.C.R. 631 (S.C.C.), Canada (Attorney General) v. Purcell (1995), [1996] 1 F.C. 644 (Fed. C.A.). The Minister says that neither the doctrine of legitimate expectations nor estoppel operates to entitle the respondents to substantive relief, i.e., the modified permit. Estoppel can only be used as a shield not a sword: Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co., [1970] S.C.R. 932 (S.C.C.), at pp. 937-939, Gilbert Steel Ltd. v. University Construction Ltd. (1976), 12 O.R. (2d) 19 (Ont. C.A.), at p. 23.

III. The Case for the Respondents

10 The respondents do not dispute the general principle of deference to ministerial discretion. They rely, however, on the web of relationships developed in the seven years preceding the October 3, 1991, rejection. Their legal position may be rationalized in several different ways:

> (1) They had a right to the modified permit to" regularize" the hospital bed situation brought about by the mutual agreement with the Minister. The Court should consider as done that which ought to have

been done;

(2) Procedural fairness dictated that the application for a modified permit should have been granted;

(3) While there may have been no right as such to a modified permit, the respondents had a reasonable and legitimate expectation that the modified permit would issue. The Minister had so promised, it was within his statutory power to keep his promise, and there was no overriding public interest that might justify the promise being broken;

(4) The Minister was estopped by his representations from insisting on a unfettered discretion in October 1991 to grant or withhold the modified permit. Too much water had gone under the bridge. The representations, and conduct of successive Ministers from 1984 onwards, led the respondents to modify their operations to include short-term care, launch a fundraising campaign and move to a new facility in Montreal. The Minister could not belatedly escape this history on October 3, 1991. The discretion which he otherwise might have possessed was fettered;

(5) The ministerial decision should be set aside on one ground of abuse of discretion. The dealings of successive Ministers with the respondents between 1984 and 1991 reflected a considered view of the public interest which was repudiated on October 3, 1991, without any regard for a very relevant consideration, namely, the implications of that decision for the respondents. If the Minister were to decide consistently with the view of the public interest he had previously espoused, the modified permit would issue. No plausible reason was given for the breach of the promise of a modified permit. The decision of October 3, 1991, was, in the circumstances, patently unreasonable.

11 It will be noted that most of these claims would lead, if anywhere, to procedural relief. That is not, as stated, the respondents' ultimate objective. While in some cases a litigant relies on a substantive claim to justify procedural protection, in this case the respondents rely to some extent on the alleged violation of their procedural rights to nourish the claim to a substantive remedy.

12 I will address each of these legal arguments in turn.

A. Do the respondents possess an acquired right to a modified permit?

13 In oral argument it was suggested that perhaps the respondents could bring themselves within the principle applied in Hill v. Nova Scotia (Attorney General), [1997] 1 S.C.R. 69 (S.C.C.). In that case a farm had been bifurcated by a new provincial highway. The farmer claimed that when expropriating his land for that purpose 27 years earlier, the province had included as part of the compensation package an equitable easement permitting him to move cattle and equipment across the highway from one side of his farm to the other. Both the farmer and the province had clearly acted on that basis for the previous 27 years. The province eventually repudiated the understanding contending that it had never acknowledged the interest in the land in writing as required by s. 21 of the Public Highways Act, R.S.N.S. 1954, c. 235. Our Court concluded that there had been "part performance" by the province, and "[q]uite simply equity recognizes as done that which ought to have been done. A verbal agreement which has been partly performed will be enforced" (per Cory J., at paras. 11-12).

14 Hill involved an equitable interest in land. In the present case the respondents cannot be said to have a "right," much less a proprietary right, to the award of a permit. The mere expectation of a favourable outcome to

the application (when eventually made), fuelled by ministerial statements and conduct, is still no more than an expectation. The respondents had not even applied for the modified permit until they relocated to Montreal in 1991.

15 In the United States a broad interpretation is sometimes given to the notion of "property" for the purposes of the due process clause (e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (U.S. S.C., 1985) (state employment), Perry v. Sniderman, 408 U.S. 593 (U.S.S.C., 1972), Mathews v. Eldridge, 424 U.S. 319 (U.S. S.C., 1976) (right to social security disability benefits), and Barry v. Barchi, 443 U.S. 55 (U.S. S.C., 1979) (renewal of horse trainer's licence)), but even the U.S. cases seem to contemplate the possession and expected continuation of an existing permit or benefit, not the hoped for acquisition of a new one.

16 Putting aside, then, the initial challenge based on Hill, the other arguments that are marshalled in support of the respondents' position proceed from very general propositions (e.g., the availability of procedural fairness) to narrower propositions that are highly specific to the dealings between the parties in this case (e.g., estoppel). Under whatever label, however, the steady drumbeat of the respondents' complaint is that they were treated by the Minister in an unfair and high-handed manner. It is true, as the appellant points out, that the Minister's power under s. 138 is framed as a broad policy discretion to be exercised "in the public interest." Yet the discretion, however broadly framed, is not unfettered. At the very least, the Minister must exercise the power for the purposes for which it was granted: Roncarelli v. Duplessis, [1959] S.C.R. 121 (S.C.C.), at p. 140, Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997 (U.K. H.L.), at p. 1030. The Minister must observe procedural fairness in dealing with the respondents' interests in their application for a permit: Cardinal v. Kent Institution, [1985] 2 S.C.R. 643 (S.C.C.), Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1978), [1979] 1 S.C.R. 311 (S.C.C.). Other limitations are more controversial. Where, as here, the Minister makes representations by word or conduct that someone will receive or retain a benefit, or that some procedural right will be afforded before a decision is taken, the availability and/or content of procedural fairness may be enlarged under the doctrine of legitimate expectation: Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170 (S.C.C.), Reference re Canada Assistance Plan (Canada), [1991] 2 S.C.R. 525 (S.C.C.), Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817 (S.C.C.), Bendahmane v. Canada (Minister of Employment & Immigration), [1989] 3 F.C. 16 (Fed. C.A.), Claudine Roy, La théorie de l'expectative légitime en droit administratif (Cowansville, Qué.: Yvon Blais, 1993). Where the representations were known to, and relied upon by, an individual affected, and such reliance would result in a detriment to that person if the Minister were to backtrack on his earlier representations, there is arguably (unless the statute or an overriding public interest dictates a contrary result) an estoppel: Québec (Sous-ministre du Revenu) c. Transport Lessard (1976) Ltée, [1985] R.D.J. 502 (Que. C.A.), Aurchem Exploration Ltd. v. Canada (1992), 91 D.L.R. (4th) 710 (Fed. T.D.). Moreover, if in light of the foregoing constraints, whether implied by law or self-imposed by the Minister, the resulting decision is patently unreasonable, it may be quashed (Baker v. Canada, supra) and an order in the nature of mandamus may be granted to require the Minister, again in the absence of an overriding public interest to the contrary, to issue the modified permit (Apotex Inc. v. Canada (Attorney General), [1994] 3 S.C.R. 1100 (S.C.C.), affirming(1993), [1994] 1 F.C. 742 (Fed. C.A.)). The list of limitations is not exhaustive.

17 At the end of the day, the respondents' main hurdle is that they do not seek procedural relief. They want the Court to grant substantive relief. They don't want a hearing or more consultation. The events in question took place 10 years ago. The world has moved on. They want the Court to order the Minister to issue the 1991-1993 modified permit.

B. The Minister Failed To Observe Procedural Fairness

18 If the respondents did not have a "right" to a modified permit, they nevertheless had a direct financial interest in the outcome of their application sufficient to trigger the duty of procedural fairness. They were, after all, existing permit holders. Their request was for permit modifications. As stated by Le Dain J. in Cardinal v. Kent Institution, supra, at p. 653:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual . . . .

19 The respondents were entitled to procedural fairness irrespective of the existence of representations and pieces of correspondence from the Minister. The nature of the respondents' interest was sufficient: Webb v. Ontario Housing Corp. (1978), 22 O.R. (2d) 257 (Ont. C.A.), per MacKinnon A.C.J.O., at p. 265, Hutfield v. Fort Saskatchewan General Hospital District No. 98 (1986), 49 Alta. L.R. (2d) 256 (Alta. Q.B.), at pp. 262-264, affirmed on other grounds(1998), 52 D.L.R. (4th) 562 (Alta. C.A.). Moreover,

> [c]ontemporary administrative law takes a very broad view of the range of the rights, privileges and interests that will attract a right to procedural fairness.

(Donald J.M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (Toronto: Canvasback, 1998) (looseleaf updated January 2001), vol. 1, p. 7-31.)

20 Once triggered, the content of procedural fairness is generally a function of (i) the nature of the decision to be made, (ii) the relationship between the decision-maker and the individual, and (iii) the effect of the decision on the individual's rights: Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653 (S.C.C.), at p. 669.

21 Even minimal procedural fairness was not extended to the respondents in this case. They had no notice that the Minister was about to reverse his position, or the reasons for the reversal, and no opportunity to present argument as to why the Minister's earlier and long-standing view that the public interest favoured a modified Mount Sinai Hospital Center should prevail. These defects enable the respondents to achieve the first of their objectives, namely, the setting aside of the Minister's October 3, 1991, decision. However, as stated, they want more.

C. The Doctrine of Legitimate Expectation

22 The respondents argue that the doctrine of legitimate expectations can be used to compel not only procedural protection but a substantive result, provided such result is not contrary to law and is otherwise within the power of the Minister, which in this case it would be (see Søren J. Schønberg, Legitimate Expectations in Administrative Law (New York: Oxford University Press, 2000), ch. 4). The prior jurisprudence in this Court is against such a proposition: see Old St. Boniface, supra, at pp. 1203-1204, Reference re Canada Assistance Plan (Canada), supra, at pp. 557-558, Baker v. Canada, supra, at para. 26. However, the respondents say that this doctrine is rapidly evolving and expanding, and has been employed in Canada and elsewhere to impose a substantive rather than merely procedural result on decision-makers exercising statutory or prerogative powers. Relevant authorities include the decision of a panel of the Quebec Court of Appeal in Québec (Sous-ministre du Revenu) c. Transport Lessard (1976) Ltée, supra; trial level decisions elsewhere in Canada, including Gingras v. Canada, [1990] 2 F.C. 68 (Fed. T.D.), and Bloomfield v. Saskatchewan (Minister of Health) (October 20, 1986), Doc. Saskatoon Q.B. 2913/86 (Sask. Q.B.); in England by Parker L.J. in R. v. Secretary of State for the Home

Department, [1984] 1 W.L.R. 1337 (Eng. C.A.), and subsequently by Mr. Justice Taylor (later Lord Chief Justice) in R. v. Secretary of State for the Home Department (1986), [1987] 2 All E.R. 518 (Eng. Q.B.), and Sedley J. (later Lord Justice) in R. v. Ministry of Agriculture, Fisheries & Food (1994), [1995] 2 All E.R. 714 (Eng. Q.B.), at p. 724 (which contains a useful discussion of European law to the same effect). More recently, in R. v. North & East Devon Health Authority (1999), [2000] 3 All E.R. 850 (Eng. C.A.) [hereinafter Coughlan], the English Court of Appeal has resoundingly confirmed that in English law the doctrine of legitimate expectations does give rise to substantive remedies. Lord Woolf M.R. was unequivocal at para. 71:

> Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits . . . . [Emphasis added.]

23 A similar approach has been adopted in Ireland (Webb v. Ireland, [1988] I.R. 353 (Ireland S.C.)) and, in a more tentative way, was expressed by the High Court of Australia in Attorney General for New South Wales v. Quin (1990), 64 A.L.J.R. 327 (Australia H.C.), per Mason C.J., at p. 336:

> It is possible perhaps that there may be some cases in which substantive protection can be afforded and ordered by the court, without detriment to the public interest intended to be served by the exercise of the relevant statutory or prerogative power.

(Australia seems subsequently to have moved against the granting of substantive relief: Cameron Stewart, "Substantive Unfairness: A New Species of Abuse of Power" (2000), 28 Fed. L. Rev. 617, at p. 634.) See also the decision of the Appellate Division of the South African Supreme Court in Administrator, Transvaal v. Traub, 1989 4 S.A. 731 (South Africa C.A.). There is also some academic support for the extension of the application of the doctrine of legitimate expectations to substantive rights; see, e.g., Christopher Forsyth, "Wednesbury Protection of Substantive Legitimate Expectations," [1997] Pub. L. 375. Against this is put the traditional view that "statutory authorities cannot disable themselves from the future exercise of their jurisdiction or powers by the giving of assurances": David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001), at p. 380.

24 Part of the difficulty with the contending positions in this case is that in English law, and in the law of those jurisdictions that have followed the English lead in this matter, the doctrine of legitimate expectations performs a number of functions that in Canada are kept distinct. Lord Woolf M.R. in Coughlan, supra, identified the unifying theme as "administrative fairness" of which procedural fairness and substantive fairness are connected parts. (See also R. v. Board of Inland Revenue (1989), [1990] 1 W.L.R. 1545 (Eng. C.A.), per Bingham L.J. (now in the H.L.), at pp. 1569-1570.) On the substantive side, Lord Woolf M.R. summarizes his position thus at para. 82:

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

25 In Coughlan itself a woman with severe physical disabilities was induced by the local health authority to move from a hospital to a nursing home on the promise that there she would have a "home for life" (para. 4). Five years later, after some consultation and for reasons that the court found to be perfectly rational (para. 65) the local health authority decided to close the nursing home. The decision was quashed because though rational and reached after some consultation, the court concluded that the public authority had placed insufficient weight on its earlier promise of a "home for life."

26 It thus appears that the English doctrine of legitimate expectation has developed into a comprehensive code that embraces the full gamut of administrative relief, from procedural fairness at the low end through "enhanced" procedural fairness based on conduct, thence onwards to estoppel (though it is not to be called that), including substantive relief at the high end, i.e., the end representing the greatest intrusion by the courts into public administration. The intrusion is said to be justified by the multiplicity of conflicting decisions by a public authority on the same point directed to the same individual(s), per Lord Woolf M.R. in Coughlan, supra, at para. 66:

> In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two.

27 In ranging over such a vast territory under the banner of "fairness" it is inevitable that subclassifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations relied on by the respondents, at the low end, would fit comfortably within our principles of procedural fairness. At the high end, they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the Canadian Charter of Rights and Freedoms.

28 Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation. There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate, and indeed inhibit rather than encourage, the development of the highly flexible rules of procedural fairness: David Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997), 35 Osgoode Hall L.J. 139. On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister.

29 Under our case law the availability and content of procedural fairness is generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest: Brown and Evans, supra, p. 7-13 et seq., David J. Mullan, "' Confining the Reach of Legitimate Expectations' Case Comment: Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast)" (1991), 44 Admin. L.R. 245, at p. 248. The doctrine of legitimate expectations, on the other hand, looks to the conduct of the public authority in the exercise of that power (Old St. Boniface, supra, at p. 1204), including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified (Brown and Evans, supra, p. 7-41). The expectations must not conflict with the public authority's statutory remit.

30 The doctrine of legitimate expectations is sometimes treated as a form of estoppel, but the weight of au-

thority and principle suggests that an applicant who relies on the doctrine of legitimate expectations may show, but does not necessarily have to show, that he or she was aware of such conduct, or that it was relied on with detrimental results. This is because the focus is on promoting "regularity, predictability and certainty in government's dealing with the public": Stanley A. de Smith, H. Woolf and Jeffrey L. Jowell, Judicial Review of Administrative Action, 5th ed. (London: Sweet & Maxwell, 1995), at p. 417, to which the editors add, at p. 426, that insisting on estoppel-type requirements would

> involve unfair discrimination between those who were and were not aware of the representation and would benefit the well-informed or well-advised. It would also encourage undesirable administrative practice by too readily relieving decision-makers of the normal consequences of their actions.

The High Court of Australia espouses a similar view:

> But, more importantly, the notion of legitimate expectation is not dependent upon any principle of estoppel. Whether the Minister can be estopped in the exercise of his discretion is another question; it was not a question raised by the appellant. Legitimate expectation does not depend upon the knowledge and state of mind of the individual concerned, although such an expectation may arise from the conduct of a public authority towards an individual . . . .

(Haoucher v. Minister for Immigration & Ethnic Affairs (1990), 19 A.L.D. 577 (Australia H.C.) [169 C.L.R. 648], per Toohey J., at p. 590.)

See also Minister for Immigration & Ethnic Affairs v. Teoh (1995), 183 C.L.R. 273 (Australia H.C.).

31 It is difficult at one and the same time thus to lower the bar to the application of the doctrine of legitimate expectation (for good policy reasons) but at the same time to expand greatly its potency for overruling the Minister or other public authority on matters of substantive policy. One would normally expect more intrusive forms of relief to be accompanied by more demanding evidentiary requirements.

32 In Reference re Canada Assistance Plan (Canada), Sopinka J. (citing Old St. Boniface, supra) regarded the doctrine of legitimate expectations as "an extension of the rules of natural justice and procedural fairness" which may afford" a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity" (p. 557 (emphasis added)). In referring to the making of representations, of course, Sopinka J. was not limiting relief just to representations but intended to include whatever procedural remedies might be appropriate on the facts of a particular case. Procedure is a broad term. The door was shut only against substantive relief. It seems to me, notwithstanding the respondents' argument, that this conclusion should be affirmed. If the Court is to give substantive relief, more demanding conditions precedent must be fulfilled than are presently required by the doctrine of legitimate expectation.

33 In Reference re Canada Assistance Plan (Canada), supra, Sopinka J. went on to note two further limitations. He quoted at p. 558 from Martineau v. Matsqui Institution (No. 2) (1979), [1980] 1 S.C.R. 602 (S.C.C.). The first limitation was that: "A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion" (p. 558 (emphasis added)). I will return to the notion of" abuse of discretion" below.

34 The second limitation was that "public bodies exercising legislative functions may not be amenable to judicial supervision" (p. 558 (emphasis added)). Reference re Canada Assistance Plan (Canada) dealt with the ap-

plication of the doctrine of legitimate expectations to Parliament where the need for judicial restraint is obvious. There may be difficulty in other contexts in distinguishing when the legislative exception applies and where it does not, as debated in the Federal Court of Appeal in Apotex Inc. v. Canada (Attorney General), [2000] 4 F.C. 264 (Fed. C.A.), especially Evans J.A. at para. 105 et seq. That issue remains open for another day.

35 In affirming that the doctrine of legitimate expectations is limited to procedural relief, it must be acknowledged that in some cases it is difficult to distinguish the procedural from the substantive. In Bendahmane v. Canada, supra, for example, a majority of the Federal Court of Appeal considered the applicant's claim to the benefit of a refugee backlog reduction program to be procedural (p. 33), whereas the dissenting judge considered the claimed relief to be substantive (p. 25). A similarly close call was made in Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System), [1996] 3 F.C. 259 (Fed. T.D.). An undue focus on formal classification and categorization of powers at the expense of broad principles flexibly applied may do a disservice here. The inquiry is better framed in terms of the underlying principle mentioned earlier, namely, that broad public policy is pre-eminently for the Minister to determine, not the courts.

36 The classification of relief as "substantive," however, should be made in light of the principled basis for its exclusion rather than as a matter of form. Where, as in Bendahmane v. Canada, relief can reasonably be characterized as procedural in light of the underlying principle of deference on matters of substantive policy, then generally speaking it should be.

37 It follows from the foregoing that decisions of the English courts and other courts that give effect to substantive legitimate expectations must be read with due regard to the differences in Canadian law.

38 In this case, as stated earlier, the Minister's decision will be set aside through the application of the ordinary rules of procedural fairness. There is no need to expand either the availability or content of procedural fairness because of the conduct of successive Ministers, which amounts, in this respect, only to an aggravating circumstance. There is, in short, no need to resort to the doctrine of legitimate expectations to achieve procedural relief and, as explained, substantive relief is not available under this doctrine.

D. Promissory Estoppel

39 The Quebec Court of Appeal concluded ([1998] R.J.Q. 2707 (Que. C.A.)) that while the Minister was not required by the doctrine of legitimate expectations to issue the modified permit, he was estopped by his earlier representations and conduct from refusing to do so. The evidence here went well beyond what is necessary to establish legitimate expectations. In determining that an estoppel remedy was available, Robert J.A. relied on, inter alia, Transport Lessard, supra, and Aurchem, supra. Reference should also be made to Bawolak c. Exroy Resources Ltd. (1992), [1993] R.D.J. 192 (Que. C.A.), and David J. Mullan," Canada Assistance Plan - Denying Legitimate Expectation a Fair Start?" (1993), 7 Admin. L.R. (2d) 269, at p. 290. Robert J.A. noted that the question whether estoppel is available against a Minister of the Crown was left open by this Court in Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), [1997] 1 S.C.R. 12 (S.C.C.), per Major J., at para. 57. See also Patrick McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities" (1979), 17 Osgoode Hall L.J. 160, at pp. 180-181.

40 I agree with Robert J.A. that estoppel may be available against a public authority, including a Minister, in narrow circumstances. The interesting analysis of McDonald, supra, illustrates the variety of circumstances in which the issue has arisen, and the variegated responses given by the Courts. A form of estoppel was applied not only by the Quebec Court of Appeal in Transport Lessard, supra, but by the Ontario Court of Appeal in Multi-

Malls Inc. v. Ontario (Minister of Transportation & Communications) (1976), 14 O.R. (2d) 49 (Ont. C.A.), and by this Court (albeit against a municipality) in Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd., [1994] 1 S.C.R. 80 (S.C.C.). Reference has already been made to the Aurchem decision of Strayer J. in the Federal Court, Trial Division, that estopped a mining recorder from refusing to register claims. There are several pertinent decisions in Britain, many of them authored by Lord Denning, that include Robertson v. Minister of Pensions (1948), [1949] 1 K.B. 227 (Eng. C.A.), at p. 231, Lever Finance v. Westminister London Borough Council (1970), [1971] 1 Q.B. 222 (Eng. C.A.), but also North Western Gas Board v. Manchester Corp., [1963] 3 All E.R. 442 (Eng. C.A.), per Sellers L.J. at p. 451.

41 In the more recent English cases estoppel too has been swallowed up under the general heading of fairness; see Coughlan, supra, at para. 80:

> As Lord Donaldson MR said in R v. ITC, ex p TSW (5 February 1992) unreported): "The test in public law is fairness, not an adaptation of the law of contract or estoppel".

42 It is to be emphasized that the requirements of estoppel go well beyond the requirements of the doctrine of legitimate expectations. As mentioned, the doctrine of legitimate expectations does not necessarily, though it may, involve personal knowledge by the applicant of the conduct of the public authority as well as reliance and detriment. Estoppel clearly elevates the evidentiary requirements that must be met by an applicant.

43 In the United States (where administrative law is heavily influenced by the due process clause in the Constitution) the courts have shown reluctance to hold government estopped. There are policy reasons for this as well as legal reasons:

> The federal government implements hundreds of extraordinarily complicated regulatory and benefit programs. Millions of civil servants give advice to citizens daily concerning their rights and duties under these programs. Erroneous advice is both inevitable and commonplace. The Internal Revenue Service (IRS) provides a good illustration. It is one of the federal agencies that is most respected for its competence. Yet, each year the General Accounting Office (GAO) conducts a study of the taxpayer advice provided by IRS, and each year that study shows that IRS gives erroneous advice in somewhere between 10 and 20 percent of all cases. Some taxpayers are injured by reliance on IRS' advice, but millions of taxpayers are benefited by its availability.

(Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, 3rd ed. (Boston: Little, Brown & Co., 1994), vol. 2, pp. 229-230.)

44 Decisions in which the U.S. Supreme Court has, however, refused to rule out public law estoppel entirely (at least in theory) include Office of Personnel Management v. Richmond, 496 U.S. 414 (U.S. S.C., 1990), at p. 423, and United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (U.S. S.C., 1973). Circuit courts which have allowed estoppel against the government in exceptional circumstances are referred to in United States v. Asmar, 827 F.2d 907 (U.S. C.A. 3rd Cir., 1987), at p. 911, note 4. Professors Davis and Pierce, supra, suggest at p. 231 that a successful claim for equitable estoppel in the United States would have to involve at least the following characteristics: "(1) unequivocal advice from an unusually authoritative source; (2) reasonable reliance on that advice by an individual; (3) extreme harm resulting from that reliance; and (4) gross injustice to the individual in the absence of judicial estoppel."

45 In this case Robert J.A. adopted the private law definition of promissory estoppel provided by Sopinka J.

in Maracle v. Travellers Indemnity Co. of Canada, [1991] 2 S.C.R. 50 (S.C.C.), at p. 57:

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

46 If this were a private law case I would agree that the elements of promissory estoppel are present. The evidence goes well beyond what is necessary to trigger procedural fairness or the doctrine of legitimate expectations. Successive Ministers made clear and specific representations that were intended to be acted on, and were in fact acted upon by the respondents. Ministers encouraged the new mix of short- and long-term beds which they knew would impact the legal relationship, i.e., the respondents' compliance with the existing permit, and the resulting need for permit modifications. Assurances were given with respect to the issuance of a modified permit. If the Minister is allowed to reverse his promise of a modified permit after the respondents had made changes to their hospital operations, including the fund raising campaign and the move to Montreal, the respondents say they would have acted on the Minister's promises to their detriment.

47 However, this is not a private law case. Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text. As stated in St. Ann's Island Shooting & Fishing Club Ltd. v. R., [1950] S.C.R. 211 (S.C.C.), per Rand J., at p. 220: "there can be no estoppel in the face of an express provision of a statute" (emphasis added). See also R. v. Dominion of Canada Postage Stamp Vending Co., [1930] S.C.R. 500 (S.C.C.).

48 Here the Minister is mandated in broad terms to act in the public interest, and if the public interest, as he defines it, is opposed to the award of the modified permit, then I do not think a court should estop the Minister from doing what he considers to be his duty. What is at issue is not so much the Minister's ability to change policies but the fate of individuals caught in the transition between successive and inconsistent ministerial decisions on the same subject. As a matter of statutory interpretation, it seems clear from the broad test of s. 138 ("the public interest") that the legislature intended the Minister, not the courts, to determine the appropriate transitional arrangements from the old policy (which welcomed a mix of 57 long-term beds and 50 short-term beds) to the new policy (50 short-term beds would only be welcome if accompanied by enhanced diagnostic and treatment services in addition to the existing operating room, laboratories and radiology facilities).

49 I mentioned at the outset that the wording of the particular statutory power in question and who wields it (a Minister) is important. The cases that are relied upon by the respondents generally deal with lesser powers or a narrower discretion at a lower level of officialdom. In Transport Lessard, supra, the issue was the interpretation of a sales tax provision in relation to the bulk sale of trucking equipment (and estoppel was applied despite the caution expressed by this Court in Granger v. Canada (Employment & Immigration Commission), [1989] 1 S.C.R. 141 (S.C.C.), affirming [1986] 3 F.C. 70 (Fed. C.A.)). The issue in Multi-Malls, supra, was a Minister's procedural decision to decline to refer a planning document to the Ontario Municipal Board for review. In Aurchem, supra, the issue was the refusal of a mining recorder to register certain mining claims because of defects of form. Strayer J. emphasized that the intended effect of his order was not to impede changes in policy but to protect people caught in the transition from a relaxed regime to a more strict regime. The regulatory requirements were matters of form not substance and the statute itself contemplated the possibility of waiver. In none of

these cases was the statutory power of decision framed in broad policy terms comparable to s. 138 of the legislation at issue here.

50 The appellant also complains that the Quebec Court of Appeal in this case used estoppel as a sword rather than a shield, but (as in Aurchem) this could be rationalized merely as having precluded the Minister from relying on factors that he was, in all the circumstances, estopped from taking into consideration.

51 There is a public law dimension to the law of estoppel which must be sensitive to the factual and legal context. Here the primary considerations are the wording of s. 138 and the status of the decision-maker. Estoppel is, in my view, not available on the facts of this case in the way in which it was applied by the Quebec Court of Appeal.

E. The Minister's Decision Amounted to an Abuse of Discretion

52 The final issue is whether the Minister's decision was patently unreasonable in light of all the circumstances. This issue goes to the substance of the decision as opposed to the process by which it was reached. The respondents place weight, in particular, on five factors: (i) the view of the public interest that the Minister and his predecessors espoused to the respondents up to October 3, 1991, namely, that the mix of facilities offered by the Center in Montreal would be in the public interest, (ii) representations by the Minister and reliance and detriment on the part of the respondents, (iii) the failure of the Minister to give a rational public interest justification for reneging on an otherwise lawful result, (iv) the Minister's failure to take into consideration the impact of his sudden reversal on the respondents' interest, and (v) in the circumstances, the patent unreasonableness of the resulting decision of October 3, 1991. In other words, the facts which gave rise to the arguments about procedural fairness, legitimate expectations and estoppel are recycled in the abuse of discretion analysis.

53 I mentioned earlier the "abuse of discretion" exception to the customary deference paid to ministerial decision making as noted by Dickson J. in Martineau v. Matsqui, supra, and reported by Sopinka J. in Reference re Canada Assistance Plan (Canada), supra. Their concern was with procedural fairness. However, the English courts have long extended" abuse of discretion" to substantive decision making which they call" Wednesbury unreasonableness" after Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. (1947), [1948] 1 K.B. 223 (Eng. C.A.). The Wednesbury case was cited with approval in Baker v. Canada, supra, at para. 53. See, generally, H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar. Rev. (sp. ed.) 281, at p. 285 et seq.

54 Baker v. Canada established that the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness. The result, as noted by Professor D.J. Mullan in Administrative Law, supra, at p. 108, was to provide "an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers." The unified approach was to some extent anticipated by earlier decisions in relation to the exercise of ministerial discretion by the British Columbia Court of Appeal in MacMillan Bloedel Ltd. v. British Columbia (Minister of Forests), [1984] 3 W.W.R. 270 (B.C. C.A.), per MacFarlane J.A., at p. 282, and by the Federal Court of Appeal in Lazarov v. Canada (Secretary of State), [1973] F.C. 927 (Fed. C.A.), per Thurlow J., at pp. 938-939. See also Nova Scotia Forest Industries v. Nova Scotia (Pulpwood Marketing Board) (1975), 61 D.L.R. (3d) 97 (N.S. C.A.), and Canadian National Railway v. Fraser-Fort George (Regional District) (1996), 140 D.L.R. (4th) 23 (B.C. C.A.).

55 In Baker v. Canada itself, L'Heureux-Dubé J., speaking for the Court, concluded, at para. 62, that the appropriate standard of review in that case was reasonableness simpliciter. That conclusion must be seen in light of

the special facts. The appellant, Mavis Baker, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption based on humanitarian and compassionate considerations under s. 114(2) of the Immigration Act, R.S.C. 1985, c. I-2, from the requirement that an application for permanent residence must be made from outside of Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. Her application was refused on the ground that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. While the decision was made in the name of the Minister of Citizenship and Immigration, it was found as a fact that the decision had been made under delegated authority by an immigration officer whose notes were accepted as a written memorandum of the reasons for decision (para. 44). The immigration officer operated within guidelines laid down by the Minister. His mandate was to apply those guidelines, which required him to

> be alert to possible humanitarian grounds, [to] consider the hardship that a negative decision would impose upon the claimant or close family members, and [to] consider as an important factor the connections between family members. (para. 72)

It was alleged that the immigration officer, who was required to operate within the four corners of the guidelines, had violated the express rules laid down by his own Minister. In these somewhat unusual circumstances the Court concluded that the decision should be reviewed on the basis of reasonableness simpliciter.

56 The Court noted in Baker v. Canada, supra, per L'Heureux-Dubé J., at para. 53, that ordinarily ministerial decisions of a discretionary nature have been accorded a very high level of deference, citing Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2 (S.C.C.), at pp. 7-8. At para. 56, L'Heureux-Dubé J. states:

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options.

57 Deference may be enhanced by the particular language used in the legislation: Sheehan v. Ontario (Criminal Injuries Compensation Board) (1974), 52 D.L.R. (3d) 728 (Ont. C.A.), where s. 5 of the Law Enforcement Compensation Act, R.S.O. 1970, c. 237, required the Board to "have regard to all such circumstances as it considers relevant" (emphasis added).

58 Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely, patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest." This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision-makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense. The privative language in s. 139.1, while not directly relevant except to a renewal, reinforces the high level of deference owed in this case ("[t]he decision of the Minister is final and without appeal").

59 Accordingly, the appropriate standard of review in this case is patent unreasonableness.

60 Resort to the doctrine of "unreasonableness" to test the validity of substantive decisions was elaborated in Baker v. Canada, supra, at para. 53:

> A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas - that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction.

61 Baker v. Canada went on to hold that the Minister and immigration officials had given insufficient weight to the impact of the decision on Ms Baker and her Canadian-born children. This is part of the traditional Wednesbury test, as pointed out in Coughlan, supra, where Lord Woolf M.R. noted, at para. 58, that the test under Wednesbury "will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise" (emphasis added). He went to say at para. 81: "We would prefer to regard the Wednesbury categories themselves as the major instances (not necessarily the sole ones) . . . of how public power may be misused." On that basis he subsumed "unreasonableness" into the global English concept of administrative unfairness.

62 Where Canadian law parts company with the developing English law is the assertion, which lies at the heart of the Coughlan treatment of substantive fairness, of the centrality of the judicial role in regulating government policy. In Coughlan, it is said, at para. 76, that the decision to withhold substantive relief under the doctrine of legitimate expectation:

> can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court. [Emphasis added.]

63 In Canada, at least to date, the courts have taken the view that, it is generally the Minister who determines whether the public interest overrides or not. The courts will intervene only if it is established that the Minister's decision is patently unreasonable in the sense of irrational or perverse or (in language adopted in Coughlan, at para. 72) "so gratuitous and oppressive that no reasonable person could think [it] justified." This high requirement is met here where the unreasonableness, as in Baker v. Canada, turns on the singular lack of recognition of the serious consequences the Minister's sudden reversal of position inflicted on the respondents who were caught in the transition between the old policy (50 short-term beds are in the public interest) and the new policy (50 short-term beds must be coupled to enhanced diagnostic and treatment facilities).

64 In my view, the Minister's decision of October 3, 1991, was "patently unreasonable" in terms of the public interest as he and his predecessors had defined it over a period of seven years of consultation, encouragement and assurances to the respondents, and in his total lack of regard for the implications for the respondents of the Minister's broken promises.

65 While the Court ought to be and would be sensitive to any serious policy reason offered by the Minister for a redefinition of the public interest in this case, particularly in light of the broad scope of the discretionary power to act" in the public interest" in s. 138, no such policy reason was articulated by the Minister in his decision letter of October 3, 1991. The Minister did not resile from the file history. He did not suggest the 50 short-term care beds were not in the public interest. The only new element is that he stated the public interest would be even further advanced by additional resources for diagnosis and treatment that he was not prepared to fund. As my colleague points out at para. 114, "[a]t the very least, [the Minister's decision] must correspond to the reality of the situation."

IV. Conclusion

66 We are therefore presented with a patently unreasonable ministerial decision reached by a process that was demonstrably unfair. The web of representation, conduct, reliance and detriment discussed above, coupled with the Minister's failure to take the respondents' interests into account on October 3, 1991, precluded the Minister from repudiating the concept of the public interest consistently espoused by Ministers over the seven-year period prior to that date.

67 In light of this history, the Minister ought not to be heard now (i.e., 10 years later) to advance a new vision of the public interest at odds with what was earlier said and done. There is, on the facts of this case, only one option available to the Minister that is not patently unreasonable and that option is to issue the 1991-1993 modified permit (i.e., according to s. 138 of the Act then in force, the modified permit "shall issue"). Thus, in the end, albeit for somewhat different reasons, I agree with the disposition proposed by my colleague, Bastarache J.

68 The alternative would be for the Court to send the decision back to the Minister to be reconsidered in light of the legal constraints identified in this decision. Such a referral would amount to a direction to issue the 1991-1993 modified permit, and the whole procedure would, of course, have an air of unreality. The respondent hospital moved from Ste-Agathe to Montreal 10 years ago. In the meantime, Ministers, policies and health budgets have come and gone. The governing legislation has been amended in significant and relevant aspects. If the present situation is regularized by the issuance of the 1991-1993 modified permit, the current status and entitlement of the respondents' facilities can thereafter be assessed by the present Minister on the basis of the present law and the present circumstances.

69 I would therefore dismiss the appeal.

Bastarache J. (L'Heureux-Dubé, Gonthier, Iacobucci, Major JJ. **concurring):**

70 This appeal involves a determination of the legality of a refusal by the appellant, the Minister of Health and Social Services (the "Minister"), to regularize the operating permit of the respondent, the Mount Sinai Hospital Center (the "Center").

I. Facts

71 The Center was originally a long-term care treatment facility dealing primarily with patients with tuberculosis. During a time when treatment of tuberculosis consisted primarily of rest in an area where the air is pure, Ste-Agathe was an appropriate location for such a centre. It was at that time perhaps best characterized as a sanatorium. However, during the 1950s, as the incidence of tuberculosis decreased and the nature and focus of respiratory disease and its treatment were changing, the Center began to introduce new programs and services, developing, in effect, a general respiratory expertise in a setting with both long-term and short-term care facilities. The short-term care services included palliative care, laboratory, radiology and operation services. Annual reports submitted to the government since 1974 indicate that this change in orientation, diversification and expansion into short-term care services was known to the government who throughout funded all of the Center's activities. Given the Center's distance from Montreal, where many of its patients requiring the short-term care services were now located, the impracticality of the Ste-Agathe location became increasingly apparent. In 1984, negotiations between the Center and the Ministry of Health and Social Services to move the Center to Montreal began in earnest.

72 During these negotiations, the Center made it clear that the Center's permit was an important consideration. At that time, the Center was operating under its original permit for 107 long-term care beds despite the fact that by 1984, in addition to short-term care services and programs, it had for 10 years been providing 57 long-term care beds and 50 intermediary or short-term care beds. The Center wanted the permit altered to reflect the reality of the services it offered. It told the Ministry that its status as a provider of both long-term and short-term care was an important feature of its fund-raising campaign amongst the Jewish community in Montreal. The Ministry promised the Center that it would formally alter the permit once the Center made the move. Under the law in force at that time, An Act respecting health and social services, R.S.Q., c. S-5, the Center suffered no prejudice by agreeing to wait, either administratively or financially. Subsequent years were spent raising the money to make the move, which ultimately cost six million dollars. Over that time, the promise to issue the correct permit was reaffirmed by subsequent occupants of the position of Minister.

73 Once the Center had moved to Montreal, in January 1991, and as the expiry date on its permit was approaching (March 31, 1991), it made the formal request to the Minister for a regularization of the permit on January 31, 1991. New legislation presented on December 10, 1990, was brought into force progressively as of September 4, 1991; An Act respecting health and social services, R.S.Q., c. S-4.2. Its status under the old unaltered permit now put the Center in the category of "residential and long-term care centres," the practical consequence of which was the loss of its independent board of directors. Without giving the Center an opportunity to make submissions on the issue, the Minister wrote to the Center on October 3, 1991, informing it that it would not receive the promised permit and would have to operate under the old unaltered permit. This was despite the fact that the services being offered included short-term care services. The government continued to fund these services and did not require that they be discontinued. Although financial considerations were cited in the letter as the reason for the refusal, the Center had at no time asked for an increased level of funding for its short-term care services. It had provided these services since at least 1974 and there was no indication that it would not be able to continue to do so within its allocated budget.

74 The Center brought an action in mandamus before the Superior Court, requesting that the court order the Minister to issue the promised permit. The Center also asked for the invalidation of the election of the unified board of directors in order to be able to elect its own board.

II. Legislation

75 Due to the fact that the Center's request was made on January 31, 1991, prior to the October 1, 1992, bringing into force of ss. 437-443 of An Act respecting health and social services, R.S.Q., c. S-4.2, governing the issue and renewal of permits, it is An Act respecting health and social services, R.S.Q., c. S-5, which applies to this request.

76 The relevant provisions of An Act respecting health and social services, R.S.Q., c. S-5 (the "former law"), are:

> 136. No person may operate an establishment unless he holds a permanent permit or a temporary permit issued for such purpose by the Minister.
>
> 137. The permanent permit indicates the category of the establishment and its class, kind and capacity, if any.

. . . . .

138. Every person applying for a permit must send his application to the Minister in accordance with the regulations.

The Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest.

139. A permanent permit is granted for a period of two years ending on 31 March.

A temporary permit is granted for a period of less than two years.

139.1 A permanent permit is renewed for two years if its holder fulfills the conditions prescribed by regulation.

However, the Minister may, after consultation with the regional council concerned, change the category, the class, the kind or capacity indicated on the permit if he considers that the public interest warrants it.

Before changing the category, class or kind indicated on the permit, the Minister must give the establishment concerned the opportunity to make representations to him.

The decision of the Minister is final and without appeal; it is not considered a refusal of renewal for the purposes of subdivision 2 of this division.

The holder of a permit that has been modified must take the necessary steps to comply with the new permit within six months of receiving it.

77 Certain features of An Act respecting health services and social services, R.S.Q., c. S-4.2 (the "new law"), also bear mentioning:

81. The mission of a hospital centre is to offer diagnostic services and general and specialized medical care. . . .

. . . . .

83. The mission of a residential and long-term care centre is to offer, on a temporary or permanent basis, alternative environment, lodging, assistance, support and supervision services as well as rehabilitation, psychosocial and nursing care and pharmaceutical and medical services to adults who, by reason of loss of functional or psychosocial autonomy can no longer live in their natural environment, despite the support of their families and friends.

. . . . .

119. A board of directors shall be established to administer all the institutions having their head offices in the territory of a regional county municipality and operating a residential and long-term care centre, or both a residential and long-term care centre and a general and specialized hospital centre with less than 50 beds.

. . . . .

126. A board of directors shall be established to administer . . .

> . . . an institution which operates both a residential and long-term care centre and a general and specialized hospital centre with 50 beds or more.

III. Judicial History

A. Quebec Superior Court, J.E. 92-1815

78 In a decision rendered on November 9, 1992, Marcelin J. of the Superior Court of Quebec made at least five important findings of fact. First, she found that the Center had carried out mixed services of long-term and short-term care for a significant period of time while located in Ste-Agathe. Second, she found that the Minister was aware that the Center operated not only as a long-term health care centre, but that it also provided other short-term care services. The government was funding these services and indicated its acquiescence despite the mismatch between the activities and the permit. Third, the discussions between the parties regarding the Center's relocation had always focused on the question of allowing the Center to operate both long-term and short-term care beds. Fourth, the Center had received promises from government authorities to the effect that its permit would be amended upon its relocation to Montreal. And, fifth, she concluded that it was because of representations made by different persons who held office as Minister that the Center agreed to wait until it established itself in Montreal before formally requesting a modification of its permit.

79 Marcelin J. allowed the mandamus application in part. She found that the Ministry's promises and conduct created a "legitimate expectation" on the part of the Center that it would be given a permit that reflected the true nature of its operations once the move to Montreal was made. However, given that the doctrine of legitimate expectations is confined to natural justice and fairness (audi alteram partem) and procedural remedies but does not provide substantive rights, Marcelin J. did not order the Minister to issue the correct permit. The remedy was limited to an order for the Minister to hear the Center's submissions on the issue before making his decision whether or not the alteration of the permit was in the public interest.

80 Hence, Marcelin J. held that the October 3, 1991, letter was not a valid exercise of the Minister's discretion for two reasons. First, it did not respect the requirement in s. 139.1 that the Minister give the concerned institution the opportunity to make representations when contemplating the modification of a permit. Secondly, Marcelin J. pointed out that the refusal in the letter was premised on weak and insubstantial reasons - the purported financial claim could not be relied on when the Center had never asked for more money to operate long-term and short-term care services.

81 Noting that the Center had been operating without a permit since March 31, 1991, Marcelin J. ordered a renewal of the former permit (within 30 days of the judgment), and she ordered the Minister to consult with the Center on its decision with respect to the modified permit (within 90 days of the judgment). Marcelin J. said that [TRANSLATION] "the Center is entitled to receive a decision of the Minister which must not be an abuse of discretion and must be based on relevant grounds without hidden purposes [and not] for an ulterior motive."

82 With respect to the status of the unified board of directors, Marcelin J. was of the view that a determination of whether the election was valid was premature given the fact that the Minister had not yet given the Center a classification that would determine this issue, either by way of a renewal of the former permit or a valid decision with respect to the modification. Such a determination would have to wait for a valid exercise of the Minister's discretion.

83 The Center appealed the decision.

B. Quebec Court of Appeal, [1998] R.J.Q. 2707 (Que. C.A.)

84 Speaking for all three members of the bench, Robert J.A. allowed the appeal, ordering the Minister to issue the permit it promised and cancelling the election of the unified board of directors in light of the Center's right to elect its own board.

85 First, Robert J.A. held that the court below made no error, still less a palpable and overriding error, in its appreciation of the evidence. Marcelin J.'s findings of fact were upheld, i.e., that the Center had been operating both long-term and short-term care beds for many years, this was known by the government, the government promised the Center to regularize the permit once the move to Montreal was made, and it was on the basis of those promises that the Center agreed to wait until the move to make the formal request for the permit regularization. Robert J.A. revisited various pieces of evidence and confirmed these findings in various ways.

86 Robert J.A. secondly confirmed Marcelin J.'s ruling that the doctrine of legitimate expectations is confined to a procedural remedy, at least as the law now stands in Canada. He reviewed the situation in various jurisdictions, noting that in the United Kingdom the doctrine has become a source of substantive as well as procedural rights, though not in Australia. Robert J.A. held that public law promissory estoppel was an alternative route that should be used in this case in order to confer a substantive remedy - the promised permit.

87 Lastly, Robert J.A. held that it was not necessary to deal with the Center's claim that this was not a s. 139.1 situation engaging ministerial discretion but in effect a situation in which the Minister was bound to issue the permit under s. 138. The idea here was that given government knowledge and approval, the Center in fact possessed the permit to operate the long-term and short-term care facility - it had in effect "acquired" the permit and it was only the wording of the permit that did not correspond to that reality. While saying that it was not necessary to deal with this issue for the purposes of the appeal, Robert J.A. noted that there might be problems with this approach because of the legal requirements related to "acquired rights."

88 It was therefore on the basis of public law promissory estoppel that Robert J.A. ordered the Minister to issue the promised permit for April 1, 1991, to March 31, 1993, and the cancellation of the election of the unified board of directors.

89 The Minister appeals to this Court.

IV. Analysis

90 Although I agree with the Court of Appeal that the Minister is bound to issue the Center the promised permit, I do not think that the proper basis for this order is the application of public law promissory estoppel. It is my view that the best way to dispose of this appeal is to recognize that the facts of this case created a situation not accurately characterized as a renewal of an existing permit under s. 139.1 of the former law. This is a situation falling under s. 138 of that law under which the Minister was bound by a prior exercise of his discretion to issue the permit for both long-term and short-term care operations once the Center relocated to Montreal.

A. Which section of the former law governs the present situation?

91 Section 139.1 of the former law states:

> A permanent permit is renewed for two years if its holder fulfills the conditions prescribed by regulation.

The regulation in question is the Permits for Establishments (Issue and Renewal) Regulation, O.C. 1373-84, (1984) 116 G.O. II, 2370. The conditions prescribed by this regulation include the requirements that the person making the demand for delivery or renewal be a Canadian citizen or permanent resident, domiciled in Quebec, solvent, not having received a sentence under the Criminal Code which has not been satisfied, and has forwarded to the Minister the required information. In other words, if this were the full content of s. 139.1, a renewal situation would not be one in which the Minister's discretion is engaged. If the conditions set out in the regulation are satisfied, the permit is renewed.

92 Yet, s. 139.1 goes on to say:

> However, the Minister may, after consultation with the regional council concerned, change the category, the class, the kind or capacity indicated on the permit if he considers that the public interest warrants it.
>
> Before changing the category, class or kind indicated on the permit, the Minister must give the establishment concerned the opportunity to make representations to him.
>
> The decision of the Minister is final and without appeal; it is not considered a refusal of renewal for the purposes of subdivision 2 of this division.

These parts of s. 139.1 import a significant degree of discretion with respect to the Minister's power to modify the permit in a renewal situation (a change may be made "if he considers that the public interest warrants it"), as well as adding finality to its exercise (the decision is "final and without appeal"). This is also the section that includes the Minister's obligation to give the affected institution the opportunity to make representations on its behalf. It is important to note at the outset that the purpose of s. 139.1 is to give the Minister a discretion that is confined to situations of permit renewal on the condition that the institution change its activities according to the new requirements that the Minister imposes reflecting his or her view of the public interest.

93 The relevant question is: was the Center's January 31, 1991, request a request for renewal of their permit subject to s. 139.1? My view is that it was not. First, I note that various documents reflect the parties' understanding that this was a request for changing the Center's permit rather than renewing it. For instance, on the application form submitted to the Minister on January 31, 1991, the Center has ticked the box "modification" rather than [TRANSLATION] "renewal." Correlatively, the Ministry refers to the situation as one of "modification" rather than renewal (September 14, 1990, letter). Second, the facts, as they were found by the court of first instance and strongly concurred with by the Court of Appeal, indicate that the parties did not see the formal request that was to be made once the Center moved to Montreal as a renewal of the former permit, a permit that had not reflected the reality of the services the Center provided and the government funded since at least 1974. The understanding between the parties was that the permit would be finally altered to reflect the true vocation of the Center: a hospital that offered both long-term and short-term care and services. Both courts below referred to this as a "regularization" of the permit situation and I agree with this characterization. While this is accurately captured under the notion of changing the permit, it is not, in my view, accurate to refer to this as renewing that old inaccurate permit. Nor is it reasonable to conclude that the Minister was exercising his discretion to renew the Center's permit with a requirement that the institution change its activities in conformity with his determination of what was now in the public interest. The evidence is that the Minister was satisfied that the Center would continue to provide the same services and would receive the same level of funding.

94 Indeed, while it is true that s. 139.1 refers to change of the category, class, kind or capacity indicated on the permit, not only is this confined to the context of a renewal application, it is also reserved for a situation in

which the Minister is considering alterations that would be in the public interest at his or her own initiative. In other words, the institution makes the renewal request that it must make every two years (even with a permanent permit) and the Minister can decide that a change that is in the public interest must be made. As long as the affected institution is given the opportunity to make representations and the decision is made in good faith, this decision is final and without appeal. However, the entire mechanism of s. 139.1 does not apply to a situation where the change is raised by the party rather than the Minister. It does not, therefore, apply in the present situation.

95 In my view, then, it was a mistake for Marcelin J. to have focused on the" natural justice" concerns raised by the s. 139.1 obligation to hear from the Center. If this was a situation of renewal, she would have been right to say that the October 3, 1991, letter could not have been a valid exercise of discretion because of the failure to observe this requirement. However, it was not a situation of renewal, and, in my opinion, s. 139.1 is simply not engaged. It is unnecessary, then, to embark on the inquiry of whether the legitimate expectation created by the course of dealings between the parties can result in a substantive remedy beyond the procedural protection provided by the right to be heard, i.e., the issuance of the permit, either within an expanded doctrine of legitimate expectations or under public law promissory estoppel.

96 I believe it is s. 138 rather than s. 139.1 that governs the present situation. This section reads:

> Every person applying for a permit must send his application to the Minister in accordance with the regulations.
>
> The Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest.

It is clear that this is the provision governing requests for new permits, i.e., all those applying for a permit must make a request to the Minister that conforms to the regulations, and the Minister will give the permit if he or she decides that it is in the public interest. It is true that the Center's January 31, 1991, request for the promised "regularized" permit does not seem to be a request for a new permit but, as indicated by such evidence as the Center's choice of "modification" in the application form, a request for a change to or alteration of the existing permit. Is this a situation in which s. 138 applies? I note in this respect the following annotation from the Collection Lois et Règlements JUDICO, Services de santé et services sociaux (7th ed. 1990-91), at p. 133:

> [TRANSLATION] An establishment holding a permit which is applying for a modification or a change to the permit must make that application within the framework of section 138.

Hence, the Center's January 31, 1991, request would seem to be firmly housed within s. 138.

97 I do not agree with the Center's submissions that it in fact (and law) possessed the modified permit and that it was merely a matter of the wording of the permit that was at issue when it made the regularization request on January 31, 1991. In my view, being entitled to the permit is different than actually holding it. I agree here with Robert J.A. when he says that there are significant problems with saying that the Center "acquired" the permit by offering the short-term care services, which admittedly were not only tolerated but actively funded by the government.

98 I note, in this respect, s. 140 of the former law, which reads:

> Every permit holder must carry on his activities within the limits fixed in his permit and keep the books and accounts prescribed by the regulations.

And s. 444 of the new law similarly reads:

> The activities of a permit holder must be carried out within the scope of his permit.

While I do not wish to be taken as ruling on this matter directly, neither party presented much in the way of material for or against the application of the doctrine of droit acquis to the present situation, it seems at the very least relevant, as Robert J.A. noted, that the Center was operating all of those years outside the boundaries of its permit. There may well be an issue of illegality that operates as a bar to the Center" acquiring" the permit in this way. I note in passing the correlative provision to s. 140, s. 141, a provision that would have been operating until the new law came into force, which reads:

> Every permit holder must, at the times fixed by regulation or, failing such, at the request of the Minister, furnish to the Minister, in such form as the latter may prescribe,
>
> (1) a detailed report of his activities containing the information prescribed by regulation;
>
> (2) financial statements certified by the auditor of the establishment, in the case of a public establishment or a private establishment contemplated in sections 176 and 177.

This provision, it seems to me, is there to ensure that the Minister is kept appraised of an institution's activities. If that institution is operating outside the bounds of its permit and the Minister knows that as a result of these documents being provided to it, a characterization of the legality or illegality of the institution's operations must surely be influenced by this factor.

99 I acknowledge that there is often an important difference between a legal act and that which documents or records it, e.g., in the absence of a writing requirement, a writing attests to the existence of a contract that exists quite independently from that writing and while assisting in matters of proof is not essential to the very existence of the contract. However, I would hesitate to characterize a permit in the same way. I think an activity can be authorized without an implied or acquired permit per se. In other words, there may be permission in the sense of what is authorized but not in the sense of a permit as an object. In any event, I would prefer here to say that the activities were authorized (i.e., permitted) but that the permit itself did not yet exist. The Center was therefore acting under its long-term care permit with the government's acquiescence with respect to any issue related to the legality or illegality of that activity. It was not acting under an acquired or implied modified permit. It brought the request for modification at the time the parties agreed to, once the move to Montreal was made. It did this because it did not yet have that permit. While that request may well have been a request for something the Center saw itself as entitled to, it was not a purely empty or formal request for that which it already possessed. Indeed, under this characterization, it would have been a s. 139.1 renewal request.

100 The government's behaviour, while not rising to the level of issuing an acquired or implied permit, did, in my opinion, result in an exercise of the Minister's discretion. When s. 138 says that "[t]he Minister shall issue a permanent permit or a temporary permit if he considers that it is in the public interest," this imputes to the Minister an exercise of discretion with respect to whether or not granting a particular temporary or permanent permit will be in the public interest. However, this discretion was exercised when the Minister promised the

Center that it would receive the modified permit, encouraged the move to Montreal, endorsed the financing campaign focused on the role of the Center as a long-term and short-term care hospital, and continued to fund the short-term care services despite the mismatch between those services and the Center's permit. When the Minister made those decisions and engaged in that behaviour with the Center, the Minister decided, for the purposes of s. 138, that it was in the public interest to give the Center a permanent permit for the operation of a long-term and short-term care institution. The actual granting of the permit was simply deferred until the move to Montreal was made. The fact that this course of dealings consisted of various elements and occurred over a long period of time is, in my view, no bar to looking at the overall situation and concluding that a decision with respect to the public interest was made and discretion on this issue was exercised. The Minister was therefore bound when the Center made the January 31, 1991, request to issue the promised permit. I believe that the fact that the Minister did not require any change in the activities of the Center is confirmation of the reasonableness of this conclusion. The specific conduct of the Minister in this case indicates that his discretion was exhausted. This does not mean that in a different set of circumstances the Minister could not, based on overriding policy concerns, in exceptional circumstances, reverse a prior discretionary decision.

B. When was the discretion exercised?

101 Given the veritable flurry of documents submitted attesting to the promise to regularize the Center's permit once the move to Montreal was made, it is difficult to pinpoint precisely when the Minister's discretion under s. 138 was exercised. It would therefore be helpful to begin with the earliest pieces of evidence in the record and follow the acts and documents that can be said to have solidified the promise made to the Center by the Minister and its representatives.

102 The Minister relies in his submissions on a document dated August 1984 entitled Programme fonctionnel et technique prepared by the Minister of Social Affairs. In this report, the Minister emphasizes the Center's role as a provider of intermediate pulmonary or respiratory care; see, e.g., pp. 7 and 9. The report signals, in a somewhat understated tone, the Minister's approbation of the Center's relocation from Ste-Agathe to Montreal (p. 10). When the Center's vocation is first referred to in that document, the following wording is used (at p. 11):

> [TRANSLATION] The vocation of Mount Sinai Hospital in Côte Saint-Luc is 107 long-term care beds: 50 intermediate pulmonary care beds and 57 physical care beds.

And again later (at p. 16):

> [TRANSLATION] . . . 50 intermediate pulmonary care beds and 57 physical care beds.

It is significant that this document seems to stabilize the 50/57 split language in the course of dealings between the parties. This had been mentioned in an earlier May 8, 1984, letter appended to the report. However, the other letter appended there, an even earlier correspondence dated June 27, 1983, did not use this language. These prior letters had made references to future negotiation over the precise allocation of beds, assessments based on the needs of the community, etc., but, in my opinion, this August 1984 document entrenches the 50/57 language between the parties.

103 I cannot accept that the Minister looked at the 50/57 vocation in terms of an overall long-term care context given the "intermediary" nature of the authorized beds. As both courts below found, intermediary beds are considered, for the purposes of long-term or short-term care classification, short-term care beds. Moreover, it is unclear why, if the Ministry truly saw the intermediary beds it authorized as long-term care beds, it would even

engage with the Center on the issue of the modification of its operating permit. If the Ministry really saw the intermediary beds this way, no modification to the permit would be required because the Center would be doing precisely what the permit indicated - running long-term care services. However, not only did the Ministry discuss with the Center the possibility of altering its permit, knowing that such an alteration was a central feature of the Center's fund-raising campaign, it in fact promised to do so once the move to Montreal was made.

104 Perhaps the most significant piece of evidence here is the November 21, 1989, letter written to the Center by the C.S.S.S.R.M.M. This letter sets out the relocation plan and acknowledges that in the 50/57 split, the 50 beds are to be short-term care beds. Here the commitment is expressed in the following way:

> [TRANSLATION] . . . fifty-seven (57) places to be reserved for long-term clientele and a maximum of fifty (50) places for intermediate short-term care.

After this date, the Minister can certainly no longer claim to have been viewing the 50/57 allocation in terms of the long-term care context. The intermediate beds are placed with the short-term care beds and the reason for the alteration of the permit is made clear. That this was a promise to make the required modification to the permit once the move to Montreal was made is evidenced by the Minister's response to the Center's request for its 1989-1991 permit. In a September 14, 1990, letter about this, the then Assistant Deputy Minister wrote:

> [TRANSLATION] As soon as your services are relocated on Côte Saint-Luc in Montreal, we shall take the steps to modify your permit.

However, once the move to Montreal was made, in January 1991, and the Center brought its request for the modified permit for 1991-1993, in a letter dated October 3, 1991, the Minister refused, stating that reclassifying the 50 beds as short-term care beds would result in the hospital having to deal with more complex clinical problems using additional financial resources that the government could not provide and the Center would have to keep operating under the old permit.

105 It is difficult to determine precisely when the Minister abandoned the preference that the Center continue operating under its long-term care permit. It is possible that this was always the preference and the refusal to modify the Center's permit was motivated by that preference. However, this is not what was indicated to the Center in the Ministry's dealings with it. As my colleague Binnie J. points out, "if the successive Ministers had gone through the same cogitations and deliberations as they did between 1984 and 1991, but kept their thoughts to themselves, I think it unlikely the respondents would succeed in obtaining the order they seek" (para. 4). I agree with him that what is important here is the course of conduct between the parties and the evidence that documents this relationship. The 1989 letter acknowledges that the beds are to be short-term care beds and the permit must be correspondingly altered. The 1990 letter documents the promise. Over the course of those dealings, the various occupants of the office of the Minister and Ministry officials knew that the hospital's vocation as a long-term and short-term care provider was an important element of the Center's fund-raising campaign; 50 intermediary beds were allocated - beds that are considered short-term care beds and were eventually acknowledged as such. These officials had knowledge of and funded all of the Center's short-term care services, promoted the move to Montreal, and promised an alteration of the permit once the move was made. Most of these elements were in place even in 1984, but they were solidified over the years in which the relocation plans were taking shape and being encouraged, culminating in what is, in my opinion, the significant triggering event here, namely the move to Montreal in January 1991. Hence, I see the Minister's discretion under s. 138 as having been exercised at that date.

106 The parties referred in their submissions to a number of decisions that have considered the level of deference to be attributed to a Minister's exercise of discretion, including this Court's recent decision in Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817 (S.C.C.). The level of deference given to such decisions is high. However, this is not a situation in which the exercise of the Minister's discretion is under review as it was in Baker. Here the Minister has exercised his discretion prior to the decision that is objected to. More specifically, the discretion has been exercised by January 1991, when the move to Montreal is made, and the decision that is objected to here is the October 3, 1991, refusal to issue the modified permit. Hence, what is at issue is the reversal of that exercise of discretion. In other words, the Minister's discretion has been "spent" or" exhausted" by the time the refusal is made.

107 However, the question remains as to whether the October 3, 1991, letter was a valid reversal of the exercise of that discretion. More specifically, we must ask whether, under some general discretionary power, the Minister was entitled to reverse that original exercise of discretion at that time, in that way.

C. Was the original exercise of discretion validly reversed?

108 In my opinion, the October 3, 1991, refusal cannot be taken as a valid reversal of the Minister's prior exercise of his discretion for at least two reasons.

109 First, the issue of additional resources and funding had never been raised before by ministerial officials to the Center's executives. There was never, in fact, any request for additional services or money by the Center. Moreover, there was no indication that the Center would have to change any of its activities in order to satisfy the requirements of the permit it asked for, thereby requiring more funding. The budget reports submitted from 1974 to 1991 have always included short-term care services, e.g., an operating room, laboratories and radiology services. The Center's October 24, 1991, letter responding to the Minister's refusal pointed out that the Center has always responded to the needs of the patients within its budget and that it had no intention of asking for adjustments to its budget for care and services resulting from the reclassification. I would also point out that the idea that the move to Montreal would not result in any reduction or increase in programs or lead to an increased budget has always been at the centre of the negotiations between the parties; see the Minister's report, supra, at p. 11. The Minister cannot now invoke a vague and ungrounded funding concern as a reason for reversing a prior exercise of discretion in these circumstances.

110 Secondly, the Minister's behaviour since that October 3, 1991, refusal of the permit modification is inconsistent with finding that the exercise of discretion has in fact been genuinely reversed. I refer here to the Minister's December 3, 1991, letter written to the president of the board of directors of another Montreal hospital, Centre hospitalier des convalescents de Montréal. In this letter, the Minister explains that the palliative care program formerly run by this hospital will be transferred to the Center. As various elements of the evidence indicate (e.g., the affidavit of Howard Blatt) and the Minister himself admits in this letter when he says that the use of these beds [TRANSLATION]" is limited to a few weeks," palliative care beds are by definition short-term care beds. Indeed, I note in this respect that in the November 21, 1989, letter referred to above, the Center is actually told by the C.S.S.S.R.M.M. that the palliative care patients cannot be given long-term care beds and they must be considered to be short-term care bed occupants. In the December 3, 1991 letter, the Minister writes [TRANSLATION]" the replacement of these beds has been carried out by Mount Sinai Hospital." This confirmation that the Center will be running short-term care beds comes after the Minister's refusal to alter the Center's permit. In my view, it indicates that the Minister's behaviour is inconsistent with a reversal of his discretion to modify the Center's permit. It is, in effect, acting as if the original exercise of the discretion is what is in opera-

tion, i.e., the Center has short-term care beds that can be used for palliative care patients. The only logical inference to be drawn is that this situation is the one that the Minister believes to be in the public interest.

111 Given the groundlessness of the Minister's refusal to alter the permit as promised and his subsequent behaviour inconsistent with the supposed reversal of the original exercise of his discretion, I cannot view that October 3, 1991, letter as a valid reversal of the discretion exercised when the Minister promised to the Center a modification of its permit to reflect reality once the move to Montreal was made.

112 In the case of Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries& Oceans), [1997] 1 S.C.R. 12 (S.C.C.), this Court recognized the ongoing nature of a Minister's discretionary power, holding that the Fisheries Act's conferral of" absolute discretion" to the Minister to issue or authorize to be issued a fishing licence included the power to revoke that authorization prior to the actual issuance of the licence. There Major J. stated, at para. 43:

> The power to issue the licence, once exercised in any single instance, is expended and may only be revised or revoked under the specific statutory conditions in s. 9. However, the power to authorize is a continuing power. . . . I do not think that the authorization to issue the licence conferred upon the appellant an irrevocable legal right to a licence. Until the licence is issued, there is no licence and therefore no permission to do what is otherwise prohibited, namely fish for lobster in the offshore. Unless and until the licence is actually issued, the Minister in furtherance of government policy may reevaluate or reconsider his initial decision to authorize the licence. Until the Minister actually issued the licence, he possessed a continuing power to reconsider his earlier decision to authorize and or issue the licence . . . .

This case and its holding, in my mind, is readily distinguishable from the case at bar.

113 The Fisheries Act, R.S.C. 1985, c. F-14, used a two-stage process of authorizing and issuing of licences. In Comeau's Sea Foods, the Ministry had telexed to the applicant a copy of the decision to authorize the licences. However, on the facts of that case, the applicants did not request that the actual licences be issued and the evidence was that they would have been had the request been made prior to a change in department policy, after which, given political pressures surrounding lobster fishing, specific clearance from the Assistant Deputy Minister was required. As Major J. put it at para. 50: "In most instances the issuance of the licence would be expected to follow its authorization in short order. Nonetheless, the time between the two does permit the Minister to assess his authorization in light of government policy or a change in circumstances." In this case, there was a legitimate change in government policy that led the Minister to reconsider issuance of the licences, thereby exercising his discretion within the period of time given to him under the statute to do so.

114 In the present case, the former law is not set up this way. As Major J. recognized in Comeau's Sea Foods, whether the power can be exercised once or more than once is a matter of interpretation (supra, at para. 44, citing C.W.C. v. Canada (A.G.) (1988), [1989] 1 F.C. 643 (Fed. T.D.), at p. 652). The legislation here does not use the authorizing/issuing steps. Section 138 governs the granting of permits or modifications to existing permits and s. 139.1 governs the renewal of permits. Hence, the Minister is not provided, as the Minister was provided under the Fisheries Act, with a period of time in which to change his or her mind. Moreover, even if such a power were to be imputed to the Minister on the basis of general discretionary powers, the refusal in this case was not a valid exercise of the Minister's discretion. The policy concern invoked in the October 3, 1991, refusal was not a fair or appropriate one given a situation in which the Minister continued to fund the short-term care services the Center provided and considered it in his dealings with the rest of the world as a provider of

both long-term and short-term care services. A policy concern invoked in such circumstances must be legitimate. At the very least, it must correspond to the reality of the situation. The Minister cannot promise the Center to issue the modified permit when the move to Montreal is made, refuse to issue that permit, and then continue to treat the Center as if the permit had in fact been issued. Having decided that it was in the public interest for the Center to operate as a long-term and short-term care facility and having continued to see things this way even after the move, the Minister must issue the 1991-1993 permit.

D. What are the Minister's subsequent obligations?

115 As I have said above, the Minister must issue the 1991-1993 modified permit, recognizing the Center's vocation as a provider of both long-term and short-term care. This will bring the Center under s. 126 of the new law into the category of "an institution which operates both a residential and long-term care centre and a general and specialized hospital centre with 50 beds or more." As such, it is entitled to its own board of directors. The election of the prior unified board must, therefore, be cancelled.

116 If the Minister wants to change the category, class, kind or capacity of the permit (e.g., have the Center operate as a residential and long-term care centre only), this must in fact be reflected in the Center's authorized activities and the government's funding of those activities. If the Minister decides to take this course of action, the Minister must:

> a. consult with the Center and give it an opportunity to make representations as s. 442.1 of the new law requires;
>
> b. make sure that its consideration of what "the public interest warrants" under s. 442.1 of the new law is based on valid and legitimate policy concerns that are fairly invoked and based on the reality of the situation.

In other words, the government cannot invoke a vague funding concern as a reason for making the change to a long-term care permit and then continue to treat the Center as a mixed-care operation. Any change in the Center's permit status, and subsequent effect on its ability to have its own board of directors, must be justified by way of an actual change in government policy based on a decision that those short-term care services no longer serve their particular purpose or the public interest.

117 It is my view that where the Minister has failed to act in accordance with a prior exercise of discretion, the criteria for the issuance of an order of mandamus are met; see Apotex Inc. v. Canada (Attorney General) (1993), [1994] 1 F.C. 742 (Fed. C.A.), affirmed [1994] 3 S.C.R. 1100 (S.C.C.). Although art. 100 of the Code of Civil Procedure, R.S.Q., c. C-25, provides that extraordinary remedies are not generally available against the Crown, this rule does not apply in circumstances where the Minister acts outside the limits of his competence, as in this case; see Denis Ferland and Benoît Emery, Précis de procédure civile du Québec, 3rd ed. (Cowansville, Qué.: Yvon Blais, 1997), vol. 1, at pp. 162-163, Paul-Arthur Gendreau et al., L'injonction (Cowansville, Qué.: Yvon Blais, 1998), at pp. 194-195, Morin c. Driscoll College Inc. (1978), [1979] R.P. 198 (Que. C.A.), Québec (Procureur général) c. Laurendeau, [1985] R.D.J. 513 (Que. C.A.), Charles Bentley Nursing Home Inc. c. Québec (Ministre des Affaires sociales), [1978] C.S. 30 (Que. S.C.).

V. Disposition

2001 CarswellQue 1272, 2001 SCC 41, 200 D.L.R. (4th) 193, 271 N.R. 104, [2001] 2 S.C.R. 281, 36 Admin. L.R. (3d) 71, 2001 CarswellQue 1273, 2 S.C.R. 281, [2001] S.C.J. No. 43, REJB 2001-24843, J.E. 2001-1280

118 For these reasons, I would dismiss the appeal with costs and order the Minister to deliver the required permit pursuant to art. 844 of the Code of Civil Procedure.

Appeal dismissed.

Pourvoi rejeté.

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