COMMENTS
COMMENTAIRES

No Expropriation Without Compensation: A Comment on Manitoba Fisheries Limited v. The Queen

Neither the obviously just result nor the apparently narrow *ratio decidendi* should obscure the serious legal questions hidden in the unanimous judgment of the Supreme Court of Canada in *Manitoba Fisheries Ltd* v. *The Queen*.[1] Is the state bound to recompense anyone harmed by legislation? Does either the common law or the *Canadian Bill of Rights*[2] provide a positive and enforceable procedure for a citizen to obtain proper compensation for property taken from him for public purposes? What constitutes "property", and when can it be said to be "taken" from a person?

I. The facts

In 1969 the Parliament of Canada enacted the *Freshwater Fish Marketing Act*.[3] This legislation created a federal Crown corporation having the exclusive right to export fish from certain "agreeing" provinces. The appellant was a long-established[4] private fish marketer in Manitoba. A substantial part of its sales were to purchasers outside of that province. Under an agreement entered into between the Government of Manitoba and the Government of Canada,[5] the new Crown corporation's monopolistic powers were made applicable to Manitoba from May 1, 1969. This effectively terminated all of the appellant's trade in fish.

The Act had contemplated this type of economic consequence upon existing fish marketers. On the one hand, section 21 provided that the Crown corporation could license other persons to carry on the export trade in fish.[6] No licences were ever issued, however,

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[1] (1978) 88 D.L.R. (3d) 462.

[2] R.S.C. 1970, App. III.

[3] S.C. 1968-69, c. 21; now R.S.C. 1970, c. F-13.

[4] The company was incorporated in 1926.

[5] The agreement was dated June 4, 1969. It is not clear from the judgment why the plaintiff's business terminated earlier, on May 1, 1969.

[6] S. 21(1) granted the Crown corporation a monopoly on, *inter alia*, the exportation of fish from an agreeing province. S. 21(2) provided that the Board [of Directors of the Corporation] might make bylaws to license persons to carry on some of its functions.

nor were any regulations ever passed by the Governor in Council exempting any person from the Corporation's monopoly under Part III of the Act. On the other hand, section 25(2)(c) of the Act specifically provided that any agreement entered into between Canada and a participating province would provide for:

> the undertaking by the province of arrangements for the payment, to the owner of any plant or equipment *used* in storing, processing or otherwise preparing fish for market, of compensation for any such plant *or equipment that will or may be rendered redundant* by reason of any operations authorized to be carried out by the Corporation under this Part [.][7]

In fact, the agreement between the Government of Canada and the Government of Manitoba did provide for such payments.[8] The Manitoba Government had offered to pay the appellants for certain of their physical assets which had been made redundant (although not taken over) by the activities of the Corporation,[9] but the appellants also claimed compensation for the loss of their goodwill.[10] When the provincial Government rejected this latter claim, the appellant sued the federal Crown for the whole value of its property.

II. The trial decision

Collier J. clearly held that the appellant's goodwill constituted "property".[11] However, he rejected the appellant's claim on the ground that the federal Crown had not, through its agent the Corporation,[12] "taken" that property from the appellant.[13] The fact that the legislative monopoly granted to the Corporation effectively permitted it to capture the trade which the plaintiff had previously enjoyed did not mean that the Crown corporation had "taken" any property from the plaintiff.[14] His Lordship could find

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[7] R.S.C. 1970, c. F-13 [emphasis added].

[8] See para. 5 of the Statement of Facts admitted by the respondent, reproduced *supra*, note 1, 463.

[9] See the decision at trial: [1977] 2 F.C. 457, 471 *per* Collier J.

[10] Note that the actual value of the goodwill was not in issue in the case. The parties had previously agreed that, if the court found for Manitoba Fisheries, the compensation payable would be settled between them, recourse to the court being contemplated only upon failure to settle: *ibid.*, 461.

[11] *Ibid.*, 459-60, where the trial judge referred to a number of cases from tax law relating to what constitutes goodwill.

[12] If the Corporation had not been the agent of the federal Crown, then the federal Crown would not have been liable for the Corporation's acts. One wonders whether the Corporation itself would have been liable.

[13] *Supra*, note 9, 461 *et seq.*

[14] *Ibid.*, 464.

no intention in the Act to permit the Crown corporation to take any property from anyone — whatever the natural consequences of the legislation might be.[15] Accordingly, the trial judge held that neither the rule in *A.-G.* v. *De Keyser's Royal Hotel, Ltd*[16] nor the *Canadian Bill of Rights*[17] entitled the plaintiff to recoup its losses from the Crown. His Lordship did, however, comment stringently on the obvious unfairness of this result to the unfortunate plaintiff, who could not enforce the agreement between the two governments (because of the doctrine of privity of contract), who was "entrapped in policy differences between two levels of government",[18] and who had been "economically erased".[19]

III. The Court of Appeal decision

The Federal Court of Appeal unanimously rejected the plaintiff's appeal.[20] Urie J. was generally prepared to assume that the trial judge was correct in holding that the appellant's goodwill constituted property.[21] He also recognized the principle from the *De Keyser's Hotel* case[22] that a statute is not to be construed as taking away the property of a subject without compensation (although either Parliament or a provincial Legislature can do so by using clear words). Urie J., however, focussed on a line of cases[23] which he said demonstrated that the Crown's obligation to pay only arose where the Crown physically assumed possession or used the subject's property. As the trial judge had held that the Crown corporation did not take such possession, the appeal was rejected on this ground.

Urie J. also held that the appellant had not been "deprived" of its property, and therefore could not invoke the protection of the *Canadian Bill of Rights*.[24] Referring to the decision of the Privy

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[15] *Ibid.*, 465-69.

[16] [1920] A.C. 508, 542 (H.L.).

[17] R.S.C. 1970, App. III, specifically s. 2(e).

[18] *Supra*, note 9, 472. His Lordship noted that the situation had been treated differently in Alberta.

[19] *Ibid.*

[20] [1978] 1 F.C. 485; 78 D.L.R. (3d) 393; 17 N.R. 28 *per* Urie J., Heald J. and MacKay D.J. concurring.

[21] *Ibid.*, 487 and 490. Later in his judgment, however, Urie J. appears to back away from this assumption: see page 496.

[22] *Supra*, note 16.

[23] *France Fenwick & Co.* v. *The King* [1927] 1 K.B. 458; *Belfast Corp.* v. *O.D. Cars Ltd* [1960] A.C. 490 (H.L. (N.I.)).

[24] R.S.C. 1970, App. III.

Council in *Government of Malaysia* v. *Selangor Pilot Association*,[25] his Lordship held that a person could not be "deprived" of his property unless it had been taken over by someone else. Since the court had already held that the Crown corporation had not "taken" the appellant's property, the appellant could not have been "deprived" of it. With respect, however, there are at least three objections to this reasoning. First, the ordinary meaning and usage of "deprived" is simply not this restrictive. Secondly, the *Canadian Bill of Rights* refers to the "... right of the individual to ... *enjoyment of property*, and the right not to be deprived thereof except by due process of law".[26] One can clearly be deprived of the *enjoyment* of one's property when it is destroyed. If this destruction is done under federal legislative authority, the *Canadian Bill of Rights* requires that it be done in accordance with due process. Surely it would be no defence for the Crown to argue that the *Canadian Bill of Rights* simply does not apply because the Crown did not acquire the property which had been destroyed. Finally, it is submitted that the *Selangor* case really revolves around the issue whether the independent pilots had any property which was affected by the legislation there in question.[27] If there is no property, obviously no one can be deprived of it (although one could be harmed in some other way). However, in *Manitoba Fisheries*, both the Trial and Appellate Divisions of the Federal Court agreed that the company's goodwill did constitute property. This aspect of the *Selangor* case would explain why Urie J., at the end of his judgment, became uncertain as to exactly what the appellants had lost:

> ... the Act here in question did not deprive the appellant of the enjoyment of any property. Unfortunately, implementation of the legislation had the effect of putting the appellant out of business but that result did not occur due to any deprivation of property of the appellant by the respondent. As earlier stated, the Crown did not acquire, possess or use any property of the appellant, either tangible or intangible, unless it could be said that the fishermen who supplied the appellant with their fish or the customers to whom the appellant sold its fish and fish products had become their [*sic*] property. Obviously that could not be so because either the fishermen or the customers could, if they so

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[25] [1977] 2 W.L.R. 901 (P.C.).

[26] R.S.C. 1970, App. III, s. 1(a) [emphasis added].

[27] Was the pilots' goodwill in their business effectively destroyed when they were forced to take out licences and to become employees of the Port Authority? If so, was their property taken? It would appear that the Privy Council did not consider that the pilots lost any property, although their Lordships did not closely analyze what qualifies as "property".

> desired, do business with anyone they wished. They were not the exclusive property of the appellant or anyone else, as the admittedly highly competitive nature of the business indicates. *What the appellant lost was not property* but was its right to carry on the business in which it had been engaged, without a licence. If that loss included whatever goodwill the appellant had, it was not taken by the Corporation.[28]

The question remains whether or not the goodwill constituted "property". If so, the appellant had clearly been deprived of it. The legislation (and not the economic skills of the Corporation) had destroyed all existing competition. The Crown corporation's statutory monopoly thus allowed it to render this property worthless, and in effect to appropriate this property for its own benefit.

IV. The Supreme Court of Canada decision

The Supreme Court of Canada, obviously sensitive to the injustice suffered by the appellant, unanimously reversed the two lower courts.[29] Ritchie J. almost immediately pinpointed the weak link in Urie J.'s judgment by expressing "great difficulty"[30] in following the latter's reasoning in the passage quoted above.[31] Pointing out that both the trial judge and Urie J. himself had clearly held that the appellant's goodwill was property, Ritchie J. agreed:

> In my opinion, ... goodwill, although intangible in character is a part of the property of a business just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill.[32]

Before turning to the more difficult question whether the Crown corporation had "taken" the appellant's goodwill, his Lordship noted that although the legislation did not specifically require the Crown corporation to pay for any property taken (or destroyed) by it, neither did it unequivocally exempt the Corporation from paying for any property it took.[33] Thus the rule in the *De Keyser's Hotel* case must clearly apply: the statute must, if possible, be construed so as not to take property away from the subject without compensation. The Court therefore held that if the Crown corporation had taken the appellant's goodwill, it was obligated

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[28] *Supra*, note 20, 495-96 [emphasis added].

[29] *Supra*, note 1, *per* Ritchie J., Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ. concurring. Laskin C.J.C. and Martland J. did not sit.

[30] *Ibid.*, 465.

[31] *Supra*, note 28.

[32] *Supra*, note 1, 466-67.

[33] *Ibid.*, 467.

to pay compensation.[34] This apparent *non sequitur* is the key to the Court's reasoning.

Did the Crown corporation "take" the appellant's goodwill? Ritchie J. seems to assume this:

> Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property *and that the same goodwill was by statutory compulsion acquired by the federal authority* [, *it*] *seems to me to follow that the appellant was deprived of property which was acquired by the Crown.*[35]

His Lordship then examined the authorities which had been cited by the Crown against this proposition. On the one hand, he noted that the decision in *Ulster Transport Authority* v. *James Brown & Sons Ltd*[36] specifically held that the redirection, by virtue of a statutory provision, of a definite portion of the respondents' business to the appellants, without compensation, did amount to a "taking" of the respondents' property. Thus this case reinforced Manitoba Fisheries' position. On the other hand, Ritchie J. distinguished on their facts the decisions in *France Fenwick & Co.* v. *The King*[37] and *Government of Malaysia* v. *Selangor Pilot Association*,[38] in both of which compensation was denied. With respect to *Fenwick*, his Lordship said:

> With the greatest respect, it is in my view difficult to equate the circumstances of that case in any way with those with which we are [here] concerned. It is indeed difficult to find any analogy between the effect of an order made under Government regulation to delay the unloading of a ship's cargo [in *Fenwick*] and the creation by Parliament of a Government corporation for the express purpose of monopolizing the whole of the business of the appellant and others like it [in the present case].[39]

Similarly, his Lordship dealt with the *Selangor Pilot* case as follows:

> In the *Malaysian* case the licences of the pilots were not disturbed except to the extent that they were required to be employed by the Port Authority which offered them employment. These conditions are in sharp contrast with those [in the present case]....
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> With all respect I am of opinion that the factual differences existing between the *Malaysian* case and the present one are so fundamental as to make the opinion of the Privy Council inapplicable to the present circumstances.[40]

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[34] *Ibid.*, 468.
[35] *Ibid.* [emphasis added].
[36] [1953] N.I. 79 (C.A.).
[37] *Supra*, note 23.
[38] *Supra*, note 25.
[39] *Supra*, note 1, 470.
[40] *Ibid.*, 471.

The Supreme Court held that the Crown had, in fact, taken the appellant's property and was bound to pay for it. Indeed, Ritchie J. noted that it had clearly been the intention of Parliament to provide compensation to those harmed by the implementation of the marketing legislation, as section 25 expressly contemplated that the agreements bringing the Act into force in the various provinces would contain an undertaking by each province to make good any loss.[41] The federal Government had subsequently offered to reimburse the provinces for up to 50 per cent of the payments made by them under the agreements.[42] Nevertheless, the Government of Manitoba refused to pay the appellant's claim. Perhaps unfortunately, the provincial Government could not be sued in this case because *it* had not taken the appellant's property, and because the appellant was not privy to the agreement between the two governments providing for compensation. Obviously seeking to do justice, and to extricate the appellant from its "entrapment in policy differences between two levels of government",[43] the Supreme Court rendered judgment against the federal Crown, with costs throughout.

V. Comment

Despite the obviously just result, one is left wondering precisely what legal basis the Supreme Court of Canada used to uphold the appellant's claim. There is no general legal principle entitling anyone who is harmed by another's action to be compensated therefor; not all *damna* are *injuria*. There is likewise no general legal principle which requires Parliament or a Legislature to provide for fair compensation to everyone who is harmed by new legislation. Indeed, Parliament or a Legislature can clearly provide for the expropriation of property without any compensation at all. With respect, neither the rule in the *De Keyser's Hotel* case[44] nor the *Canadian Bill of Rights*[45] provides a substantive right to fair compensation for property taken from a subject. Both are mere rules of construction: if a statute does not unambiguously require expropriation without compensation, then expropriation

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[41] *Ibid.*, 471-72. The Canada-Manitoba agreement did contain such a clause: see *supra*, notes 5 and 8 and accompanying text. The mode of valuation of the appellant's business approved by the federal Government would have taken account of goodwill.

[42] *Ibid.*, 472.

[43] *Supra*, note 18.

[44] *Supra*, note 16.

[45] R.S.C. 1970, App. III.

without compensation is not to be inferred. Neither of these rules can have any application where there is no ambiguity in the statute. In that case, the only question would be whether the statute did in fact authorize property to be "taken". It might, in these circumstances, be possible to argue that one could apply these rules of construction so as to construe the statute as providing that actual title to the property in question would remain with the original owner. However, such rules of construction cannot apply so as to found a substantive right to compensation.

The situation might be different if the taking of the property purported to be by virtue of the royal prerogative, rather than under statute. There might well be a general duty on the Crown to pay for any property over which it exercised its prerogative powers. While a subject could previously gain recompense for his property by taking a petition of right, he can now (apparently) sue the federal Crown in the Federal Court.[46] Indeed, much of the *De Keyser's Hotel* case deals with the precise circumstances in which the Crown could seize property under its prerogative, the obligations of the Crown to pay compensation, and the procedure to be used. Nevertheless, the House of Lords held that the power under which the property was taken in that case was statutory and not prerogative, and that the statute and regulations clearly provided for compensation. Surely the owners of the hotel would have lost their case if the statute had expressly provided that no compensation was to be paid in those circumstances.

Obviously Parliament should consider, before it enacts legislation, whether those who will be affected should be compensated, and should make clear (and enforceable) provision therefor. But if Parliament is not this careful, what sorts of harm or loss will the courts say entitle a person to compensation from the Crown? What *damna* will the courts treat as *injuria*? Will the line be drawn at the taking of property — as in this case? What precisely is "property" and when is it "taken"? Unfortunately, the Supreme Court has not given us any guidelines on these perplexing questions — even if it did undoubtedly do justice in this case.

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[46] But see the remarks by Urie J., *supra*, note 20, 492, rejecting the appellant's argument that the *Exchequer Court Act*, R.S.C. 1970, c. E-11 (now replaced by the *Federal Court Act*, S.C. 1970-71-72, c. 1 and R.S.C. 1970, 2d Supp., c. 10) itself gave a direct cause of action against the Crown for compensation in these circumstances.

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