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The Role of the Sole Practitioner: *Manitoba Fisheries* v. *The Queen*

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Both of the papers in this session are examples of a particular genre in legal historical writing, what is often referred to as legal archeology. This involves taking a case - usually a jurisprudentially significant case - and looking at the background to it, the context in which it arose, the leading players, and the course of the legal proceedings. The purpose is not to ask whether the case was rightly or wrongly decided, but rather to see how it got to court and how it became a leading case. Frequently one lesson from these kinds of studies is that the process by which legal principles are enunciated is a more serendipitous one than we might like to think. Another lesson, an uncomfortable one at times for a law teacher, is that one discovers sometimes that one knows very little about a case thought to be very familiar. I have been teaching the Supreme Court of Canada judgment in *Manitoba Fisheries* for over 20 years, only when I took on this project did I really appreciate what the case was about.

My paper is not about professionalism in general or codes of professional ethics. But it is about the practice of law, in particular about the role that sole practitioners can play, and especially about how significant at times that role that can be. In this case a sole practitioner succeeded where the best lawyers from the largest firms thought there was no case, and against the best of the government's lawyers.

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To make sense of the role of my particular sole practitioner, I need to supply a good deal of background to the case, which very few here will have heard of and even fewer will have read recently. But *Manitoba Fisheries* is a leading case, the decision that introduced into Canadian law the doctrine of *de facto* expropriation. As my first piece of background I will explain what that means, and then I will go back and discus in some detail where the case comes from. In the second half of my talk I will discus the introduction into the case of my principal character, and the litigation process which ensued.

An expropriation of property by the government occurs when the government takes title to a person's property, via a compulsory purchase of it. Although Canada has no constitutional protection for property, making it theoretically possible for the government to expropriate without paying compensation, it is largely unthinkable that any government would do so given our political culture and its respect for private property. What if the government, rather than expropriating property, merely regulates the use of it through environmental legislation, or zoning, or building controls, or one of the many other ways in which we regulate for the common good? That is generally not considered to be an expropriation, and the citizen is not compensated, even if the regulation in question takes away some of the bundle of rights associated with property and even if it devalues the property. While the line between expropriation of title and regulation of use is usually clear, there are circumstances in which one could argue that regulation is so comprehensive as to amount to, in effect, an expropriation. A regulation which prohibited all uses of land, including sale, would presumably be such a regulation. And if that regulation was considered to be a taking of the property, despite the fact that title was not taken, a little used but important principle of statutory construction in Anglo-Canadian law can be invoked. It states: '[t]he recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.' In short, compensation is presumed, although the government can displace that presumption if the words of the statute 'clearly' indicate that there will be no compensation.

Manitoba Fisheries, decided by the Supreme Court of Canada in 1978, is the first case in which the

Supreme Court of Canada held that a de facto expropriation had occurred. How did the case come about? Especially, how did it become a case about de facto expropriation. An understanding of the case must start with a 1969 federal statute, the *Freshwater Fish Marketing Act* [FFMA]. The FFMA did three things. First, it established the Freshwater Fish marketing Corporation [FFMC], a crown corporation. Second, it gave the FFMC a monopoly over interprovincial trade and international trade in freshwater fish caught in what were termed the 'participating provinces.' The federal parliament's power to regulate 'trade and commerce' under s.91 of the BNA Act is, of course, limited to the regulation of international and inter-provincial trade. Third, it provided that the Act would not go into force in a province until such time as that province had done two things: altered its provincial law so as to give he FFMC an internal monopoly within the province, and agreed to compensate any companies who as a result of this scheme had 'plant and equipment rendered redundant.' In short, once all the provincial legislation was passed and the compensation agreements were made, the FFMC has a monopoly over the freshwater fishing industry in some provinces, a monopoly that extended from the purchase of fish from fishers to its export from the province. The 'participating provinces' were Manitoba, Saskatchewan, Alberta and Ontario, although in Ontario's case the FFMC's monopoly operated only in a small region of the far north west. The FFMC also had a monopoly in the North West Territories.

Why was all this done. It is useful to being my explanation with a quotation from a 1966 federal commission of inquiry into the industry, the McIvor commission. McIvor stated that he was 'not aware of a worse pocket of poverty in Canada than the northern segments of the inland fishery.' He was referring to the fishers, and his report amply bore out this conclusion and analysed the reasons for the industry being in such poor shape. Distance to market was part of the problem. Another part was related to distance - there were too many middlemen. Some of the larger fishery companies employed agents who bought from fishers, but the more typical patters was for a small time dealer to buy at the dock from a number of fishers and sell on to a larger dealer/processor. Everybody along the chain took a profit, so prices at the lakeshore were very low, and generally the fishers had no choice about who to sell to. In Manitoba, which had the most fishers engaged in the trade, there was one dealer for every 17 fishermen.

Another significant problem for the Canadian industry was that more than 80% of the catch went to the US, most of that to make gefilte fish for the large urban Jewish populations. So imports were controlled by a small number of American importers in Chicago, New York, and Detroit. Buyers controlled the market and were able to keep prices down. As the McIvor commission put it, prices were weak because there were 'too many exporters to counter the control exercised by a few importers.'

The result of all this, as already noted, was that the primary producers eked out a subsistence income only. Their problems were further exacerbated by the fact that many of the fishermen did not own their own boats or equipment, and borrowed money for them from dealers and exporters, money which they could not repay at the end of the season. McIvor went so far as to draw comparisons with indentured servitude. The socio-economic problem was exacerbated by the substantial representation in the industry in the prairies of aboriginal - Indian and Metis - fishermen.

People had been concerned about the industry at least since the 1930s, and the post war years saw a variety of studies and commissions, at the federal and provincial levels, into the industry. There were also negotiations between governments on how to fix the problems, as it was clear that federal-provincial co-operation was needed. Some concerted scheme was slow in coming, with two issues proving contentious. One was that while all agreed that a centralised marketing system was needed to get better prices in the US, like the Wheat Board, the issue of whether existing dealers and processors should stay in place was contested. The McIvor commission said they should not, that real assistance for the fishers required the removal of middlemen. Eventually all governments accepted this. The other issue was a related one - what kind of compensation, if any, should be paid to those displaced by a new scheme and, more importantly perhaps, who should pay it. As noted above, the final deal had the provinces compensating, but only for 'plant and equipment rendered redundant' by the operations of the FFMC.

In May 1969 the FFMA came into force, and from now on I will talk only about Manitoba. It very quickly became clear that existing dealers and processing companies were being put out of business.

They applied for compensation, but were generally offered what they saw as derisory amounts. Manitoba Fisheries, for example, one of the group of the 8 largest companies who ultimately took the matter to court, was offered $1,500 in 1971 for what was termed a 'disposal allowance,' a sum of money to be used in helping the company sell its equipment, and $4,104 in 1972 under the same rubric. The problem was that there was no market for plant and equipment because of the FFMC's monopoly. The companies not very unhappy with the offers, and demanded compensation for loss of business.

The Manitoba government was completely unsympathetic to these demands. The government in question was the first NDP provincial administration in Canada, led by Ed Schreyer, and took the view that compensation was not a right, but an unusual and generous gesture. Minister of Mines and Natural Resources, Leonard Evans, put it this way: 'It must be clearly understood by the industry that the compensation for redundancy is only being considered by the government because of the very special problems of the industry.' The government was especially unwilling to shell out large sums as compensation to people displaced by economic reform legislation, especially when it saw the companies as being responsible for the plight of the fishers. Moreover, the government had an ambitious reform agenda, including the introduction of public auto insurance, and compensation was no part of that. The companies especially got no change out of Sidney Green, who succeeded Evans as Minister of Mines and Natural Resources, and took on the job of dealing with the fishery companies. Generally considered the leader of the 'hard liners' in the Schreyer government, and an abrasive personality, he was the least likely person to be sympathetic. In one back room off-the-record meeting recalled by the lawyer for Manitoba Fisheries, he displayed both is acerbic nature and his policy position in graphic terms: the companies had 'f***ed the Indians for fifty years,' he said, and now they were 'getting theirs.'

In 1973, having received nothing in negotiations, the eight principal Manitoba companies combined to hire Aikins Macaulay, the major Winnipeg law firm, to represent them in a lawsuit. But the Aikins lawyers could not come up with any basis on which to sue. The fact that the companies had been taken out of business through government regulation was legally irrelevant. Governments

legislate in variety of ways in many areas of the economy, and such economic regulation almost always produces some winners and some losers. The losers must seek change in the ballot box or by influencing sitting governments, not in the courts. Manitoba had promised Ottawa that it would compensate, and had made offers of compensation under the exact compensation formula agreed with Ottawa. The companies received the same kind of answer from another Winnipeg law firm, Thompson Dorfman, which would not take the case. Joe O'Sullivan, one of the city's top litigators, and a man with an encyclopedic knowledge of the law, also took the view that there was no case.

All this background finally brings me to the sole practitioner, via a pinochle game. Harry Marder was the owner of Manitoba Fisheries, and regularly played pinochle with one Sam Arenson. One night, as Marder sounded off about how he was getting nowhere with 'fat cat' Aikins Macaulay lawyers, Arenson told him to 'go see my young nephew' who was a 'smart boy,' 'just starting out.' So Marder went to see Ken Arenson in the fall of 1974. Arenson had been called to the Manitoba bar only four years previously, in 1970. A Winnipegger, and one of six brothers three of whom became lawyers, Arenson attended what was then the Manitoba Law School, which was run by the profession and held classes at the law courts. He was in the last class to graduate from that school, for in 1970 it became the Faculty of Law at the University of Manitoba. He spent his first three years after his call to the bar working as the Director of the Agassiz Centre for Water Studies, at the law school. He resigned to run for the Liberal party in the 1973 provincial election, recruited by new Liberal leader Izzy Asper, but came third in Winnipeg Centre.

After the election Arenson set up his own general practice in a then down at heel area of Winnipeg, doing what sole practitioners usually do - everything. Working out of what he described as 'a very small office, 100 square feet on two floors, with murals painted on the walls,' He did what sole practitioners do, especially in their early years - he bailed people out of jail, helped buy and sell houses, took on small claims, defended drug possession cases, etc. He worked largely on his own, helped by articling students. He still practices on his own, but in Toronto, having moved there in 1982.

It was Arenson who came up with what proved to be an ultimately successful strategy. He did not disagree with his large firm counterparts that there was no legal case arising out of the new regulatory scheme as such. What he did was to turn an economic regulation issue into a case about property. He came up with the idea that something had been taken by the federal government when it created the export monopoly and put the companies out of business. That something was the goodwill of each of the companies. Goodwill, the value of a company in excess of the value of its tangible and intangible assets, is recognised as property in a variety of contexts. The argument Arenson came up with was that in taking over the export trade and dealing with the companies' former trading partners, the FFMC had effectively acquired the goodwill that the companies had built up over the years. As he put it, it was late at night, and he was poring over the Manitoba Fisheries file, 'when it occurred to me that goodwill had been acquired.' It was 'an odd and ecstatic moment.' It came to me 'out of the ylem'.

Arenson sued the federal crown on this basis. When he did so the seven other companies sued also, some represented by Aikins Macaulay and some by well-known Winnipeg lawyer D'Arcy McCaffrey. All the other cases lay dormant as Arenson's suit on behalf of Manitoba Fisheries went forward as the test case. I do not have time to detail the litigation process, which involved a motion to strike the claim as not founded on any cause of action brought unsuccessfully by the crown, a trial and appeal in federal court, both won by the crown, and a full day hearing at the Supreme Court of Canada, which Manitoba Fisheries won using the goodwill argument. Al of this is detailed in my longer paper. But I will make a few general points here.

First, Arenson pretty much handled the case solo. He did have some help from McCaffrey and John Lamont of Aikins was there at most of the hearings, but Arenson did the questioning at trial and most of the arguments in the appeal courts. Second, the government, in contrast, tended to change lawyers as the case went up the court hierarchy, brining in more senior people. This was not a good strategy. Third, in my view there were good arguments against Arenson's claim which were not deployed, perhaps because of the continual changing of counsel. One was that one cannot have goodwill in a monopoly. Good will is the trading advantage one has against a competitor, and Manitoba Fisheries

may well have had it before 1969. But the test laid down in the Supreme Court of Canada in this case was a three-fold: there must be property, it must be taken from the citizen, and the government must acquire the property. The government's agent, the FFMC, did not acquire the goodwill because it was a monopoly. The second argument which the crown lawyers never pushed, and which I think might have been persuasive, was that the statute negatived compensation for loss of goodwill. Recall that the rule of statutory interpretation at issue says that compensation for a taking is presumed 'unless the words of the statute clearly so demand.' The statute does not need to 'explicitly' deny compensation, only 'clearly' do so. It is at least arguable that in stating that a province and the federal government must make an agreement with respect to compensation for 'plant and equipment rendered redundant,' the FFMA was in effect also stating - 'no compensation for anything else, including goodwill.'

However, in the end neither of these arguments might have worked for a court which found this degree of economic regulation distasteful. Although the trial judge and the Court of Appeal found for the crown in the law, the judges expressed their unhappiness with the result. Collier J at trial said that Manitoba Fisheries and the other companies had been 'unfairly treated' by Manitoba, had become 'entrapped in policy differences between two levels of government' and as a result had been 'economically erased.' They 'ought to receive better treatment' from both governments. 'The law ... compels rejection of the plaintiff's claim,' he said at the end, but '[i]t does not follow that justice, in the true sense, has been done.' And the Court of Appeal judgment called the result 'harsh.' The Supreme Court of Canada had a freer hand, and its judges were equally sympathetic to the plaintiff. At the leave to appeal hearing Arenson, as was the accepted procedure, was to speak first. When he rose to do so the presiding judge, Pigeon J., told him the court did not need to hear from him, clearly indicating that he had won leave. When the crown lawyer got up to speak, Pigeon fired a question at him" if a private individual had done this, would we not have called it theft?' This attitude towards the case was presumably shared by all seven judges on the actual appeal panel, for the Supreme Court unanimously allowed the appeal.