

T-2138-06

Court File No.

FEDERAL COURT

B E T W E E N :

THE CANADIAN WHEAT BOARD

Applicant

and

ATTORNEY-GENERAL OF CANADA

Respondent



APPLICATION UNDER section 18.1 of the *Federal Courts Act*,
R.S.C. 1985, c. F-7, as amended

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Winnipeg, Manitoba or at such location as might permit the matter to be heard on an expedited basis.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

December 4, 2006

Issued by: _____

Registry of the Federal Courts
363 Broadway, 4th Floor
Winnipeg, Manitoba
R3C 3N9

TO: **ATTORNEY-GENERAL OF CANADA**
Federal Office
310 Broadway, 3rd Floor
Winnipeg, Manitoba
R3C 0S6

APPLICATION

This is an application for judicial review in respect of order in council P.C. 2006-1092 dated October 5, 2006 (the “Direction”), issued by the Governor in Council (“GIC”) to the Canadian Wheat Board (“CWB”) pursuant to subsection 18(1) of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended (the “Act”). The Direction purports to prohibit the CWB from:

- (a) expending funds “...directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research”; and
- (b) providing funds “to any other person or entity to enable them to advocate the retention of the monopoly powers” of the CWB.

1. The applicant makes application for:

- (a) a declaration that the Direction is unlawful and *ultra vires* the authority granted to the GIC pursuant to subsection 18(1) of the Act;
- (b) in the alternative to (a) above, a declaration that the GIC acted beyond its jurisdiction or without jurisdiction in issuing the Direction to the CWB;
- (c) a declaration that the GIC acted contrary to law by issuing the Direction for the improper purpose of prohibiting the CWB from making public statements opposing the Government of Canada’s policy regarding the future of the CWB and from communicating with western Canadian wheat and barley producers regarding the CWB’s statutory object;

- (d) an order declaring that the Direction contravenes subsection 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982 c. 11, and is therefore of no force and effect;
- (e) a declaration that the Direction is vague and unenforceable;
- (f) in the alternative to (e) above, an order quashing the Direction as being vague and unenforceable;
- (g) an order for an expedited hearing of the within application and granting such further and other ancillary relief necessary to give effect to such an order;
- (h) its costs of the application; and
- (i) such further and other relief as this Honourable Court deems just.

2. The grounds for the application are:

Overview

- (a) In accordance with the terms of its governing statute, the CWB's "single desk" is the means through which western Canadian farmers market their wheat and barley in Canada and throughout the world. The Act requires that all wheat and barley produced in the "designated area" and intended for human consumption within Canada or for export be sold through the CWB. The current federal government (the "Government") has committed itself to the abolition of the single desk and the creation of an open market for wheat (including durum wheat) and barley.

However, the Government's minority status has prevented it from enacting legislation to eliminate the single desk.

- (b) Instead, the Government has implemented a carefully orchestrated campaign designed to impede the CWB from carrying out its statutory duties and obligations. Central to the Government's campaign is the Direction, which has been issued for the unlawful purpose of preventing the CWB from communicating with western Canadian farmers regarding the single desk and the CWB's statutory mandate, in order to facilitate the implementation of the Government's policy in a manner contrary to the law of Canada as established in the Act.
- (c) Following amendments to the Act in 1998, the majority of the CWB's board of directors (the "Board") is elected by wheat and barley producers and is directly accountable to them. Since that time the Board has assumed overall responsibility to manage the business and affairs of the CWB. The Board has concluded that the Direction is impeding the operations of the CWB and is not in the best interests of western Canadian grain farmers. Therefore, the Board determined, by resolution, that it was necessary to seek judicial review of the Direction.

The CWB and its Statutory Object

- (d) The CWB is a statutory corporation created pursuant to the provisions of the Act; it is expressly neither an agent of the Crown, nor a Crown corporation. Subsection 3.01(1) empowers the CWB's Board to direct and manage the CWB's

business and affairs and vests the CWB's powers in the Board. Ten of the CWB's fifteen directors are elected by western Canadian wheat and barley producers while four are appointed by the GIC. The remaining director is the president of the CWB and is appointed by the GIC in consultation with the Board, which must approve the salary of the nominee. The Act provides that all directors, whether elected or appointed, have the same powers, duties and obligations.

- (e) While the Act confers certain limited powers on the federal government in relation to the Board, including the authority to issue directions to the Board pursuant to section 18 of the Act, the federal government has no involvement in the CWB's day-to-day operations. Prior to 1999, the CWB's operations were conducted by federal government appointees. Following amendments to the Act in 1998, on January 1, 1999 the CWB became a farmer-controlled entity which is accountable to the producers who elect the majority of the Board. Consequently, the CWB is focused solely on acting on behalf of western Canadian wheat and barley producers and maximizing returns for producers.
- (f) Section 5 of the Act provides that the object of the CWB is the marketing in an orderly manner, in interprovincial and export trade, of grain grown in Canada. The CWB fulfils its statutory object through three foundational pillars provided for in the Act: (i) single desk selling; (ii) price pooling; and (iii) the guarantee by the federal government of initial payments to producers and the CWB's borrowings in that regard.

- (g) The single desk is established in Parts III and IV of the Act and is the key mechanism through which the CWB fulfils its statutory object. The Act prohibits anyone other than the CWB from engaging in the interprovincial or export trade of wheat or barley, subject to certain limited exceptions. The CWB markets western Canadian wheat and barley through its single desk, which enables the CWB to obtain a higher return for producers than would otherwise be achieved in an open market.
- (h) Section 47.1 of the Act, enacted by Parliament in 1998, provides that before the Act is amended to either cover additional grains or remove grains from the ambit of the Act, the Minister must consult with the Board and producers must vote in favour of such a change.

The Government's Proposed Elimination of the Single Desk

- (i) Following the federal election in 2006, the Conservative Party of Canada formed the Government. Thereafter, the Prime Minister of Canada, the Minister of Agriculture and Agri-Food (the "Minister") and other Conservative Party Members of Parliament made a number of public statements indicating that the Government intended to implement what was variously described as a "dual market", "marketing choice" or a "voluntary" CWB for western Canadian wheat and barley producers. The implementation of such a policy by the Government would result in the elimination of the single desk. However, the minority status of the Government in the House of Commons has effectively prevented it from taking legislative action to implement its policy.

- (j) Upon assuming office, the Government took a number of steps in furtherance of its stated intention to abolish the single desk with the apparent aim of hindering the ability of the CWB to conduct its operations in accordance with the Act, including, among others:
- (i) in April 2006, the Minister wrote to the CWB advising that the Government intended to implement its stated policy of “voluntary participation” in the CWB and further, that all communication and promotional material issued on behalf of the CWB “should clearly reflect Government policy”;
 - (ii) in May 2006, the Member of Parliament for the riding of Battlefords-Lloydminster, with the support of the Minister, introduced a private member’s bill that would have limited the scope of the single desk by carving out an exception to the single desk requirements in the Act;
 - (iii) in June 2006, following hearings relating to the status of the CWB, the Government members of the Standing Committee on Agriculture and Agri-Food (the “Agriculture Committee”), issued a minority report which criticized the recommendation by the majority of the Agriculture Committee that any legislative or regulatory changes to the single desk mandate of the CWB be subject to a plebiscite of producers;
 - (iv) in June 2006, the Minister refused to approve the CWB’s corporate plan which it is required, pursuant to section 19 of the Act, to submit annually to the Minister, on the grounds the plan referred to the single desk and a proposal by the CWB to leverage the single desk for the benefit of producers;
 - (v) in July 2006 the Minister organized and attended a roundtable meeting, to which the CWB was not invited and was attended by individuals and organizations supportive of the Government’s policy, which was convened for the purpose of contributing to the implementation of “dual-marketing” for western Canadian grain producers;
 - (vi) in September 2006 the Minister announced the appointment of a task force (the “Task Force”) that was created to prepare a report regarding the transition of the CWB from its current incarnation pursuant to the Act, to a new regime where the CWB would operate without the statutory powers it currently exercises, and the structure of this new entity;
 - (vii) in October 2006, the Minister ordered the removal of approximately 16,000 producers from the voters list during the election period pursuant

- to which producers in five of ten districts in western Canada elect directors to fill five of the elected director positions on the Board;
- (viii) in the fall of 2006, the Minister filled vacancies on the Board with individuals who had previously expressed support for the Government's policy, after advising the CWB on at least one prior occasion that government-appointed directors should "understand and support the directions of government policy in areas affecting the CWB"; and
 - (ix) on November 29, 2006, after the Board considered and rejected a demand by the Minister that it remove material from its website on the grounds that it allegedly violated the Direction, the Minister wrote to the President of the CWB indicating that he was considering recommending that the GIC terminate the President's position with the CWB.
- (k) The Minister publicly released the Task Force's report on October 30, 2006 (the "Task Force Report") which recommended a four stage process for the implementation of an open market in wheat and barley through the repeal of the Act and the enactment of new legislation. The Task Force Report also recommended that the CWB be restructured as a private entity, owned by producers, with the result that the CWB would no longer operate as a single desk seller of producers' wheat and barley.
- (l) On October 31, 2006, the Minister announced that a plebiscite would be held in early 2007 on whether barley should continue to be marketed through the single desk and that details regarding the list of eligible voters and the question to be asked would be announced at a later date. This announcement was made without the required consultation with the Board, as mandated by the Act. The Minister has refused to confirm whether producers of wheat would also be consulted through a plebiscite.

The Direction Issued by the GIC

- (m) The Direction was delivered to the CWB on October 6, 2006 and is as follows:

Her Excellency the Governor General in Council, on the recommendation of the Minister of Agriculture and Agri-Food, pursuant to subsection 18(1) of the *Canadian Wheat Board Act*, hereby directs The Canadian Wheat Board to conduct its operations under that Act in the following manner:

(a) it shall not expend funds, directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research; and

(b) it shall not provide funds to any other person or entity to enable them to advocate the retention of the monopoly powers of The Canadian Wheat Board.

- (n) In the Regulatory Impact Analysis Statement accompanying the Direction, the Government acknowledged that the purpose of the Direction was to “ensure that the CWB carries out its operations and duties in a manner which is not inconsistent with the federal government’s policy objectives”, notwithstanding the fact that the Government’s policy is not the law of Canada.

- (o) In accordance with subsection 18(1.1) of the Act, the Board caused the Direction to be implemented by the CWB to the extent it was possible to do so, given the vague and ambiguous language used in the Direction.

- (p) Following the implementation of the Direction, the Minister, his officials and Government Members of Parliament made public statements regarding the scope and meaning of the Direction. These public statements suggested, among other things, that:

- (i) the Direction was not intended to act as a “gag order” over directors and officers of the CWB;

- (ii) the Direction did not prohibit directors and officers of the CWB from expressing their views in favour of the single desk where the CWB did not expend any funds in connection with that expression; and
 - (iii) the Direction did not apply to the CWB's website.
- (q) Notwithstanding these public comments, the GIC has not amended or otherwise re-issued the Direction to accord with these statements or to clarify the scope and application of the Direction.
- (r) The CWB requested on at least three occasions that the Minister seek the repeal of the Direction by the GIC but the Minister has refused to do so.
- (s) To the knowledge of the Board, the GIC's power to issue directions to the CWB pursuant to section 18 of the Act has been used infrequently by the GIC and never over the objection of the CWB. When interpreted in the context of the purpose and scheme of the Act, the authority granted to the GIC under section 18 of the Act must be viewed as authorizing the federal government to intervene in the operations of the CWB only in very limited circumstances.
- (t) In contrast to the Government's public statements that the Direction did not apply to the website, on November 17, 2006 the Minister wrote to the CWB to demand that it remove its response to the Task Force Report from its website. This apparent contradiction between the Government's public statements and the Minister's letter of November 17th has amplified the uncertainty surrounding the application of the Direction to the operations of the CWB.

The Direction is Unlawful

- (u) As part of fulfilling its statutory object and duties, the CWB, through its directors, officers and employees, necessarily communicates with producers on a daily basis regarding its operations and activities. A key element of this communication relates to the single desk and the role it plays in the marketing of producers' wheat and barley by the CWB. These communications occur as part of the CWB's daily operations and often at the request of producers who seek information from the CWB. In large part, these communications entail the expenditure of funds by the CWB.

- (v) As a result of the issuance of the Direction, CWB officers and employees have faced significant impediments in responding to questions from producers which relate to the single desk or explain the nature of the CWB's operations to producers, for fear of violating the Direction. The Direction has impeded the CWB's ability to fulfill its statutory mandate and obligations, particularly in the context of the pending barley plebiscite where producers are increasingly seeking information from the CWB.

- (w) The Direction was issued by the GIC for an unlawful and improper purpose inasmuch as the Government has admitted that its purpose is to ensure that the CWB does not publicly question or undermine the Government's policy objectives regarding the implementation of "marketing choice" and the elimination of the single desk, notwithstanding the fact that the Act enshrines the

single desk as the law of Canada and the Government is unable to pass legislation to change it.

- (x) The Direction is unlawful and *ultra vires* the authority granted to the GIC under subsection 18(1) of the Act as it impedes and interferes with the CWB's normal business activities and communications between the CWB and producers, and therefore prevents the CWB from fulfilling its statutory mandate of marketing western Canadian grain in an orderly manner.
- (y) If the reference in the Direction to the "indirect" expenditure of funds can be interpreted to include the payment of salaries to employees, for example, the CWB, as a corporate entity rather than an individual, cannot express its views without incurring costs. All communications emanating from the CWB, from a simple telephone call to the convening of major meetings with producers, as well as the issuance of press releases, advertising, or the public statements of its officers and employees necessarily result in the expenditure of funds. Interpreted in such a manner, the Direction accordingly infringes the CWB's right of freedom of expression.
- (z) As a breach of the Direction may give rise to criminal or civil liability on the part of the CWB and its directors and officers, its scope and application must be clearly defined. However, the Direction is improperly vague and the activities to which it applies are unclear, as evidenced by the Government's attempts to clarify its scope and purpose. In the result, the Direction is unenforceable.

- (aa) The *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended.
 - (bb) Subsection 2(b) and section 24 of the *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11.
 - (cc) Sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.
 - (dd) Such further and other grounds as counsel may advise and this Honourable Court may accept.
3. This application will be supported by the following material:
- (a) the affidavit of Adrian C. Measner, sworn, and the exhibits thereto;
 - (b) the affidavit of Kenneth R. Ritter, sworn, and the exhibits thereto; and
 - (c) such further and other material as counsel may advise and this Honourable Court may accept.

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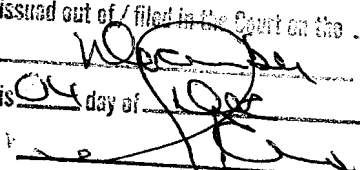
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Solicitors for the Applicant

I HEREBY CERTIFY that the above document is a true copy of the
original issued out of / filed in the Court on the 04
day of November A.D. 2006
Dated this 04 day of November 2006


GEORGES COUTU
REGISTRY OFFICER
AGENT DU GREFFE

Court File No.

FEDERAL COURT

BETWEEN:

THE CANADIAN WHEAT BOARD

Applicant

- and -

ATTORNEY-GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

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