Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada
T-2622-96

B e t w e e n:

THOMAS RICHARD JACKSON,

Applicant,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent.

REASONS FOR ORDER

ROTHSTEIN J.

The applicant challenges the jurisdiction of the Canadian Wheat Board to require him to obtain a licence to export pedigree status seed wheat which he says is not wheat within the meaning of that term as used in the *Canadian Wheat Board Act*, R.S.C. 1985, C-24. In July 1996, he applied to the Canadian Wheat Board for an export licence to export pedigree status seed wheat. The Board found the applicant's application incomplete and no licence was issued. It is that decision not to issue a licence that gives rise to this judicial review.

Two preliminary issues are raised by the respondent. The first is that

the application is brought out of time. The second is that the Canadian Wheat Board is not a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Court Act* and the judicial review is not the appropriate procedure for the applicant to have taken in this case. With respect to the time issue, at the hearing I ordered that to the extent an extension of time was required that it was granted and that the matter was to proceed.

With respect to whether the Canadian Wheat Board is a federal board, commission or other tribunal, the respondent relies on *Wilcox v. C.B.C.* 1981 F.C. 326 and *Cairns v. The Farm Credit Corporation* 1992 2 F. C. 115 for the proposition that the powers being exercised by the Canadian Wheat Board in this case are private powers incidental to the carrying out of its business and as such the Court does not have jurisdiction to grant relief against the Canadian Wheat Board on judicial review under section 18.1 of the *Federal Court Act*.

The definition of "federal board, commission or other tribunal" in section 2 of the *Federal Court Act* provides:

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

In considering whether to characterize a federal entity as a federal board, commission or other tribunal for purposes of section 2 of the *Federal Court Act*, the jurisprudence appears to make a distinction between the exercise of

powers of a public character and the exercise of powers which are incidental to the carrying on of a business. In *Wilcox, supra,* Thurlow A.C.J. (as he then was) stated at page 329:

> . . . it appears to me that the expression "jurisdiction or powers" [in section 2 of the *Federal Court Act*] refers to jurisdiction or powers of a public character in respect of the exercise of which procedures by prerogative writs or by injunction or declaratory relief would formerly have been appropriate ways of invoking supervisory authority of the superior courts. I do not think it includes the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or of the business it is authorized to operate. Absurd and very inconvenient results would grow from an interpretation that it does include such power and it does not appear that was intended or that it is necessary to so interpret the expression in the context in which it is used.

Thurlow, A.C.J. went on in Wilcox to assess whether the CBC was of a public character and concluded at 329 that the CBC was "at least in respect of its broadcasting activities, not a federal board, commission or other tribunal within the meaning of section 2..."

The *Wilcox* case was distinguished in *Aeric Inc. v. Canada Post Corporation*, [1985] 1 F.C. 127. In *Aeric* at 135-137, Ryan J.A. assessed whether Canada Post was of a significantly public character. However, he went on at 137 to identify that the deciding factor was whether the powers being exercised by the corporation had a public character or were general powers of management conferred upon the corporation incidentally to carrying out its commercial activities. He held at 138 that the Chairman was exercising a power to hear an appeal conferred by a regulation approved by the Governor in Council, as opposed to a general power of management. The Chairman was therefore a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Court Act*.

Thus, the approach in *Aeric* is that, although the character of the corporation is significant to the analysis, it is the character of the powers being exercised which determines whether the decision maker is a federal board, commission or other tribunal for the purposes of section 18.1 of the *Federal Court Act*.

In respect of the character of the Canadian Wheat Board, the well-known passage in *Murphy v. C.P.R. and A.G. of Canada*, [1958] S.C.R. 626 at 630 describes the purposes of the *Canadian Wheat Board Act*:

> The purposes of the *Canadian Wheat Board Act* is made apparent by an examination of its provisions. The Board constituted by the Act is required to buy all wheat, oats and barley produced in the designated area, that area being substantially the three prairie provinces. Under regulations which the Board is empowered to make, deliveries of grain to elevators or to railway cars may be limited and, except with the permission of the Board, no person may deliver grain to an elevator who is not the actual producer of the grain and in possession of a permit book issued by the Board, or load into a railway car any such grain which has not previously been delivered under a permit book and with the Board's permission. The Board is required to undertake the marketing of all the grain delivered either to elevators or railway cars and the producers receive their proportionate share of the monies realized from the sale of grain of the grade delivered by them less the expenses of the operation of the Board. It is a matter of common knowledge that much of the greatest part of the grain delivered to elevators or to railway cars is exported from the province which it is grown either to other provinces of Canada or to foreign countries.

Having regard to specific provisions of the *Canadian Wheat Board Act*, there are indications that the Board is constituted as a public entity. Subsection 4(2) of the Act provides that the Board is, for all purposes, an agent of her Majesty in Right of Canada. Section 5 of the Act provides that the object of the Board is the marketing, in an orderly manner in interprovincial and export trade, of grain grown in Canada. Under paragraph 6(j) the Board has power to act as an agent of any Minister or Her Majesty in Right of Canada in respect of any operations that it may be directed to carry out by the Governor in Council. Subsections 7(2) and (3) provide that profits of the

Board are to be paid to the Receiver General and losses are to be paid out of monies provided by Parliament. Under section 18, the Governor in Council may by order, direct the Board with respect to the manner in which any of its operations, powers and duties under the Act shall be conducted, exercised or performed.

I need go no further to be satisfied that the Canadian Wheat Board can be characterized as a corporation with significant public aspects which involve the carrying out of government policy. Of course, not all of the powers conferred by the *Canadian Wheat Board Act* are public. Under section 6 of the Act, for example, the Board has been vested with general powers incidental to its business such as to enter into contracts, to enter into ordinary commercial banking arrangements, to acquire and hold real property and generally to do all things necessary and incidental to the carrying out of its operations. However, in keeping with *Aeric*, the Court must examine the specific power being exercised in this case.

The power of the Board at issue is an export licensing power set out in section 14 of the *Canadian Wheat Board Regulations*:

> 14. The Board may grant a licence for the export, or for the sale or purchase for delivery outside Canada, of wheat, wheat products, barley or barley products if
>
> (*a*) the export, sale or purchase of the grain or products for which the licence is sought does not adversely affect the marketing by the Board, in interprovincial or export trade, of grain grown in Canada; and
>
> (*b*) the applicant pays to the Board a sum of money that, in the opinion of the Board, represents the pecuniary benefit enuring to the applicant pursuant to the granting of the licence, arising solely by reason of the prohibition of the export of that grain or those products without a licence, and the then existing differences between the prices of that grain or those products inside and outside Canada.

The Board derives this export licensing power by reason of paragraphs 45(*a*) and 46(*c*) of the *Canadian Wheat Board Act*:

> **45.** Except as permitted under the regulations, no person other than the Board shall
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> (*a*) export from or import into Canada wheat or wheat products owned by a person other than the Board;
>
> **46.** The Governor in Council may make regulations
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> (*c*) to provide for the granting of licences for the export from or import into Canada, or for the sale or purchase for delivery outside Canada, of wheat or wheat products, which export, import, sale or purchase is otherwise prohibited under this Part;

Under these provisions, the Canadian Wheat Board is granted a significant regulatory power. The Board is to engage in the granting of export licences for the purposes of carrying out government policy allowing for the export of wheat from Canada by persons other than the Board if the conditions specified in section 14 of the regulations are satisfied.

A regulatory power such as the granting of licences is by nature public. There can be no doubt that when the Board is carrying out the licensing power, it is not exercising the general management powers of an ordinary corporation. No ordinary corporation has the power to regulate. Regulatory power is one of the hallmarks of public, as opposed to private commercial activity.

The Canadian Wheat Board, when it is granting a licence pursuant to section 14 of the *Canadian Wheat Board Regulations* is therefore a federal board within the meaning of sections 2 and 18.1 of the *Federal Court Act*.

In a further line of submission, counsel for the Canadian Wheat Board relies on subsection 4(3) of the *Canadian Wheat Board Act* which provides:

> 4. (3) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Board on behalf of Her Majesty, whether in its name or in the name of Her Majesty, may be brought or taken by or against the Board, in the name of the Board, in any court that would have jurisdiction if the Board were not an agent of Her Majesty.

Counsel's argument is that this provision displaces judicial review by actions against the Board as if it were not an agent of Her Majesty and therefore the powers at issue in this case must be challenged by way of action and not judicial review.

I do not read subsection 4(3) in this way. This provision deals with actions arising against the Board in respect of any obligation incurred by it on behalf of Her Majesty and allows a person to sue the Board in any court that would have jurisdiction if it were not an agent of her Majesty. In other words, by reason of subsection 4(3), a person may sue the Board in a provincial superior court. Without subsection 4(3), the person may have had to bring suit in the Federal Court. But this provision presupposes that the Board has incurred an obligation. For example, the Board may have contracted to deliver wheat and a purchaser may think the Board has breached the contract by non delivery or delivery of wheat of a different description than that contracted for. It is this type of action that subsection 4(3) enables a person to bring in a provincial superior court. The essence of such a proceeding is a private contractual dispute and should be brought by way of action either in the Federal Court or a provincial superior court. Judicial review would not be an appropriate procedure in such case. By

contrast, the licensing power of the Board cannot be construed as an obligation incurred by the Board and subsection 4(3) would not be relevant to a proceeding brought against the Board in respect of the exercise of that type of public power which, as I have said, is properly the subject of judicial review.

The preliminary jurisdictional objection of the Board is therefore dismissed.

I turn to the merits. The applicant concedes that the Canadian Wheat Board has jurisdiction to control the marketing of wheat for export. However, he says that his wheat is not wheat contemplated by the *Canadian Wheat Board Act.* He relies on subsection 2(2) of the *Canadian Wheat Board Act* which provides:

> Unless it is otherwise provided in this Act, words and expressions used in this Act have the same meaning as in the *Canada Grain Act*, except that where in any definition of any such word or expression contained in that Act the word "elevator" is used, it has the meaning given to it in subsection (1).

The applicant says that under the *Canada Grain Act,* S.C.1970-71-72, c. 7, grain is defined thus:

> "grain" means any seed designated by regulation as a grain for purposes of this Act.

The Regulations under the *Canada Grain Act* contain Schedule III which includes Table III entitled Grades of Extra Strong Red Spring Wheat (Canada Western). The Table then refers to Grades as Nos. 1 and 2 Canada Western

Extra Strong Red Spring. The Table also specifies a Variety as "Any Variety of Extra Strong Red Spring Wheat equal to or better than Glenlea".

The applicant concedes that his wheat is Extra Strong Red Spring Wheat and that his variety "Wildcat" is equal to or better than Glenlea. However, he says that his wheat has the status of pedigree seed which is not a grade referred to in Table III. As a result he says that his wheat is not designated as a grain for purposes of the *Canada Grain Act* and by reason of subsection 2(2) of the *Canadian Wheat Board Act* is not included as wheat under that Act. He therefore concludes that his wheat is not under the jurisdiction of the Canadian Wheat Board and that he is free to export it at will and that he is not required to obtain a licence to do so from the Canadian Wheat Board. A second related argument is that the applicant's wheat is seed wheat as contemplated by the *Seeds Act*, R.S., c. S-7, and that, as such, it is not under the control of the Canadian Wheat Board. In essence he says that wheat that comes under the *Seeds Act* cannot also come under the *Canadian Wheat Board Act*.

The applicant's arguments proceed on an extremely vague foundation which involves tenuous linkages between different words and statutes.

Wheat, as that term is used in paragraph 45(*a*) of the *Canadian Wheat Board Act*, means all wheat. The word is not qualified in any way except as permitted by regulation. The intent of the provision is to give the Canadian Wheat Board a monopoly over the export of any and all wheat and wheat products from Canada. This conclusion is supported by paragraph 46(*b*) of the Act which provides:

> **46.** The Governor in Council may make regulations
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> . . .
>
> (*b*) to exclude any kind of wheat, or any grade thereof, or wheat produced in any area in Canada, from the provisions of this Part either in whole or in part, or generally, or for any period;

The necessary implication of Parliament granting the Governor in Council the regulation making authority to exclude any kind of wheat or any grade thereof from the Board's monopoly under paragraph 45(*a*) is that any and all wheat is initially contemplated under paragraph 45(*a*).

Even if the applicant's arguments based on subsection 2(2) of the *Canadian Wheat Board Act* and the linkages to the designation of grain under the *Canada Grain Act* were to be considered, it would not assist the applicant because the applicant's wheat is designated under the *Canada Grain Act*. Subsections 6(1) and 6(2) of the *Canada Grain Regulations* provide:

> **6.** (1) The seeds set out in Schedule III are designated as grains for the purposes of the Act.
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> (2) The grades of grain and specifications therefore set out in schedule 3 are hereby established under the grade names set out in that schedule.

The applicant's wheat is a variety of Extra Strong Red Spring Wheat equal to or better than Glenlea. As such it is a seed designated as a grain under the *Canada Grain Regulations* for purposes of the *Canada Grain Act* and therefore under the applicant's linkage theory, would be wheat under the *Canadian Wheat Board Act*. The fact that it is pedigree status and that it apparently has not been graded under the *Canada Grain Act* as No. 1 or No.

2 does not detract from this conclusion. That is a matter of grading. The seed designated as grain is Extra Strong Red Spring Wheat and the applicant's wheat is included in that designation.

As to the applicant's second argument, the fact that the applicant's wheat may be wheat to which the *Seeds Act* applies does not exclude that wheat from the application of the *Canadian Wheat Board Act.* There is no inconsistency between the *Seeds Act* and the *Canadian Wheat Board Act* which might indicate that wheat contemplated by one act is excluded from application of the other.

The applicant has strongly held views about the Canadian Wheat Board's monopoly over the export of wheat. However that is a policy matter and any change must be one for Parliament to make. The role of the Court is to interpret and express the existing law. Under existing law, the applicant's wheat is that contemplated by the *Canadian Wheat Board Act* and unless he obtains a licence from the Board by meeting its requirements, he may not export such wheat.

The judicial review is dismissed.

Marshall Rothstein
Judge

HALIFAX, NOVA SCOTIA
AUGUST 21, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-2622-96
STYLE OF CAUSE:	Thomas Richard Jackson v. The Attorney General of Canada
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 13, 1997
REASONS FOR ORDER OF:	The Honourable Mr. Justice Rothstein
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