Federal Court  Cour fédérale

Date: 20111207

Docket: T-1057-11
Docket: T-1735-11

Citation : 2011 FC 1432

Winnipeg, Manitoba, December 7, 2011

PRESENT: The Honourable Mr. Justice Campbell

Docket: T-1057-11

BETWEEN:

FRIENDS OF THE CANADIAN WHEAT BOARD, HAROLD BELL, DANIEL GAUTHIER, KEN ESHPETER, TERRY BOEHM, LYLE SIMONSON, LYNN JACOBSON, ROBERT HORNE, WILF HARDER, LAURENCE NICHOLSON, LARRY BOHDANOVICH, KEITH RYAN, ANDY BAKER, NORBERT VAN DEYNZE, WILLIAM ACHESON, LUC LABOSSIERE, WILLIAM NICHOLSON AND RENE SAQUET

Applicants

and

ATTORNEY-GENERAL OF CANADA, THE MINISTER OF AGRICULTURE AND AGRIFOOD IN HIS CAPACITY AS MINISTER RESPONSIBLE FOR THE CANADIAN WHEAT BOARD AND THE CANADIAN WHEAT BOARD

and **Respondents**

COUNCIL OF CANADIANS, ETC GROUP (ACTION GROUP ON EROSION, TECHNOLOGY AND CONCENTRATION), PUBLIC SERVICE ALLIANCE OF CANADA AND FOOD SECURE CANADA

Interveners

Docket: T-1735-11

AND BETWEEN:

THE CANADIAN WHEAT BOARD, ALLEN OBERG, ROD FLAMAN, CAM GOFF, KYLE KORNEYCHUK, JOHN SANDBORN, BILL TOEWS, STEWART WELLS AND BILLWOODS

Applicants

and

THE MINISTER OF AGRICULTURE AND AGRIFOOD IN HIS CAPACITY AS MINISTER RESPONSIBLE FOR THE CANADIAN WHEAT BOARD

Respondent

and

PCSC – PRODUCER CAR SHIPPERS OF CANADA INC., LOGAN CONNOR, LEONARD GLUSKA, BILL WOODS, MYRON FINLAY, HOWARD VINCENT, GLEN HARRIS, AND TIM COULTER

Interveners

REASONS FOR ORDERS

[1] The present Applications concern the rule of law and the disregard for it by the Respondent Minister of Agriculture (the Minister).

[2] The law concerned is s. 47.1 of the *Canadian Wheat Board Act*, RSC 1985, c C-24 (the *Act*) which requires the Minister to engage in a consultative process with the Canadian Wheat Board (CWB) and to gain the consent of Western Canadian wheat and barley producers with respect to

proposed changes to the currently well-established process of marketing the grains in Canada. At the present time, contrary to the requirements of s. 47.1, the Minister is unilaterally proceeding to revolutionize the process by securing the imminent passage of legislation.

[3] A most recent reminder of the rule of law as a fundamental constitutional imperative is expressed by Chief Justice Fraser in *Reece v Edmonton (City)*, 2011 ABCA 238 at paragraphs 159 and 160:

> The starting point is this. The greatest achievement through the centuries in the evolution of democratic governance has been constitutionalism and the rule of law. The rule *of* law is not the rule *by* laws where citizens are bound to comply with the laws but government is not. Or where one level of government chooses not to enforce laws binding another. Under the rule of law, citizens have the right to come to the courts to enforce the law as against the executive branch. And courts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. This right in the hands of the people is not a threat to democratic governance but its very assertion. Accordingly, the executive branch of government is not its own exclusive arbiter on whether it or its delegatee is acting within the limits of the law. The detrimental consequences of the executive branch of government defining for itself – and by itself – the scope of its lawful power have been revealed, often bloodily, in the tumult of history.
>
> When government does not comply with the law, this is not merely non-compliance with a particular law, it is an affront to the rule of law itself […].
>
> [Emphasis added]

[4] The Applicants each request a Declaration that the Minister's conduct is an affront to the rule of law. For the reasons that follow, I have no hesitation in granting this request.

I. The Scheme of the *Act*

[5] The CWB is a corporation without share capital that is charged by s. 5 of the *Act* with the statutory objective to "market in an orderly manner, in interprovincial and export trade, grain grown in Canada." The scheme of the *Act* is as follows: by Part III, the CWB is required to buy all wheat and barley produced in Manitoba, Saskatchewan, Alberta, and the Peace River District of British Columbia; Part IV prohibits any person other than the CWB from exporting, transporting from one province to another, selling or buying wheat or barley, subject to limited exceptions established by the *Act* or its regulations; and Part V establishes the mechanisms by which the CWB's marketing authority may be altered, and contains s. 47.1, the interpretation of which is at the centre of the present Applications:

47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless	47.1 Il ne peut être déposé au Parlement, à l'initiative du ministre, aucun projet de loi ayant pour effet, soit de soustraire quelque type, catégorie ou grade de blé ou d'orge, ou le blé ou l'orge produit dans telle région du Canada, à l'application de la partie IV, que ce soit totalement ou partiellement, de façon générale ou pour une période déterminée, soit d'étendre l'application des parties III et IV, ou de l'une d'elles, à un autre grain, à moins que les conditions suivantes soient réunies :
(*a*) the Minister has consulted with the board about the exclusion or extension; and	*a*) il a consulté le conseil au sujet de la mesure;

(*b*) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.	*b*) les producteurs de ce grain ont voté — suivant les modalités fixées par le ministre — en faveur de la mesure.

[Emphasis added]

The "board" referred to in s. 47.1 (a) is that of the CWB charged under the *Act* to direct and manage the business and affairs of the Corporation (the Board). The "producers" referred to in s. 47.1 (b) are those persons that farm grain in the area named in Part III (the Producers).

II. The Introduction of Bill C-18

[6] On October 18, 2011, the Minister introduced in Parliament Bill C-18: *An Act to reorganize the Canadian Wheat Board and to make consequential and related amendments to certain Acts (Marketing freedom for grain farmers Act*). The name of the legislation proposed in Bill C-18 accurately states the nature of the changes to the governance structure of the CWB, and, indeed, the whole system of the marketing of grain in Canada; what is considered to be marketing freedom for grain farmers will replace the present centralized marketing system.

[7] At the present time, Bill C-18 has passed second reading at the Senate and is before the Standing Senate Committee.

III. Issues

[8] The present Applications are simple in nature; they are directed at an examination of the Minister's conduct with respect the requirements of s. 47.1. The Applicants confirm that the

validity of Bill C-18, and the validity and effects of any legislation which might become law as a result of Bill C-18 are not in issue in the present Applications.

[9] The Applicants make it clear that their Applications are no threat to the Sovereignty of Parliament to pass legislation. The controversy in the present case arises from the *Act*, legislation that Parliament has already passed. Section 47.1 contains conditions which are known in law as "manner and form" procedural requirements. This form of limitation on the exercise of legislative power is well recognized in law. At paragraph 34 of the Producer Car Shippers argument, attention is directed to the following passages from Professor Hogg's text, *Constitutional Law of Canada*, (Carswell, Toronto, 5th ed, 2007):

> Would the Parliament or a Legislature be bound by *self-imposed* rules as to the "manner and form" in which statutes were to be enacted? The answer, in my view, is yes.
>
> […]
>
> Thus, while the federal Parliament or a provincial Legislature cannot bind itself as to the substance of future legislation, it can bind itself as to the manner and form of future legislation.
>
> […]
>
> It seems implausible that a legislative body should be disabled from making changes to its present structure and procedures. Moreover, the case-law, while not conclusive, tends to support the validity of self-imposed manner and form requirements.
>
> [Footnotes omitted]
>
> (Motion Record of Producer Car Shippers, Tab 10)

[10] The Minister has attempted to argue that s. 47.1 does not meet the requirements of a "manner and form" provision. I dismiss this argument and find any debate on "manner and form" is

not properly before the Court for determination. Section 47.1 is presumed to be constitutionally valid, and no argument challenging this presumption has been properly presented in the present Applications; to do so would require notice of a Constitutional Question which has not been given. Thus, as the judicial review Applications are framed, the sole question for determination is: did the Minister breach the process requirements of s. 47.1, and if so, what relief, if any, should be granted? The answer to this question requires a statutory interpretation analysis.

IV. The Applications

[11] Both the CWB and the Producers place heavy reliance on the democratic process instrumental in the marketing of grain under the *Act*. The present Applications have been launched to protect the process and the separate, but conforming interests, of the Producers under T-1075-11 and the CWB under T-1735-11.

[12] It is an undisputed fact that the Minister tendered Bill C-18 without conducting the consultation and gaining the consent expressed in s. 47.1 of the *Act*. As expressed by Chief Justice Fraser in the quote above: "courts have the right to review actions of the executive branch to determine if they are in compliance with the law and, where warranted, to declare government action unlawful." Thus, I find that the Minister's decision to not comply with the conditions expressed in s. 47.1, prior to tabling Bill C-18, is judicially reviewable pursuant to section 18.1 (3) (b) of the *Federal Courts Act*, RSC 1985, c F-7.

[13] As a result, the issue is whether the factual and legal basis has been established for making Declarations that state fault on the part of the Minister. Each Application supports the making of a

fault finding. The CWB supports the Producers' argument in T-1057-11 and makes its own argument on similar lines in T-1735-11. The CWB confirms this point as follows:

> Although the Applications are framed somewhat differently, there is significant overlap between the parties to, and the relief sought in, the Applications. At their core, the Applications are each premised on the failure of the Minister to comply with his statutory duty under section 47.1 of the Act.
>
> (Written Representations of the Canadian Wheat Board in T-1735-11, para. 9)

[14] However, each Applicant frames the request for Declaratory relief in a slightly different way. The Applicants in T-1057-11 express the claim for relief as follows:

> (a) a declaration that the Minister breached his statutory duty to consult with the Board and conduct a vote of wheat and barley producers as to whether they agree with the removal of wheat and barley from the application of Part IV of the Act and with the elimination of the CWB's exclusive statutory marketing mandate (Breach Declaration);
>
> and
>
> (b) a declaration that the Minister breached the duty of fairness and acted contrary to the legitimate expectations of producers in causing the Bill to be introduced in Parliament without first consulting with the Board and with producers through a producer vote (Legitimate Expectation Declaration).
>
> (Amended Notice of Application dated November 8, 2011)

And in T-1735-11 the Applicants express the request this way:

> (a) a declaration that the Minister failed to comply with his statutory duty pursuant to section 47.1 of the Act, to consult with the Board and to hold a producer vote, prior to the causing to be introduced in Parliament Bill C-18, *An Act to reorganize the Canadian Wheat Board and to make consequential and related amendments to certain Acts* ("Bill") (Breach Declaration);
>
> and

> (b) a declaration that the Minister has acted in breach of the legitimate expectations of the CWB, the Board and producers, and contrary to the duty of fairness, in causing to be introduced in Parliament the Bill without first consulting with the Board and holding a producer vote (Legitimate Expectation Declaration);
>
> (Notice of Application dated October 26, 2011)

[15] By consent, given the conjunction of both Applications, and the consolidated argument filed by the Minister in response, it is appropriate to determine each Application with a separate order, but on the basis of the present single set of consolidated reasons which addresses the core arguments which have equal application to both.

[16] Two interventions have been permitted: that of the Council of Canadians, and ETC Group, the Public Service Alliance of Canada and Food Secure Canada (the "Council"); and that of the Producer Car Shippers of Canada Inc. *et al* ("Producer Car Shippers"). The Council maintains an interest in food sovereignty, food safety, food security, and the important role that the CWB plays in maintaining and protecting those interests, and has permission to address how s. 47.1 is to be interpreted in accord with NAFTA and the *Charter*. The Producer Car Shippers maintain an interest in protecting the rights and investments of grain producers who ship their own grain, and have permission to address the application of the "manner and form" doctrine with respect to s. 47.1 of the *Act*.

V. Breach of the Law Challenge

A. *The Test for Statutory Interpretation*

[17] Whether the Minister breached the law is a matter of statutory interpretation and consideration of the Minister's conduct against that interpretation. I agree with the Applicants that an appropriate test to be applied in the present Applications is as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Canada 3000 Inc, Re: Inter-Canadian (1991) Inc (Trustee of)*, 2006 SCC 24 at para. 36; *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42 at para. 26).
>
> (Applicants' Memorandum of Fact and Law in T-1735-11, para. 44)

B. *The Applicants' Argument*

[18] The Applicants argue that:

> Properly interpreted in the context in which s. 47.1 and the 1998 amendments were adopted and the object underlying their enactment, as well as the intention of Parliament, the ordinary sense of the broad wording employed in s. 47.1 demonstrates that the Minister is obligated to consult with the CWB and to hold a producer vote prior to causing to be introduced in Parliament a bill that alters the CWB's exclusive marketing mandate; by causing the Bill to be introduced, the Minister breached his statutory duty.
>
> (Applicants' Memorandum of Fact and Law in T-1735-11, para. 45)

[19] Thus, to the Applicants, history is important. The *Act* was first introduced in 1935, and in 1943 the CWB became a "Single Desk" which means the CWB became the sole marketing agency for western Canadian wheat. This authority was extended to oats and barley in 1949, though the marketing of oats was subsequently removed from the CWB's exclusive jurisdiction in 1989. Throughout this period government-appointed Commissioners managed the CWB; however, in

1998, legislative amendments were introduced to improve the CWB's marketing mandate and structure to introduce democratic governance and greater accountability. The amendments transferred control of the CWB to the farmers by creating a board of directors. Since 1998, two-thirds of the members of the board are elected directly by the grain producers. Section 47.1 was also implemented at that time.

[20] Based on the historical context, the Applicants make the following arguments with respect to the purpose of s. 47.1 and the scheme and the object of the *Act* :

> In this case, the 1998 Amendments and section 47.1 were adopted in response to increasing calls for greater farmer control over the CWB's operations and marketing mandate, including the demands of some for dual marketing.
>
> The creation of the Board, the majority of which was farmer-elected, and the adoption of section 47.1 were in response to "the reasonable expectations of a majority of western grain producers" and were aimed at empowering farmers. The purpose of section 47.1 was to ensure that "producers should be in control of any future changes to the [CWB's] mandate".
>
> […]
>
> The bill creates a dual marketing system in which Part IV, containing the prohibitions on the export or interprovincial sale of wheat and barley, is repealed, but the CWB remains as a purchaser of grain. Section 47.1 was enacted by Parliament to ensure that the Minister consulted with the Board and with producers prior to introducing legislation to implement this very system.
>
> […]
>
> The purpose of the 1998 Amendments is clear. The consistent themes underlying the amendments were democracy, accountability, flexibility and empowerment for farmers. Similarly, the purpose of section 47.1 was to ensure that "farmers, not government, would be in control of any future change to the [CWB's] marketing authority", including the implementation of dual marketing and the elimination of the Single Desk.

> (Applicants' Memorandum of Fact and Law in T-1735-11, paras. 47-48, 50, and 58)

[21] With respect to the intention of Parliament in introducing s. 47.1, from the body of evidence presented by the Applicants, I find the following statements of the former Minister responsible for the CWB to be particularly cogent:

> House of Commons, October 7, 1997:
>
> Virtually every marketing innovation which farmers have debated over the past several years will be possible under this new law. In a nutshell, that is what Bill C-4 is all about, empowering producers, enshrining democratic authority which has never existed before, providing new accountability, new flexibility and responsiveness, and positioning farmers to shape the kind of wheat board they want for the future (Affidavit of Allen Oberg, September 15, 2011, para. 38, Exhibit 7);
>
> House of Commons, February 17, 1998:
>
> Such a change would have eliminated the problematic clauses while respecting and enshrining the fundamental principle of democratic producer control;
>
> […]
>
> Tonight, at long last, Bill C-4 will come to a vote at third reading. Its passage will signal an era of change for the future. Its major themes are democracy, accountability, flexibility and empowerment for farmers.
>
> Farmers will take control. They will have it within their authority to shape their marketing agency as they see fit. I have complete confidence in the judgment of producers to exercise their new authority with strength, wisdom and prudence to the greater and greater success of the prairie farm economy and prairie farmers most especially (Affidavit of Allen Oberg, September 15, 2011, para. 40, Exhibit 9);
>
> Senate Committee, May 5, 1998:

> The amendment would require that if any future minister responsible for the [CWB] decides that it is appropriate public policy to change the mandate of the [CWB], to make it either bigger or smaller, it would be up to him to make that policy determination. But he would be required to conduct a vote in advance to obtain the consent of farmers (Affidavit of Allen Oberg, September 15, 2011, para. 42, Exhibit 11).
>
> [Emphasis in the original]

[22] In addition, the Former Minister repeatedly confirmed that s. 47.1 requires a Producer vote if a proposed change is "significant or fundamental":

> Policy Statement, "Changes in Western Grain Marketing", October 7, 1996:
>
> The proposed legislation will provide for future mandate changes contingent upon the formal considered advice of the CWB board of directors and, if a quality control issue is involved, the formal certification by the Canadian Grain Commission that a change can in fact be made without jeopardizing the world-renowned Canada reputation for high quality, consistency and dependability. If the CWB directors consider <u>any proposed change to be significant or fundamental</u>, a producer vote would be a prerequisite before implementation [Emphasis added] (Record of the CWB, Tab 3, p. 112);
>
> Standing Committee on Agriculture and Agri-Food, Meeting No. 57, December 12, 1996:
>
> In future the Wheat Board's mandate may be adjusted, conditional upon three things: first of all, a clear recommendation to that effect by the directors of the Canadian Wheat Board; secondly, if a quality control issue is involved, the unequivocal concurrence of the Canadian Grain Commission that a change can be made safely without damaging Canada's reputation for quality and consistency; and third, <u>if the proposed change is significant or fundamental</u>, then an affirmative vote among farmers would need to be a prerequisite [Emphasis added] (Record of the CWB, Tab 4, p. 125).

[23] The Council submits that the intention of Parliament can be evidenced by the invocation of international trade obligations as a rationale for the 1998 Amendments by the Former Minister. The

democratic nature of s. 47.1, which mandates producer control, was considered necessary in order to defend the CWB's marketing practices in the face of the NAFTA. The Former Minister stated that s. 47.1 was intended to prevent the *Act* from being "used as some thinly veiled excuse by our competitors, perhaps the United States, to launch some form of trade harassment" (House of Commons, February 17, 1998; Affidavit of Allen Oberg, September 15, 2011, Exhibit 9; Council Memorandum of Fact and Law, paras. 8-14).

[24] The Council effectively argues that, when in doubt, statutory interpretation must have regard to democratic and constitutional values. In the present case this is especially important because s. 47.1 speaks to the unique situation in which these democratic values are already implemented in the structure of the CWB. This fact requires that, in proposing that a fundamental change be made to the structure, the Minister must act democratically. This is what s. 47.1 says. Not adhering to these values is not only disrespectful, it is contrary to law.

C. *The Minister's Response*

[25] The Minster advances the following statutory interpretation argument:

> The Applicants contend that section 47.1 should be read expansively in such a way as to require the Minister to seek and to obtain a favourable producer vote before being allowed to introduce any bill "that alters the CWB's exclusive marketing mandate." In an affidavit filed by the CWB in these proceedings, the Chair of its board of directors states the CWB position as being " […] simply that farmers, not the government, should decide the future of the Single Desk in a vote held in accordance with section 47.1 of the Act."
>
> The clear wording of the section 47.1, however, refers only to the addition or subtraction of particular grains or types of grain from the marketing regime as it is established in Parts III and IV of the *Act.* It does not refer to limiting the future repeal of the *Act* itself or to any

> other changes. It leaves the future of the "single desk" as a matter for Parliament to decide.
>
> Section 47.1 is found in Part V under the heading, *"OTHER GRAINS – APPLICATION OF PARTS III AND IV,"* which means that, not only in its wording but in its statutory context as well, it is clearly directed only to the addition or subtraction of particular grains in Parts III and IV. The future of the "single desk" is a policy and legislative decision for Parliament, not for the Court.
>
> […]
>
> Properly interpreted, the scope of section 47.1 addresses the inclusion or exclusion of particular grains or types of grain. Given the principle of Parliamentary sovereignty, section 42(1) of the *Interpretation Act*, and the clear wording of section 47.1 found under the statutory heading *"OTHER GRAINS – APPLICATION OF PARTS III AND IV"*, this provision cannot be so broadly interpreted, as urged by the Applicants, as to place a perpetual veto in the hands of each category of grain producers over the continued existence of the marketing regime, or on the repeal of the *Act* itself.
>
> Understanding the crucial distinction between removing types of wheat or barley from the application of Part IV of the *Act* and repealing the entire *Act* itself is fundamental to the correct interpretation of section 47.1. Bill C-18 does not remove a particular type of prairie wheat or barley from the application of Part IV of the *Act*. Rather, Bill C-18 repeals the *Act*, thereby terminating the CWB's marketing monopoly in order to replace it with a new regime that allows all grain producers the freedom to market and sell their grain as they choose, including through the CWB if they so decide.
>
> [Emphasis in original]
>
> [Footnote removed]
>
> (Respondents' Consolidated Memorandum of Fact and Law, paras. 31-33; 38-39)

[26] The Minister relies upon the following evidentiary statements in support of the interpretation argument:

a. A government news release issued in September 1997 concerning the then Bill C-4 (into which section 47.1 was eventually added in the

course of Parliamentary deliberations) stated that the concept of farmer control was directed to the potential exclusion or inclusion of various types of grains into the system (Affidavit of Allen Oberg, September 15, 2011, Exhibit 6);

b. The Minister, at second reading in the House of Commons of the Bill containing section 47.1, stated that:

> [t]his new law will also empower producers to determine democratically what is and what is not under the Canadian Wheat Board's marketing jurisdiction.
>
> [Emphasis in original]

(Affidavit of Allen Oberg, September 15, 2011, Exhibit 7);

c. Clauses 23 and 26 of Bill C-4 show that the arrangements for exclusion and inclusion of grains would take place by regulation. It is clear that changes such as the abolition of the "single desk" or the repeal of the *Act* in the future were not the type of changes to which the new provisions were intended to apply (Affidavit of Allen Oberg, September 15, 2011, Exhibit 8);

d. Commenting on an amendment to the bill that would become section 47.1, the Minister testified before the Standing Senate Committee on Agriculture and Forestry on May 5, 1998. The Minister referred to the inconsistency that had historically marked the methods by which inclusions and exclusions of various grains, such as oats and barley, had previously taken place – sometimes by Order in Council and sometimes by statutory amendment. When the Minister stated, "…it is unclear how one goes about amending the jurisdiction of the Canadian Wheat Board", he had in mind the problem of moving various grains in or out of the regime that the CWB administered. He was not referring to more fundamental changes to the nature or existence of the marketing regime itself (Affidavit of Allen Oberg, September 15, 2011, Exhibit 11);

e. When the Secretary of State moved second reading in the House of Commons and concurrence in the amendments made in the Senate to Bill C-4, including the clause that is now section 47.1, the Secretary of State stated:

> The second area of Bill C-4 where the Senate has proposed amendments concerns the means by which

> the number of grains under the marketing regime of the wheat board can be either expanded or reduced.
>
> As originally, drafted, western Canadian producers had a process for excluding any kind, type, class or grade of wheat or barley from the marketing authority of the board. Similarly, the bill also laid out an inclusion process for adding crops to the mandate of the wheat board.
>
> The amendment filled a gap in the existing Wheat Board Act. As it now stands under the Canadian Wheat Board, the process for changing the Canadian Wheat Board's mandate is unclear, as every member from prairie Canada I am sure knows.
>
> There have been concerns expressed by producers and producer groups about the mechanism for inclusion and exclusion originally laid out in Bill C-4. Plenty of concerns have been expressed.
>
> I am sure my colleagues from the opposition party are going to get up very shortly and tell me why the matter has not been set right yet.
>
> The amendment responds to those concerns. The amendment would replace existing clauses related to the inclusion-exclusion of grains with the provision that would require the current and future ministers responsible for the board to consult the board of directors with its two-thirds majority of farmer chosen members and conduct a vote among producers before any grains are added or removed from the mandate of the board.

(Affidavit of Allen Oberg, September 15, 2011, Exhibit 12)

[Emphasis in Original]

(Respondents' Consolidated Memorandum of Fact and Law, para. 47)

D. *Conclusions*

[27] I find that by applying the interpretation test as set out above, the Applicants' argument which relies upon a contextual historical approach with respect to the unique democratic nature of the CWB, and its importance, is compelling. I accept the argument that the CWB's democratic marketing practices are "significant and fundamental" because they are long standing, and strongly supported by a large number of the some 17,000 grain producers in Western Canada. This support is worthy of respect; the following argument on the rule of law made by the Council makes this clear:

> The rule of law is a multi-faceted concept, conveying "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." The Courts have repeatedly described the rule of law as embodying the principle that the law "is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power." In other words, for political action to be legitimate, decision-making must operate within the constraints of the law. Governments cannot flout the law and must respect legitimate legal processes already in place. As the Supreme Court stated in the *Secession Reference*, "[i]t is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation."
>
> Adhering to the rule of law ensures that the public can understand the rules they are bound by, and the rights they have in participating in the law-making process. As the Applicants note, western farmers relied on the fact that the government would have to conduct a plebiscite under s. 47.1 before introducing legislation to change the marketing mandate of the CWB. Disregarding the requirements of s. 47.1 deprives farmers of the most important vehicle they have for expressing their views on the fundamental question of the single desk. Furthermore the opportunity to vote in a federal election is no answer to the loss of this particular democratic franchise. Until the sudden introduction of Bill C-I8, Canadian farmers would have expected the requirements of s. 47.1 to be respected.
>
> The rule of law must therefore inform the interpretation of s. 47.1, which sets out a process that includes consultation and a democratic vote prior to abolishing the single desk. An interpretation of s. 47.1

> that is consistent with the rule of law would give effect to the plain meaning of its words as ordinary citizens would understand and interpret them, and not in a manner that defeats the consultative purpose of s. 47.1 — particularly, given that citizens and stakeholders understood s. 47.1 to provide them with particular rights and acted in accordance with that understanding.
>
> [Footnotes excluded]
>
> (Memorandum of Fact and Law of the Council, paras. 26-28)

[28] I give weight to the Council's argument that s. 47.1 applies to changing the structure of the CWB because the democratic structure is important to Canada's international trade obligations under NAFTA. I find that this is an important consideration which supports the argument that Parliament's intention in s. 47.1 is not to alter this structure without consultation and consent.

[29] However, the Applicants' statutory interpretation, which I accept, should not be considered to the exclusion of the Minister's interpretation which focuses on the words used in s. 47.1 itself. In my opinion, the correct interpretation of the provision includes both perspectives. In my opinion, to accept the Minister's interpretation to the exclusion of the Applicants' would results in an absurdity, a condition which is to be avoided.

[30] By construing the liberal interpretation of the *Act* which best ensures the attainment of its objects, I find that the *Act* was intended to require the Minister to consult and gain consent where an addition or subtraction of particular grains or types of grain from the marketing regime is contemplated, and also in respect of a change to the democratic structure of the CWB. As the Applicants argue, it is unreasonable to interpret the *Act* to conclude that while the Minister must

consult and gain consent when extracting or extending a grain, she or he is not required to consult or gain consent when dismantling the CWB; the point is made as follows:

> … Under the Minister's interpretation of section 47.1, farmers would be denied a vote "when it is most needed", namely, in circumstances where the CWB's exclusive marketing mandate is to be eliminated. That interpretation is not only inconsistent with the principle that the words of a statute must be placed in context, but is contrary to common sense.
>
> (Applicants' Memorandum of Fact and Law in T-1735-11, para. 52)

[31] Section 39 of Bill C-18 proposes to replace the whole marketing scheme of wheat in Canada by repealing the *Act* after a transition period. I find that it was Parliament's intention in introducing s. 47.1 to stop this event from occurring without the required consultation and consent.

VI. Legitimate Expectations

[32] As an alternative argument, the Applicants maintain that the Minister has failed to meet legitimate expectations. The Supreme Court of Canada describes a legitimate expectation as follows:

> It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.
>
> (*Old St Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170, at para. 110)

During the course of oral argument, the Applicants confirmed that, should they be successful on the s. 47.1 breach argument, they would be content with that as the single result of the Applications. Therefore, I exercise my discretion not to grant the Legitimate Expectation Declaration requests.

VII. Conclusion

[33] The Minister argues that the declarations should not be granted because their effect would be meaningless. In response, I say that there are two meaningful effects of granting the Breach Declarations.

[34] The first effect is that a lesson can be learned from what has just occurred. Section 47.1 speaks, it says: "engage in a consultative process and work together to find a solution." The change process is threatening and should be approached with caution. Generally speaking, when advancing a significant change to an established management scheme, the failure to provide a meaningful opportunity for dissenting voices to be heard and accommodated forces resort to legal means to have them heard. In the present piece, simply pushing ahead without engaging such a process has resulted in the present Applications being launched. Had a meaningful consultative process been engaged to find a solution which meets the concerns of the majority, the present legal action might not have been necessary. Judicial review serves an important function; in the present Applications the voices have been heard, which, in my opinion, is fundamentally importantly because it is the message that s. 47.1 conveys.

[35] The second and most important effect is that the Minister will be held accountable for his disregard for the rule of law.

[36] I find it is fair and just to issue the Breach Declaration on each Application.

"Douglas R. Campbell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1057-11 and T-1735-11
STYLE OF CAUSE:	T-1057-11 FRIENDS OF THE CANADIAN WHEAT BOARD, ET AL. *v.* ATTORNEY GENERAL OF CANADA, ET AL. and COUNCIL OF CANADIANS, ET AL. (Interveners) T-1735-11 THE CANADIAN WHEAT BOARD, ET AL. *v.* THE MINISTER OF AGRICULTURE AND AGRIFOOD IN HIS CAPACITY AS MINISTER RESPONSIBLE FOR THE CANADIAN WHEAT BOARD and PCSC – PRODUCER CAR SHIPPERS OF CANADA INC. (PRODUCER CAR SHIPPERS), ET AL. (Interveners)
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	December 6, 2011
REASONS FOR ORDER:	CAMPBELL J.
DATED:	December 7, 2011

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