Cour fédérale

Federal Court

Date: 20070731

Docket: T-1124-07

Citation: 2007 FC 807

Ottawa, Ontario, July 31, 2007

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

THE CANADIAN WHEAT BOARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] On June 7, 2007, by Order in Council P.C. 2007-973, the Governor in Council made regulations amending the *Canadian Wheat Board Regulations*, C.R.C. 1978, c. 397 (Regulations). The amendment to section 9 (the new Regulation) of the Regulations coming into force on August 1, 2007 will remove barley and barley products (barley) from the "single desk" marketing authority of the Canadian Wheat Board (CWB).

[2] In Court file T-1124-07, the CWB argues that the new Regulation is *ultra vires* the authority of the Governor in Council and asks the Court to declare the new Regulation *ultra vires* and of no force and effect.

[3] In Court file T-1105-07, the Friends of the Canadian Wheat Board and others (the Friends) also challenge the authority of the Governor in Council to make the new Regulation and essentially ask for the same relief as the CWB.

[4] Prothonotary Aronovitch ordered that the hearing of these two judicial reviews would be expedited and heard at the same time. She also granted the Provinces of Alberta, Saskatchewan, and Manitoba intervenor status in both files.

[5] The Provinces of Manitoba and Saskatchewan support the Applicants in both files and the Province of Alberta supports the position taken by the Respondent.

[6] As the judicial reviews in the two Court files concern the same legal issues, the Applicants ask for the same relief, and the intervenors take the same positions in both files, these reasons will also apply to and will be filed as the Reasons for Judgment in Court file T-1105-07.

Background

[7] The Canadian Wheat Board is a corporation without share capital. It is not an agent of Her Majesty the Queen nor is it a Crown Corporation. Pursuant to section 5 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24 (Act), the CWB's objective is the "marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada." Under Parts III and IV of the Act, the CWB has the exclusive control over wheat produced in the designated area. In subsection 2(3) of the Act, "designated area" is defined as the area comprising the Provinces of Alberta, Saskatchewan, Manitoba, and that part of British Columbia known as the Peace River District.

[8] When the first version of the Act was enacted in 1935, the Act only applied to the marketing of wheat. At that time the CWB did not have the exclusive control over wheat. Amendments to the Act in 1947 gave the CWB the exclusive authority over the marketing of wheat. The addition of section 29(A) to the Act in 1948 gave the Governor in Council the authority to extend by regulation the application of either or both of Parts III and IV to oats or barley. It read, in part:

> 29A (1) The Governor in Council may by regulation extend the application of Part III or of Part IV or of both Parts III and IV to oats or to barley or to both oats and barley.
> (2) Where the Governor in Council has extended the application of any Part of this Act under subsection one, the provisions of the said Part shall be deemed to be re-enacted in this Part, subject to the following:
> (a) the words "oats" and "barley", as the case may be, shall be substituted for the word "wheat";
> (b) the expression "oat products" or "barley products" as the case may be, shall be substituted for the expression "wheat products";

[9] Between 1949 and 1971, the Governor in Council made regulations extending Parts III and IV of the Act to oats and barley on an annual basis for each crop year.

[10] In 1971, Parts III and IV of the Act were extended to oats and barley by an amendment to section 9 of the Regulations. The extension to oats was removed in 1989. Since that time, section 9 of the Regulations states that "Parts III and IV of the Act are hereby extended to barley."

[11] In addition to creating the new governance structure for the CWB that exists today, the 1998 amendments to the Act added section 47.1. It reads:

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.

[12] The 1998 amendments also repealed paragraph 46(b) of the Act. It read:

46. The Governor in Council may make regulations ... (b) to excluded 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;	46. Le gouverneur en conseil peut, par règlement : ... b) soustraire tout type ou grade de blé, ou le blé produit dans une région donnée du Canada, a l'application de la présente partie, totalement ou partiellement, de façon générale, ou pour une période déterminée;

[13] As noted above, on June 7, 2007, the Governor in council, pursuant to sections 46, 47 and 61 of the Act, amended the Regulations by replacing the existing section 9 with the following:

Part III of the Act is extended to barley.

[14] With this amendment, Part IV will no longer be extended to barley. As a result, although the Wheat Board will still be entitled to market barley, barley will be removed from the CWB's monopoly or, as it is known, its "single desk" authority.

The Respondent's Submissions

[15] The Respondent submits that the key regulation-making power is found in subsection 47(1) of the Act. It authorizes the Governor in Council by regulation to extend the application of certain parts of the Act to barley. It reads:

47(1) The Governor in Council may, by regulation, extend the application of Part III or of Part IV or of both Parts III and IV to oats or to barley or to both oats and barley.	47(1) Le gouverneur en conseil peut, par règlement, étendre l'application de la partie III ou de la partie IV, ou des deux, à l'avoine et à l'orge, ou à l'un des deux.

[16] Subsection 47(1) read together with subsection 31(4) of the *Interpretation Act*, R.S.C. 1985, c. I-21 provide the Governor in Council with the power to repeal the extension of the Act to barley. Subsection 31(4) of the *Interpretation Act* reads:

31(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.	31(4) Le pouvoir de prendre des règlements comporte celui de les modifier, abroger ou remplacer, ou d'en prendre d'autres, les conditions d'exercice de ce second pouvoir restant les mêmes que celles de l'exercice du premier.

[17] Further, as provided in subsection 3(1) of the *Interpretation Act*, this statutory presumption may only be displaced by a contrary intention that is clear and unambiguous. Subsection 3(1) reads:

3(1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.	3(1) Sauf indication contraire, la présente loi s'applique à tous les textes, indépendamment de leur date d'édiction.

[18] The Respondent maintains that in this instance Parliament has not expressed a contrary intention.

[19] The Respondent also submits that this position is consistent with Justice Rothstein's consideration of the applicability of subsection 31(4) to the Act in *Saskatchewan Wheat Pool v. Canada (Attorney General)*, [1993] F.C.J. No. 902 (F.C.T.D.) (QL). At paragraphs 35 and 36, Justice Rothstein stated:

> 35. In extending the application of Parts III and IV of the *Canadian Wheat Board Act* to barley, the Governor in Council is acting by regulation. I can see no reason why subsection 31(4) of the *Interpretation Act* would not enable the Governor in Council, if he chose to do so, to repeal the extension of Parts III and IV to barley.
>
> 36. At this point in time, section 9 of the *Canadian Wheat Board Regulations*, C.R.C. 1978, c. 397, as amended, extends Part III and IV of the *Canadian Wheat Board Act* to barley. The Governor in Council has not acted to repeal this extension, but I see no reason why he could not do so provided it was done in accordance with relevant provisions of the *Canadian Wheat Board Act* and subsection 31(4) of the *Interpretation Act*.

[20] Contrary to the Applicants' submissions, the Respondent argues that these statements by Justice Rothstein are an integral part of the decision and are not *obiter dicta*. The Respondent grounds this assertion of the following analysis.

[21] The issue in *Saskatchewan Wheat Pool* was whether the Governor in Council could by regulation deregulate the interprovincial marketing of barley and the export and import of barley to or from the United States. The regulations at issue partially deregulated the single desk for barley. That is, barley producers could sell their barley to buyers in the United States without going through the CWB.

[22] In his decision, Justice Rothstein noted the similarity between the provisions of the former section 29A and the statutory authority in section 47 of the Act empowering the Governor in Council by regulation to extend the application of Parts III and IV to oats and barley. At paragraph 22, Justice Rothstein stated:

> … Parliament thought it best to maintain flexibility and leave it to the Governor in Council to act by regulation to extend the Canadian Wheat Board's exclusive authority over oats and barley.

[23] Following a recital of the provisions of section 29A, he stated at paragraph 24:

> 24. Thus while it was left to the Governor in Council, in his discretion, to extend or not extend Parts III and/or IV of the Act to oats and/or barley, once they were extended, those Parts were deemed re-enacted so as to apply to oats and/or barley. The effect of the words of subsection 29A(2) was to apply Parts III and/or IV, only with the necessary modifications to recognize that those Parts were applicable to oats and/or barley. No other changes to Parts III and IV other than those envisaged by section 29A were authorized. The Governor in Council was not vested with the authority to amend Parts III and IV.

[24] The Respondent maintains that the preceding quote is the crux of the decision. The Governor in Council has a limited authority, namely, to extend the single desk to barley in its entirety or to repeal that extension in its entirety. The Governor in Council does not have the authority to alter any one aspect of the single desk regime set out in Part IV of the Act.

[25] Following a review of the history of the manner in which the Act was extended by regulation to barley, Justice Rothstein states at paragraphs 30 to 33:

> 30. I refer to the annual making of regulations because the applicants in this case argue that the Governor in council, in acting under section 29A, now section 47, is, in effect, promulgating the coming into force of legislation governing the Canadian Wheat Board's authority over barley and that once exercised, the power is spent. In other words, the Governor in Council cannot revoke the extension of Parts III and IV once he has extended them and that it is only Parliament that can revoke the Board's authority over barley.

> 31. The inference I draw from the annual extensions of Parts III and IV to oats and barley is that the Governor in Council could act by regulation to extend the Board's exclusive control over the marketing of oats and barley in a crop year if he chose to do so; however, if in any crop year the Governor in Council chose not to do so, the Board would not have control over oats and barley for that crop year and would continue not to have control until the Governor in Council decided to extend the application of Parts III and IV at a later date.
>
> 32. This view is supported by the fact that section 29A has been re-enacted as a continuing enabling provision as section 47 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended.
>
> 33. This leads me to the conclusion that the extension of Parts III and IV to oats and barley is a regulatory action of the Governor in Council. It is not analogous to the promulgation of a statute and the regulatory power is not spent once it is acted upon by the Governor in Council.

[26] Based on the above, the Respondent says that the finding in sections 35 and 36 is integral to the decision since Justice Rothstein ultimately decided that the challenged regulation was *ultra vires* as it partially deregulated barley from the single desk, a power not given to the Governor in Council under section 47 and 31(4).

[27] The Respondent also points to paragraph 62 as another key aspect of the decision where Justice Rothstein finds that while section 47 gives the Governor in Council the power to extend Parts III and IV to barley, that is the extent of the regulatory power conferred. Parts III and IV of the Act cannot be changed because of the deemed re-enactment provisions.

[28] Finally, the Respondent also refers the Court to paragraphs 66 and 67 of the decision. They read:

> 66. I earlier indicated that it was my view that section 47 of the *Canadian Wheat Board Act* and subsection 31(4) of the *Interpretation Act*, confer on the Governor in Council the power to revoke the extension of Parts III and IV of the *Canadian Wheat Board Act* to barley. I was somewhat troubled by the proposition that the Act allowed the Governor in Council to completely deregulate barley but not deregulate it in part as has been attempted here. I have carefully reviewed section

> 47 to see if there was a necessary implication that barley could be partially deregulated by the Governor in Council. I cannot see how this can be the case. When Parts III and IV of the *Canadian Wheat Board Act* are extended to barley, they are deemed re-enacted. It is beyond the authority of the Governor in Council to amend Parts III and IV, which is what is implied by partial deregulation.
>
> 67. I can only conclude that Parliament was prepared to permit the Governor in Council only to decide whether or not the interprovincial and export trade in barley should be subject to the same regulatory regime set forth in the Act as was applicable to wheat. If the Governor in Council decided upon the deregulatory approach, the Canadian Wheat Board would not trade in barley and there would be no licencing system applicable. There would be an open or free market in barley. However, if the Governor in Council decided to regulate barley, it would involve the board having exclusive control over the marketing of barley either by trading in the commodity itself or by licencing others to do so. The Act does not contemplate partial deregulation by the Governor in Council as was attempted by Order in Council P.C. 1993-1399.

[29] The Respondent acknowledges that the *Saskatchewan Wheat Pool* decision does not end the debate. The question today is whether anything has transpired since 1993 that alters or displaces the conclusion reached by Justice Rothstein. The Respondent maintains that nothing has occurred that would undermine the conclusion.

[30] The Respondent submits that when the 1998 amendments were passed, Parliament must be taken to have been aware of the presumption found in section 31(4) and the outcome in the *Saskatchewan Wheat Pool* case. The Respondent also submits that in 1998 it would have been open to Parliament to repeal the regulation making power in section 47 or the presumption in subsection 31(4) but it was not done.

[31] The Respondent also takes the position that the Act contemplates two distinct regimes for changing the scope of its application. First, pursuant to the combined operation of section 47 and subsection 31(4) the Governor in Council has the authority to extend or revoke the application of

Part III or Part IV, or both Parts III and IV, to oats or barley by regulation. Second, pursuant to section 47.1, Parliament may extend or revoke the application of the Act to any grain including wheat and barley. However, if a bill is introduced to alter the application of Part IV to wheat or barley in any way, or to extend the application of Parts III and IV, or both Parts III and IV to any other grain, then section 47.1 requires that two conditions precedent be met.

[32] The Respondent argues that the duality of regimes interpretation finds further support in the fact that the new unproclaimed section 47 maintains the ability of the Governor in Council to extend or repeal the extension of Parts III or IV, or both Parts III and IV to barley. As well, subsection 47(5) requires conditions parallel to those found in section 47.1 to be satisfied before the Minister recommends making a regulation to the Governor in Council.

[33] Finally, the Respondent characterizes the power under section 47.1 as being much broader than the very limited power conferred on the Governor in Council by operation of section 47 and subsection 31(4). Subject to certain conditions, it gives the power to Parliament to include any grain, for example canola, in the single desk of the CWB. Similarly, the powers to exclude in section 47.1 are much broader than the limited power to exclude under section 47. In 47.1, the power to exclude is not just to wheat and barley but any kind, type, class or grade of wheat and barley produced anywhere in Canada. As Justice Rothstein stated in *Saskatchewan Wheat Pool*, the Governor in Council's power does not permit it to partially deregulate by taking one type of barley out of the single desk but not another or to take barley grown in Alberta out of the single desk but not barley grown in the other two prairie provinces. These powers are reserved to Parliament under

section 47.1. In contrast, the powers under section 47 are simply an "on" and an "off" switch, the Governor in Council may extend the application of the Act to barley or may repeal the extension of the Act to barley.

Analysis

[34] Before turning to an analysis of the validity of the specific Regulation at issue in the present case, it is worthwhile to review certain principles in relation to subordinate legislation and statutory interpretation.

[35] It is well established that those who are granted the power by Parliament to enact subordinate legislation must exercise that power in accordance with the enabling statute. As sated by Justice Estay in *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2. S.C. R. 735:

> … However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

[36] In *Bay Travel Centre Ltd. v. Registrar of Travel Services et al.* (1981), 126 D.L.R. (3d) 685, Chief Justice McLachlin, as a Judge of the British Columbia County Court, abstracted the following principles from prior Supreme Court of Canada jurisprudence. At paragraph 24 she states;

> It is well-established that Regulations may neither exceed nor be inconsistent with the statutory provisions under which they are made. If they do, they constitute attempts to legislate by adding to or amending the statute, and will be held to be *ultra vires*: *Belanger v. The King*, (1916) 34 D.L.R. 221; 54 S.C.R. 265. The delegated authority must be exercised strictly and in accordance with the enabling

> statute; Regulations may neither enlarge nor abridge the scope or substance of the delegated power: *King v. National Fish Co. Ltd.* (1931) Ex. C.R. 75. The proper method of construction is to read the enabling statute together with the Regulations, so that any excess of power assumed by the body entrusted with the duty of making the Regulations is revealed: *King v. National Fish Co. Ltd., supra.*

[37] In *Waddell v. Schreyer et al.* (1983), 5 D.L.R. (4th) 254; *Waddell v. Canada (Governor in Council),* [1983] B.C.J. No. 2017 at paras 28, 29 and 30, Justice Lysyk made a number of observations that are helpful in this analysis. He stated:

> 28. In determining the scope of a power or discretion delegated by Parliament it may be necessary to look beyond the literal terms of the particular delegating provision of the enactment to ascertain limitations on that power or discretion which must have been intended by Parliament. ...
>
> 29. Rephrased in terms less charged than evasion of an Act of Parliament, the underlying principle is familiar enough. In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.
>
> 32. ... the delegate may not frustrate or evade the Act of Parliament or exercise his discretionary powers arbitrarily or otherwise than in accordance with the purposes or objects of the enactment. The delegate must not only stay within the literal terms of the delegating provision but must respect, as well, restrictions upon his mandate that are implicit in the legislative scheme considered in its entirety.

[38] It is also well established that regulations passed pursuant to the authority of an Act cannot operate as an amendment of that statute. As the Court of Appeal stated in *Bell Canada v. Challenge Communications Limited*, [1979] 1 F.C. 857 at para. 14:

> 14. ... Where there is a conflict between one of the provisions of a statute and a regulation passed there under, the statute itself is treated as supplying the governing consideration and the regulation is treated as being subordinate to it. ...

[39] As to the principles of statutory interpretation, in *NAV Canada v. Wilmington Trust Co.*, [39] 1 S.C.R. 865 (S.C.C.) at para. 36, the Supreme Court of Canada reiterated the fundament principle of statutory interpretation, namely, that "the words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

[40] With these principles in mind, I will now turn to an analysis as to whether the new Regulation is *ultra vires*.

[41] As reviewed earlier, the Respondent's position that the new Regulation is valid is grounded on the combined operation of section 47 of the Act and subsection 31(4) of the *Interpretation Act*, reliance on the *Saskatchewan Wheat Pool* decision, and the absence of a contrary intention that would displace the statutory presumption in subsection 3(1) of the *Interpretation Act*.

[42] Turning first to the *Saskatchewan Wheat Pool* case, for the purpose of this analysis it is not necessary to decide whether paragraphs 35 and 36 of the decision are *obiter* or the *ratio* of the case. Even if a conclusion is reached that paragraphs 35 and 36 reflect the *ratio* of the decision, the question still remains whether anything has transpired subsequent to Justice Rothstein's decision that would give rise to a different result today.

[43] In particular, the question is whether section 47.1 and the repeal of subsection 46(b) reflect a contrary intention of Parliament to the use of section 47 and subsection 31(4) as the authority to repeal the Regulation extending the application of Part IV of the Act to barley.

[44] The Respondent argues that a contrary intention as contemplated is subsection 3(1) must be clear and unambiguous. In my view, this is not a correct statement of the law. In *Bank of Montreal v. Gratton* 1987, 45 D.L.R. (4th) 290 at p. 294, the British Columbia Court of Appeal in the context of considering the same phrase in the provincial legislation held:

> ... The contrary intention need not be found in express words, but may be inferred from the scheme of the enactment, its legislative history and other circumstances which surround the use of the word in question. Although the Interpretation Act does not use the words "the context otherwise requires", the conclusion that a contrary intention appears may be based on the fact that the context otherwise requires.

[45] The first task in statutory interpretation is to discern the ordinary sense or meaning of the relevant provision. In the present case, section 47 expressly provides the Governor in Council with the authority to extend the application of Parts III and IV or either of them to barley. Section 47 does not expressly refer to the exclusion of barley or any grain. Section 47.1, however, expressly provides that barley may be excluded from the application of the Act. As well, in section 47.1, Parliament reserved to itself the power to exclude barley provided that certain conditions were met. Within the Act itself, there is no express delegated authority to the Governor in Council to exclude barley. Read together in their ordinary sense, the power to include barley is delegated to the Governor in Council, but the power to exclude is reserved to Parliament.

[46] The parties tendered a great deal of evidence surrounding the legislative history comprising primarily of excerpts from Hansard. I have not found this evidence to be particularly helpful in discerning Parliament's intention at the time it passed the 1998 amendments. In many instances, the specific amendment being discussed could not be identified with any degree of certainty.

[47] In contrast, the evolution of the legislation in terms of the express provisions dealing with the inclusion and exclusion of grain is helpful. Prior to the 1998 amendments when section 47.1 was added to the Act, subsection 46(b) of the Act specifically authorized the exclusion of wheat, and barley by virtue of the re-enactment provision, by regulation without the need to rely on the *Interpretation Act*. Subsection 46(b) was repealed at the same time section 47.1 was added to the Act. The language of section 47.1 is similar to the language of the repealed subsection 46(b) except for one key difference, subsection 46(b) provided for exclusion by regulation and section 47.1 provides for exclusion by Parliament. The simultaneous repeal of section 46(b) and the enactment of section 47.1 supports the view that at the time of the amendments Parliament intended to revoke the Governor in Council's power under section 47 to exclude barley and other grains from the application of Parts III and IV of the Act.

[48] The Respondent argues, however, that the Governor in Council's power to exclude barley from the application of Parts III and IV under section 47 is not at odds with the power reserved to Parliament under section 47.1. This argument is premised on the Respondent's assertion that

Parliament intended and the Act contemplates two distinct regimes for changing its application, a very narrow regulatory power and a much broader statutory power. As such, the two powers can co-exist harmoniously. I reject this argument. The Respondent characterizes the very narrow power under section 47 as an "on" and an "off" switch. While this may have been the case prior to the 1998 amendments, when section 47.1 is read with a view to ascertaining the scope of the provision in relation to barley, one of the powers expressly reserved to Parliament is the exclusion of barley from the application of the Act. This specific enactment takes precedence over the power to exclude by regulation created by the operation of section 47 and subsection 31(4).

[49] There is also the matter of the new section 47 that was enacted in 1998 but not proclaimed in force. The relevant provisions state:

> 47. (1) The Governor in Council may, by regulation, on the recommendation of the Minister, extend the application of Part III or of Part IV or of both Parts III and IV to barley.
> (2) Where the Governor in Council has extended the application of any Part under subsection (1), the provisions of that Part shall be deemed to be re-enacted in this Part,
> ...
> (5) The Minister shall not make a recommendation referred to in subsection (1) unless
> (a) the Minister has consulted with the board about the extension; and
> (b) the producers of barley have voted in favour of the extension, the voting process having been determined by the Minister.

[50] The Respondent argues that the existence of this new section 47 goes against a finding that section 47.1 reflects a contrary intention. In my opinion, even if the new section 47 was in force, it would not materially alter the outcome of these applications. The language of the existing section 47 only speaks of extension. It contains no express language of exclusion. On its face, other than adding the requirements of consultation with the Board and a vote by barley producers,

the new section 47 would do nothing more than continue to permit Parts III and IV to be extended to barley by regulation. As with the existing section 47, a regulatory power to exclude could only be grounded on the combined operation of the new section 47 and subsection 31(4) of the *Interpretation Act*.

[51] It is also important to look at the purpose underlying the repeal of section 9 of the Regulations. Section 9 of the Regulations was initially passed to include barley in the application of Parts III and IV of the Act. Although on its face, the new regulation simply extends the application of Part III to barley, by repealing the former section 9 of the Regulations and replacing it with the new section 9, in effect, the Governor in Council has excluded barley from the CWB's single desk authority. This power is expressly reserved to Parliament in section 47.1.

[52] In my opinion, in 1998, Parliament did not intend to create two alternative regimes for the exclusion of barley from the Act. Instead, I conclude that the 1998 amendments were intended to create separate self-contained processes, one to extend the Act to barley and one to exclude barley from the Act. The inclusion of section 47.1 reflects a contrary intention by Parliament that displaces the statutory presumption in subsection 31(4) of the *Interpretation Act*.

Conclusion

[53] For the above reasons, I conclude that the new Regulation is *ultra vires* and of no force and effect.

JUDGMENT

THIS COURT ORDERS AND DECLARES that:

1. The judicial review is allowed with cost to the Applicant.

2. Section 9 of the *Canadian Wheat Board Regulations*, C.R.C. 1978, c. 397 is *ultra vires* and of no force and effect.

"Dolores M. Hansen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1124-07
STYLE OF CAUSE:	THE CANADIAN WHEAT BOARD v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	July 25 and 26, 2007
REASONS FOR ORDER:	HANSEN, J.
DATED:	July 31, 2007

APPEARANCES:

Mr. John Lorn McDougall, Q.C. Mr. Brian R. Leonard Mr. Matthew Fleming	FOR THE APPLICANT
Mr. Dave Hill Mr. Stephen Vincent	FOR THE RESPONDENT
Mr. Alan Ladyka	FOR THE INTERVENOR (MANITOBA)
Mr. Don McKillop, Q.C.	FOR THE INTERVENOR (SASKATCHEWAN)
Mr. Allan Meikle	FOR THE INTERVENOR (ALBERTA)

SOLICITORS OF RECORD:

Fraser Milner Casgrain LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT
Deputy Attorney General of Manitoba	FOR THE INTERVENOR (MANITOBA)
Deputy Attorney General of Saskatchewan	FOR THE INTERVENOR (SASKATCHEWAN)
Deputy Attorney General of Alberta	FOR THE INTERVENOR (ALBERTA)