

Court File No. T-1124-07

**FEDERAL COURT**

B E T W E E N :

**THE CANADIAN WHEAT BOARD**

Applicant

and

**ATTORNEY-GENERAL OF CANADA**

Respondent

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

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

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.

June 18, 2007

Issued by:

*Robert M'Vondo*

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

Robert M'Vondo  
REGISTRY OFFICER  
AGENT DU GREFFE

TO:

**ATTORNEY-GENERAL OF CANADA**

Federal Office  
310 Broadway, 3<sup>rd</sup> Floor  
Winnipeg, Manitoba  
R3C 0S6

I HEREBY CERTIFY that the above document is a true copy of  
the original issued out of / filed in the Court on the \_\_\_\_\_

day of JUN 18 2007 A.D. 20\_\_\_\_

Dated this \_\_\_\_\_ day of JUN 18 2007

*Robert M'Vondo*  
REGISTRY OFFICER  
AGENT DU GREFFE

## APPLICATION

This is an application for judicial review in respect of order in council P.C. 2007-937 dated June 7, 2007 pursuant to which the Governor in Council (“GIC”) promulgated the *Regulations Amending the Canadian Wheat Board Regulations* (the “Impugned Regulations”) amending the *Canadian Wheat Board Regulations*, C.R.C., c. 397 (the “CWB Regulations”), ostensibly in accordance with the authority granted to the GIC pursuant to sections 46, 47 and 61 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended (the “Act”). The Impugned Regulations purport to remove barley from the application of Part IV of the Act and from the “single desk” marketing authority of the Canadian Wheat Board (the “CWB”).

1. The applicant makes application for:
  - (a) a declaration that the Impugned Regulations are unlawful and *ultra vires* the authority granted to the GIC pursuant to sections 46, 47 and 61 of the Act and accordingly are of no force and effect;
  - (b) in the alternative to (a) above, a declaration that the GIC acted beyond its jurisdiction or without jurisdiction in making the Impugned Regulations;
  - (c) if necessary, an interlocutory order staying the operation of the Impugned Regulations pending the determination of their validity by this Honourable Court;
  - (d) 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;
  - (e) its costs of the application; and
  - (f) such further and other relief as this Honourable Court deems just.

2. The grounds for the application are:

*Overview*

- (a) Created by the Act, the CWB's single desk (the "Single Desk") is the means by which western Canadian farmers market the wheat (including durum wheat) and barley they produce both in Canada and throughout the world. The core component of the Single Desk is established in Part IV of the Act.
- (b) Amendments to the Act in 1998 transferred operational control over the CWB from the federal government to western Canadian wheat and barley producers. Key among these amendments was the addition of section 47.1 which established that wheat or barley may be removed from the application of Part IV of the Act only by way of valid legislation enacted by Parliament, preceded by consultations with the board of directors of the CWB and a majority vote of producers in favour of the exclusion of the grain from Part IV of the Act.
- (c) 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 and barley but its minority status has prevented it from enacting legislation to carry that into effect. By enacting the Impugned Regulations the GIC has unlawfully attempted to circumvent the requirements of the Act, and in particular section 47.1 thereof, and to create an open market for barley by regulatory amendment rather than legislative change.



*The CWB, its Statutory Object and the 1998 Amendments to the Act*

- (d) The CWB is a statutory corporation continued pursuant to the provisions of the Act which expressly provides that, *inter alia*, the CWB is not an agent of Her Majesty or a Crown corporation. Section 5 of the Act establishes that the object of the CWB is the marketing in an orderly manner, in interprovincial and export trade, of grain grown in Canada.
- (e) Part III of the Act provides for the pooling of all grain delivered to the CWB by producers, which is classified as being a particular type, grade, class and quality of wheat or barley. Price pooling ensures that each producer receives the same payment for the same grain delivered at the same location in the designated area regardless of when during the crop year that grain is delivered.
- (f) Part IV of the Act prohibits any person other than the CWB from engaging in the sale of wheat, durum or barley that is destined for export or for human consumption within Canada, subject to certain limited exceptions.
- (g) Amendments to the Act made by Parliament in 1998 (the “1998 Amendments”) transferred the authority to direct and manage the business and affairs of the CWB from federal government appointees to a new fifteen member board of directors (the “Board”), ten members of which are elected directly by western Canadian wheat and barley producers. The statutory powers of the CWB were vested in the Board with the result that federal government has no involvement in the CWB’s day-to-day operations.

(h) The intent and effect of the 1998 Amendments was to transform the CWB from an entity controlled by and accountable solely to the federal government to a farmer-controlled enterprise accountable to the western Canadian wheat and barley producers who elect the majority of the Board.

(i) The 1998 Amendments also included the addition of section 47.1 of the Act, which provides as follows:

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

(a) the Minister has consulted with the board about the exclusion or extension; and

(b) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.

(j) Section 47.1 requires that legislation be enacted in order to remove a grain from the CWB's Single Desk marketing authority but ensures that the ultimate decision to remove the grain is reserved to farmers.

***Government Policy Regarding the CWB and the Promulgation of the Impugned Regulations***

(k) Following the federal election in 2006, the Conservative Party of Canada formed the Government. Thereafter, the Minister of Agriculture and Agri-Food and Minister Responsible for the Canadian Wheat Board (the "Minister"), among other members of the Government, embarked on a policy 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 prevented it from taking legislative action to fulfil its stated intention.

- (l) On March 28, 2007, following a non-binding, three-option plebiscite conducted on the questionable premise that it is possible for the CWB to survive in an open market without the Single Desk, the Minister announced that the Government would amend the CWB Regulations to remove barley from the CWB's Single Desk.
  
- (m) Following the publishing of proposed amendments to the CWB Regulations in the *Canada Gazette* on April 21, 2007 and the expiry of the 30 day comment period, the GIC made the Impugned Regulations on June 7, 2007. The Impugned Regulations contemplate that Part IV of the Act will no longer apply to barley effective August 1, 2007.

***The Impugned Regulations are Ultra Vires***

- (n) The GIC has no power or authority pursuant to the Act to exclude barley from the application of Part IV of the Act by way of regulation.
  
- (o) The scheme of the Act, and in particular section 47.1, requires that the exclusion of barley from the application of Part IV of the Act may only be carried out through the enactment by Parliament of valid legislation, following consultation



with the Board and a majority vote of barley producers in favour of barley's removal from the Single Desk.

- (p) Accordingly, the Impugned Regulations are *ultra vires* the authority of the GIC.

***The Urgency of this Application***

- (q) In 1993 the GIC made regulations (the "1993 Regulations") creating what was referred to as the "Continental Barley Market". In essence, the 1993 Regulations created an exception to the general prohibitions against the interprovincial and export trade of barley established in the Act by permitting barley producers and others to sell barley grown in Canada directly to customers in the United States without delivering their barley to the CWB or obtaining a license from the CWB.
- (r) However, the 1993 Regulations were subsequently found by this Honourable Court to be *ultra vires* the GIC's authority under the Act. In the result, producers and other industry participants who had entered into contracts following the enactment of the 1993 Regulations were unable to fulfil their contractual obligations to deliver barley following the determination by this Honourable Court that the 1993 Regulations were invalid.
- (s) Should the Impugned Regulations be found to be invalid following the implementation date of August 1, 2007, as was the case with the 1993 Regulations, producers and other industry participants who entered into contracts on the assumption that the Single Desk for barley was or would be abolished, will

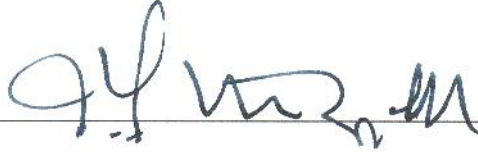


almost certainly be unable to fulfill their contractual supply obligations without being in breach of the law. Thus, an expeditious resolution of this proceeding is needed to minimize the disruption and cost associated with a finding that the Impugned Regulations are unlawful.

- (t) In addition, the Minister's March 28<sup>th</sup> announcement of his intention to amend the CWB Regulations to remove barley from the Single Desk, together with the enactment of the Impugned Regulations, has had and continues to have a significant impact on the CWB's ability to effectively carry out its operations under the Act.
- (u) The validity of the Impugned Regulations raises a serious issue requiring expeditious resolution by this Honourable Court, as the CWB is suffering irreparable harm as a result of the promulgation of the Impugned Regulations, and the balance of convenience favours the issuance of an injunction staying the operation of the Impugned Regulations pending this Honourable Court's determination as to their validity.
- (v) The *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended.
- (w) The *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.
- (x) 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 Ward P. Weisensel, sworn, and the exhibits thereto; and
- (b) such further and other material as counsel may advise and this Honourable Court may accept.



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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 \_\_\_\_\_

day of **JUN 18 2007** A.D. 20 \_\_\_\_\_

Dated this \_\_\_\_\_ day of **JUN 18 2007** 20 \_\_\_\_\_



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