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

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

WRITTEN REPRESENTATIONS OF THE APPLICANT

(Motion Returnable July 5, 2007)

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PART I: OVERVIEW

1. This motion arises in the context of an application for judicial review 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"). The Impugned Regulations purport to remove barley from the application of Part IV of the *Canadian Wheat Board Act*, R.S.C. 1985, c.C-24, as amended (the "Act") and from the "Single Desk" marketing authority of the Canadian Wheat Board ("CWB").

2. In the application the following relief, *inter alia*, is sought:

(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; and

(c) an order for an expedited hearing of the application and granting such further and other ancillary relief necessary to give effect to such an order.

3. As set out in the application, it is the position of the CWB that by enacting the Impugned Regulations, the GIC has unlawfully attempted to circumvent the requirements of the Act, and, in particular, section 47.1 thereof, to create an open market for barley by regulatory amendment rather than legislative change.

4. This motion is for an Order:

(a) directing that the application for judicial review in court file T-1105-07 (the "Friends Application") be heard together with this proceeding (collectively, the "Applications") or one immediately after the other and granting such further and other ancillary relief necessary to give effect to such an order;

(b) abridging the period for the hearing of the Applications and setting an expedited hearing date and timetable for the remaining steps in the Applications; and

(c) appointing a case management judge to oversee the conduct of the Application.

PART II – THE FACTS

The CWB's Statutory Object, Powers and Operations

5. The CWB is a corporation without share capital continued under the Act. Subsection 4(2) of the Act expressly provides that the CWB is not an agent of Her Majesty the Queen and is not a crown corporation.

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, as amended, sections 3 and 4.

6. As set out at section 5 of the Act, the CWB's statutory mandate is to "market in an orderly manner, in interprovincial and export trade, grain grown in Canada". The CWB fulfils its statutory object through three foundational pillars provided for in the Act: (i) single desk selling; (ii) price pooling; and (iii) the guarantee by the federal government of initial payments to producers and the CWB's borrowings in that regard.

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, as amended, section 5 and Parts II, III and IV.

7. The core component of the CWB's Single Desk is established under Part IV of the Act and the regulations enacted there under, which prohibit anyone other than the CWB from engaging in the interprovincial or export trade of wheat or barley, subject to certain limited exceptions.

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, as amended, Parts III and IV.

The 1998 Amendments to the Act

8. Following amendments to the Act in 1998, the board of directors (the "Board") of the CWB assumed overall responsibility for the direction and management of the business and affairs of the CWB. Prior to that time, the CWB was directed by 3 to 5 Commissioners appointed by the federal government. The Board is now comprised of 10 directors elected directly by producers, 4 directors appointed by the GIC and 1 director who is also the president and chief executive officer of the CWB and is appointed by the GIC following consultation with the Board, which must approve the president's salary.

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, as amended, sections 3.01, 3.02 and 3.09.

Affidavit of Ward P. Weisensel, sworn June 19, 2007 (the "Weisensel Affidavit") at paras. 27-29.

9. 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.

Weisensel Affidavit at paras. 32-43.

10. 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.

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, as amended, section 47.1.

11. 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.

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, as amended, section 47.1.

Weisensel Affidavit at para. 33.

The Impugned Regulations and the Urgency of this Application

12. On March 28, 2007, following a non-binding, three-option plebiscite and without consultation with the CWB, the Minister announced that the Government would amend the CWB Regulations to remove barley from the CWB's Single Desk.

Weisensel Affidavit at paras. 13 and 55-59.

13. 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 provide that Part IV of the Act will no longer apply to barley effective August 1, 2007.

Weisensel Affidavit at paras. 69 and 90.

14. The Minister's announcement of an August 1st implementation date for an open barley market has created a significant degree of uncertainty in the barley market. In 1993, the GIC issued an order in council amending the CWB Regulations in order to create what was referred to as the "Continental Barley Market". In essence, these amendments permitted producers and

others to sell barley produced in Canada directly to customers in the United States, rather than being required to deliver their barley to the CWB.

Weisensel Affidavit at para. 24 and 86-87.

15. Following an application for judicial review to the Trial Division of the Federal Court, the amendments to the regulations were declared to be unlawful as being outside the scope of the GIC's authority under the Act (the "1993 Decision"). However, between the issuance of the order in council on June 21, 1993 amending the regulations and the 1993 Decision released on September 10, 1993, producers and other industry participants had entered into contracts with customers in the United States for the sale of barley. Ultimately, the 1993 Decision brought an end to the Continental Barley Market and resulted in participants being unable to meet their contractual obligations to deliver grain to U.S. customers. In the result, producers and a number of grain companies incurred significant losses attributable to the implementation and subsequent unwinding of the Continental Barley Market.

Weisensel Affidavit at para. 25.

16. In addition, 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 in two key ways: (i) the CWB has not been able to obtain sufficient deliveries from farmers in order to fulfil existing contracts; and (ii) the CWB's ability to effectively market barley on behalf of producers has been impaired.

Weisensel Affidavit at paras. 78-87.

The Status of the Applications

17. On June 13, 2007 the notice of application in the Friends Application was served and filed in Winnipeg. The applicants in the Friends Application also seek an order that the Impugned Regulations are *ultra vires* the authority granted to the GIC under the Act. In addition, the Friends Application seeks a declaration that the GIC acted contrary to law by making the Impugned Regulations in a manner that is contrary to section 47.1 of the Act.

> *Notice of Application, Friends of the Canadian Wheat Board et al. v Attorney General of Canada*, Court File No. T-1105-07 at para. 1.

18. On June 18, 2007 the notice of application in this proceeding was served and filed in Winnipeg. On June 19, 2007, the affidavit of Ward P. Weisensel, the Chief Operating Officer of the CWB, was served on the respondent.

> *Notice of Application, The Canadian Wheat Board v. Attorney General of Canada*, Court File No. T-1124-07.

PART III – THE ISSUES

19. Given the effect that the Impugned Regulations have on the ability of the CWB to carry out its statutory obligations and on the barley market generally, and given the impending August 1, 2007 implementation date, the issues raised in the within motion are as follows:

(a) whether the Applications should be heard together;

(b) whether urgent circumstances or other valid reasons exist justifying an order for an expedited hearing and setting a timetable for the remaining steps in the Applications; and

(c) whether in the circumstances of this proceeding, sufficient reasons exist which warrant the designation of the Applications as specially managed proceedings and the appointment of a case management judge to manage the conduct of the application.

PART IV – LAW AND ARGUMENT

The Applications Should be Heard Together

20. Rule 105 provides that the Court may order, in respect of two or more proceedings, that they be heard together or heard one immediately after the other.

> Rule 105, *Federal Courts Rules*, SOR/98-106, as amended.

21. The Court has inherent jurisdiction to order that proceedings be arranged in a manner that simplifies their conduct and reduces costs for the parties and the Court in the absence of substantial prejudice to one of the parties.

> *Apotex Inc. v. Wellcome Foundation Ltd.* (1993), 69 F.T.R. 178, 1993 CarswellNat 386 (F.C.T.D.) at para. 13.

22. In determining whether proceedings should be heard together or one heard immediately following the other, the Court will consider whether there are common parties, common legal and factual issues, similar causes of action, parallel evidence and the likelihood that the outcome of one case will resolve the other.

> *Global Restaurant Operations of Ireland Ltd. v. Boston Pizza Royalties Ltd.*, 2005 FC 317, 38 C.P.R. (4th) 551, 2005 CarswellNat 575 (F.C.) at para. 11.

23. Proceedings will be ordered heard together even where there are differences in the legal issues raised in each, particularly where there are common parties, the factual background is the same and it would be duplicative and inefficient to have two different judges canvass and analyze the same information.

> *Global Restaurant*, *supra* at paras. 17 and 18.

24. In the circumstances, the Applications should properly be heard together for the following reasons:

(a) there are common legal and factual issues, key among them, whether in the circumstances, the Impugned Regulations were validly enacted;

(b) the Applications seek similar relief;

(c) the respondent to the Applications is the same and is represented by the same counsel;

(d) the resolution in this application of the validity of the Impugned Regulations will resolve the same issue in the Friends Application; and

(e) there will be overlapping evidence related to the process by which the Impugned Regulations were made.

The Circumstances of this Proceeding Justify an Expedited Hearing and Timetable

25. Rule 8 provides that a Court may abridge a period provided by the Rules.

Federal Court Rules, S.O.R. 2004/283, rule 8.

26. An order expediting proceedings will be granted where a party seeking to expedite the matter demonstrates urgency or other reasons justifying such an order.

Pearson v. Canada, [2000] F.C.J. No. 246 (F.C.T.D.) (Q.L.) at para. 15.

27. A proceeding will also be expedited where the respondent will not be prejudiced as a result of the truncation of the time limits under the Rules.

Apotex Inc. v. Wellcome Foundation Ltd., (1998), 228 N.R. 355, F.C.J. No. 859 (F.C.A.) (Q.L.) at paras. 3-4.

28. Where an issue in a proceeding is a "serious and important one" and it is in the "in the interest of justice that [the] issue be heard and disposed of" prior to a party potentially suffering prejudice as a result of the decision under review, proceedings will be expedited in the interests of justice.

Del Zotto v. Canada (Minister of National Revenue), [2000] 257 N.R. 56, F.C.J. No. 573 (F.C.A.) (Q.L.) at paras. 7-8.

29. The factual issues for the court's determination on this application will, for the most part, not be in dispute, with the result that the exchange of affidavits and any cross-examinations may be concluded in a timely fashion. In the result, the respondent will not be prejudiced by an order setting an expedited hearing date.

30. Moreover, the validity of the Impugned Regulations is a serious and important issue with ramifications which extend beyond the immediate dispute between the CWB and the federal government, to the western Canadian barley market as a whole and the farmers and other industry participants who carry on business in that market.

Weisensel Affidavit at paras. 24-26 and 63-87.

31. Uncertainty and financial losses similar to those associated with the creation and subsequent unwinding of the Continental Barley Market may be minimized in this case by an expeditious resolution of this proceeding. Accordingly, the interests of justice dictate that this matter be heard as soon as possible to minimize disruption in the western Canadian barley market.

Weisensel Affidavit at paras. 24-26 and 63-87.

Appointment of a Case Management Judge

32. Rule 384 provides that a party to a proceeding may at any time bring a motion to have the proceeding managed as a specially managed proceeding.

Federal Courts Rules, S.O.R. 2004/283, rule 384.

33. Rule 385 provides that a case management judge shall deal with all matters that arise prior to the hearing of a specially managed proceeding and may give any directions that are

necessary for the just, most expeditious and least expensive determination of the proceeding on its merits. A case management judge may also fix the period for the completion of subsequent steps in the proceeding and conduct any dispute resolution conferences considered necessary.

Federal Courts Rules, S.O.R. 2004/283, rule 385.

34. A case management judge may be appointed to manage an application for judicial review, notwithstanding the fact that the one of the parties refuses to consent to such an order, where a substantial reason exists to depart from the timelines prescribed in Part V of the Rules.

Canada (Information Commissioner) v. Canada (Minister of Environment) (1999), 179 F.T.R. 29, F.C.J. No. 1760 (T.D.) (Q.L.) at paras. 4, 10, 22 and 28.

35. If an order is granted expediting the hearing of the Applications and setting an expedited timetable for their conduct, it will be of benefit to both the parties and the Court that a designated judge, familiar with the relevant facts and issues in the proceeding, be assigned to deal with any matters that may arise in the conduct of the application within a compressed timeline.

PART V –RELIEF SOUGHT

36. Accordingly, the CWB seeks an order:

(a) that the Applications be heard together in such manner as directed by this Honourable Court;

(b) setting an expedited hearing date;

(c) abridging the period for the conduct of the Applications and setting a timetable for the remaining steps in the Applications; and

(d) designating the Applications as specially managed proceedings and appointing a case management judge to oversee the conduct of the Applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

J. L. McDougall, Q.C.

Brian R. Leonard

Matthew Fleming

Counsel for the Moving Party/Applicant

Court File No. T-1124-07

FEDERAL COURT

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