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

AFFIDAVIT OF WARD P. WEISENSEL
(Sworn June 19, 2007)

I, WARD P. WEISENSEL, of the City of Winnipeg in the Province of Manitoba, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Chief Operating Officer ("COO") of the Canadian Wheat Board (the "CWB") and as such have knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of matters referred to herein, I have stated the source of my knowledge and in all such cases believe it to be true.

2. I was raised in Cudworth, Saskatchewan where my family operated a farm. I have a Masters of Science in Agricultural Economics from the University of Saskatchewan and prior to joining the CWB, I was a lecturer and research associate at the same University, as well as a farmer.

3. I began working for the CWB as a policy analyst in 1991 and in that capacity advised the CWB regarding the 1993 Continental Barley Market referred to in paragraphs 24 and 25 below. I then worked as a marketing manager in the Asia-Pacific sales area for 18 months before being promoted to the head of Corporate Policy. In January 1998 I became Assistant Vice-President in the Grain Transportation Division and in December 2000, I became Vice-President, Transportation and Country Operations. I was promoted to Executive Vice-President of Marketing in June 2003, a position which was re-named COO in February 2004.

4. I have sworn this affidavit in support of the application for judicial review of Order in Council P.C. 2007-937 dated June 7, 2007, pursuant to which the Governor in Council ("GIC") made the *Regulations Amending the Canadian Wheat Board Regulations* (the "Impugned Regulations"), which purport to amend the *Canadian Wheat Board Regulations*, C.R.C., c. 397 (the "CWB Regulations"). The Impugned Regulations will remove barley from the single desk marketing authority of the CWB and create an open market for the purchase and sale of barley by western Canadian barley producers effective August 1, 2007. A copy of the Impugned Regulations and accompanying Regulatory Impact Analysis Statement is attached hereto as **Exhibit "1"**.

5. In 1998, Parliament made several important amendments to the Act, the intent of which was to transfer operational control over the CWB from the federal government to Western Canadian wheat and barley producers. Central to these amendments was the addition of section 47.1 which contemplates that a grain may be removed from the CWB's single desk marketing authority only by way of legislation, preceded by consultations between the Minister Responsible for the Canadian Wheat Board and the board of directors of the CWB (the "Board"), and a vote in favour of the removal of the grain by a majority of its producers. I am advised by

Ken Ritter, the Chair of the Board, that he and the majority of the Board believe that the Impugned Regulations contravene the overall scheme of the Act and in particular, section 47.1 thereof. Accordingly, the Board instructed the CWB to bring this application in order to clarify whether barley can lawfully be removed from the CWB's single desk by way of regulation.

The Canadian Wheat Board

6. 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.

7. 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". Under Parts III, IV and V of the Act and the regulations enacted thereunder, the CWB has been granted the exclusive legal authority to sell wheat, durum wheat and barley produced in the "designated area" that is intended for export from Canada or for human consumption within Canada.

8. The "designated area" is defined in subsection 2(3) of the Act as that area comprised by the Provinces of Manitoba, Saskatchewan and Alberta, and that part of the Province of British Columbia known as the Peace River District.

9. A farmer who grows grain and delivers it to the CWB is commonly referred to as a "producer", which is also a defined term in the Act. Throughout this affidavit, I use the terms "producer" and "farmer" interchangeably.

10. The CWB has approximately 460 employees and represents approximately 75,000 producers. It is based in Winnipeg and is the last significant farmer run corporation in the western Canadian grain industry.

11. The CWB operates on a "crop year" which runs from August 1 to July 31. Annually, western Canadian farmers sell between 18 and 24 million tonnes of wheat, durum and barley through the CWB to customers in more than 60 countries worldwide. Revenue from those sales during the 2005-06 crop year was $3.498 billion, approximately 11% of which was attributable to the sale of barley. All of the CWB's revenues, less costs, are returned to producers. During the 2005-06 crop year, total earnings distributed to farmers totalled $3.15 billion, an amount equal to approximately 91% of sales revenue. Farmers pay all of the CWB's costs. The federal government only contributes to the CWB's operating costs in the event of a pool deficit requiring the government's initial payment guarantee to be called upon.

12. The operations of the CWB are based on three fundamental mechanisms or elements which are established by the Act: (i) single desk selling; (ii) price pooling; and (iii) the guarantees by the federal government of initial payments to producers and of the CWB's borrowings.

13. The single desk is the key mechanism by which the CWB fulfils its statutory mandate. The core component of the single desk is established in Part IV of the Act, which 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. The CWB markets western Canadian wheat and barley through its single desk, thereby enabling producers to obtain greater leverage in the world grain market, as well as in the domestic grain handling and transportation system. In

the result, the single desk allows western Canadian wheat and barley producers to enjoy greater returns on their grain. Analyses prepared by industry experts have concluded that the single desk allows western Canadian barley producers to enjoy significantly higher returns than they would receive in an open market and that the alternative "marketing choice" system, referred to below in paragraphs 30, 45 and 46, is unworkable. Copies of the report by Doctors Schmitz, Schmitz and Gray dated February 2005 regarding the premiums generated by the CWB's single desk for barley, the report by Dr. Fulton dated 2006 regarding the impact of removing the CWB's single desk and Dr. Fulton's statement filed by the federal government in the Trial Division of the Federal Court in the *Archibald* case are attached collectively hereto as **Exhibit "2"**.

14. The primary means by which farmers price the grain that they deliver to the CWB is through one of the four "pools" that the CWB operates; wheat, durum, designated (often described simply as "malt" or "selected") barley and feed barley, which are established in accordance with Part III of the Act. Each pool has a "pool return outlook", or "PRO" which is the forecast price the CWB expects to pay farmers for their grain. The PRO is published monthly, excepting the months of June and August, beginning in the February preceding the beginning of the crop year (August 1st) and continuing until the September following the end of the same crop year (July 31st). The CWB is not bound by the PRO price but it is seen by farmers as a valuable planning tool for, among other things, deciding which crops to plant.

15. Farmers also price their barley using the CWB's "producer payment options", or "PPOs", which are linked to and based upon the PRO. Amendments to the Act in 1998 authorized the CWB to offer farmers increased flexibility related to: (i) the timing of the delivery of their grain to the CWB; (ii) the time at which producers receive payment from the CWB; and (iii) the price paid by the CWB to farmers.

16. 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. In addition, the pooling system:

(a) ensures individual farmers are not disadvantaged due to the timing of sales of their grain, as grain in the pool is priced throughout the year and the final net pooled return reflects both the highs and lows of the marketplace for the year;

(b) spreads the cost of marketing, delivery and distribution over the entire volume of sales; and

(c) ensures all farmers receive their share of price premiums created by the single desk.

17. Most farmers enter into delivery contracts with the CWB between August and October when they are in a position to estimate how much of a particular grain they will be able to deliver to the CWB. The CWB employs a "call system" whereby the CWB requires farmers, in accordance with the terms of their contract with the CWB, to deliver portions of their grain at different times, depending on customer demand. The bulk of the deliveries to the CWB typically begin at the outset of a crop year and continue through the Fall and Winter and into the Spring. Most farmers store their undelivered grain on their farms or in grain elevators until it is "called" by the CWB.

18. On delivery of their grain to an elevator, the grain is classified as being a particular type, grade, class and quality of wheat or barley which determines the amount of the "initial payment" received by producers for their grain in accordance with the provisions of Part III of the Act and the regulations enacted thereunder. The "initial payment" represents a portion (typically around 65%) of the final anticipated return for that particular product. That payment is adjusted upwards during the crop year as sales are made out of the pool. The undistributed balance remaining at the end of the crop year is distributed to farmers by interim and final payments. By

the time the final payment is made (5 – 6 months after the end of the crop year) usually less than 5% of the total balance remains to be distributed. All payments to producers fairly reflect the market value of the quantity and quality of the particular product that they deliver.

19. With respect to the marketing of barley by the CWB, the largest proportion of the CWB's sales activities relate to the sale of "designated" barley (or "malt" barley as it is often described) which is sold primarily to customers in the malting industry who in turn, sell their processed product, barley malt, to their customers in the brewing industry. The global market for malt barley typically operates 6-12 months "forward" such that brewers purchase malt from "maltsters" (the companies that process malting barley into malt) 6-12 months before they actually require the malt to be delivered at their breweries. When maltsters price malt for their customers, it is vital to their business that they be able to price their barley at the same time. This, in turn, means that barley marketers worldwide, including the CWB, forward sell to maltsters. In the result, many of the CWB's sales to maltsters occur months before the barley crop is harvested.

The CWB's History in Relation to Barley

20. On July 5, 1935, Parliament enacted the first version of the Act. The CWB of 1935 built on western Canadian grain farmers' strong history of pooling and joint selling and was a true successor to the first CWB established at the end of the First World War and the provincial wheat pools created in the 1920s. A detailed historical review of the CWB to 1987 prepared by Dr. John Herd Thompson of Duke University for the federal government is attached hereto as **Exhibit "3"**.

21. In 1948, Parliament amended the Act to add section 29A, which authorized the Governor in Council to extend the application of either or both of Parts III and IV of the Act to oats or barley. In his book, *Chosen Instrument – A History of the Canadian Wheat Board: The McIvor Years*, William E. Morriss explains (at pages 192-193) and I believe him to be correct, that in 1948, at the time the federal government was considering whether the CWB should be granted marketing authority over oats and barley, there was concern that any legislation enacted in this regard would infringe provincial jurisdiction and be found to be unconstitutional. This concern apparently stemmed from the manner in which the majority of oats and barley were marketed at that time. According to Mr. Morriss, the federal government apparently addressed this issue in the following manner:

> … unlike wheat, the bulk of Canada's feed grains were either fed in the province of origin or moved in interprovincial trade to the East, with very little going to export. Authority for compulsory marketing of oats and barley through the [CWB] was therefore questioned. The government solved the constitutional question by making proclamation of the federal legislation conditional upon enactment of complementary legislation by the governments of the three prairie provinces. Legislative action by the provinces would assure beyond a doubt that compulsory marketing of oats and barley through the [CWB], either within provinces or across provincial boundaries, was constitutional. Further, it would provide political acceptance of the policy by the three major producing provinces. The latter consideration may have had more importance that the unresolved legal implications.

22. On July 20, 1949, following the enactment of coarse grains legislation by Manitoba, Saskatchewan and Alberta, the GIC issued Order in Council P.C. 3713 enacting regulations which extended the application of both Parts III and IV of the Act to oats and barley, albeit for the 1949-50 crop year only. A copy of Order in Council P.C. 3713 is attached hereto as **Exhibit "4"**.

23. After 1949, the GIC issued orders in council enacting regulations extending Parts III and IV to barley for the relevant crop year on an annual basis until 1971 when the GIC amended section 9 of the regulations to read as follows: "Parts III and IV of the Act are hereby extended to oats and barley". Section 9 remained unchanged until 1989 when it was amended to remove oats from the CWB's single desk. Thereafter, section 9 read as follows: "Parts III and IV of the Act are hereby extended to barley."

24. In 1993, the GIC issued an order in council amending the 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.

25. 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.

26. As I explain further below in paragraphs 64 and 86, management of the CWB, supported by the Board, believes that it is critical that the validity of the Impugned Regulations be

determined as soon as possible to ensure that the same problems that were associated with the creation and subsequent unwinding of the Continental Barley Market are limited in this instance.

A Farmer Controlled CWB

27. The CWB was, for most of its existence, a federal government agency. From 1935 until the end of 1998, the CWB was managed by a board of three to five federally appointed full-time Commissioners in whom were vested all of the CWB's powers, as set out in the Act.

28. In 1998, following an extensive review of western grain marketing by the federal government, the Act was amended (the "1998 Amendments") to create a new corporate governance structure which transferred authority over the CWB from the federally appointed Commissioners to the fifteen directors of the CWB, ten of whom are producers elected directly by their fellow producers. As part of this change and upon the relevant amendments coming into force on December 31, 1998, the Board assumed responsibility to direct and manage the business and affairs of the CWB.

29. Each elected member of the Board represents one of ten districts within the "designated area" for a term of four years. Board elections are held every two years on a staggered basis. Current practice has the elections in all of the *even* numbered districts held at the same time, followed two years later by elections in the *odd* numbered districts. Four of the remaining directors are appointed by the federal government while the fifth, the president and chief executive officer, is effectively jointly approved by the CWB and the federal government in accordance with the provisions of the Act. Although the farmer-elected directors join the Board as representatives of the farmers in the district that elected them and the appointed directors join the Board pursuant to order in council appointments, the Act provides that, like any member of a

corporate board of directors, all directors owe their statutory duties of loyalty and care to the CWB alone.

30. The CWB director elections are hotly contested races in which the primary issue is whether the CWB should continue to exercise its single desk marketing authority over wheat and barley, or whether a new system should be implemented. The key issue in any candidate's platform is whether that candidate is a "single desk supporter" or supports an open market or some variant of an open market, typically described as a supporter of a "dual market", "marketing choice" or a "voluntary CWB".

31. On September 5, 2006 the CWB director elections commenced for districts 1, 3, 5, 7 and 9. On December 10, 2006 the results were announced with four of the five directors elected being supporters of retaining the single desk. As presently constituted, eight of the ten elected directors are supporters of the single desk.

Section 47.1

32. The 1998 Amendments also included the addition of section 47.1 of the Act which provides as follows:

> *Minister's Obligation*
>
> 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.

33. I believe that the addition of section 47.1 and the transfer of authority from federal government appointees to the Board, the majority of which would be elected directly by producers, reflected Parliament's intent that western Canadian wheat and barley producers be given far greater influence over the entity responsible for the interprovincial and global marketing of their grain, in addition to leaving to farmers any decisions regarding which grains the CWB should market.

34. The 1998 Amendments stemmed from two bills introduced in Parliament, the first of which, Bill C-72, *An Act to amend the Canadian Wheat Board Act and to make consequential amendments to other Acts*, died on the order paper when the 1997 federal election was called. A copy of Bill C-72, reprinted as amended by the House of Commons Standing Committee on Agriculture and Agri-Food (the "House Committee") and reported to the House of Commons on April 16, 1997 ("Bill C-72"), is attached hereto as **Exhibit "5"**.

35. The second bill, Bill C-4, *An Act to amend the Canadian Wheat Board Act and to make consequential amendments to other Acts* ("Bill C-4"), was based to a significant extent on Bill C-72, as amended by the House Committee and received first reading in the House of Commons on September 25, 1997. A copy of Bill C-4 as introduced at first reading, is attached hereto as **Exhibit "6"**. Subsequently, in opening debate on Bill C-4 on October 7, 1997, the then Minister Responsible for the CWB (the "Former Minister") stated, among other things, as follows:

> Throughout its history the Canadian Wheat Board has been governed by a small group of up to five commissioners, all appointed by the Government of Canada without any requirement

> that anybody be consulted and legally responsible only to the Government of Canada. But in today's dynamic and changing marketplace, producers have made it clear that they want the Canadian Wheat Board to be more accountable to them. They want more control, and that is what Bill C-4 will provide.
>
> […]
>
> 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.

A copy of the relevant portion of *Hansard* containing the Minister's statement in the House of Commons is attached hereto as **Exhibit "7"**.

36. Both Bills C-72 and C-4 contained (at clause 22 of Bill C-72 and clause 24 of Bill C-4) amendments to the Act which were referred to as an "exclusion" clause. The exclusion clause authorized the GIC, on recommendation by the Minister Responsible for the CWB, to exclude by way of order, "any kind, type class or grade of wheat" from the provisions of Part IV of the Act provided, among other things, that the exclusion was first recommended by the Board and where the kind, type, class or grade of wheat was "significant", producers of the grain had voted in favour of the exclusion. Bill C-4 also included an "inclusion" clause (at clause 26) which authorized the GIC to extend the application of either or both of Parts III and IV to any other grain, by way of regulation, provided that, among other things, the inclusion had first been recommended by the Board and a majority of producers of the grain had voted in favour of the inclusion.

37. Following its referral to the House Committee, Bill C-4 was reported to the House of Commons on November 7, 1997 with certain proposed amendments. At this stage in the legislative process, Bill C-4 contemplated, at clauses 24 and 26, that a grain could be included or excluded by the GIC by way of regulation, following a recommendation by the Board and a favourable producer vote. A copy of Bill C-4 as amended by the House Committee and reported to the House of Commons is attached hereto as **Exhibit "8"**.

38. The exclusion and inclusion clauses were the subject of further consideration during the review of Bill C-4 by the Standing Senate Committee on Agriculture and Forestry (the "Senate Committee"). In appearing before the Senate Committee, the Former Minister explained that he had previously proposed in the House of Commons that the inclusion and exclusion clauses be replaced with a new provision which apparently was similar to the current section 47.1 of the Act. However, the Former Minister's proposal failed to obtain the requisite unanimous consent of the House of Commons prior to third reading. A copy of the relevant portion of *Hansard* which refers to the Former Minister's attempt to obtain unanimous consent for his proposal is attached hereto as **Exhibit "9"**.

39. The Former Minister also emphasized in his evidence before the Senate Committee that the purpose of his proposal was to ensure that legislation, preceded by a producer vote, was required prior to a grain being added to or removed from the CWB's single desk marketing authority. A copy of the transcript of the Minister's appearance before the Senate Committee regarding Bill C-4 on May 5, 1998 is attached hereto as **Exhibit "10"**.

40. On May 14, 1998, following the Former Minister's appearance before it, the Senate Committee issued a report, a copy of which is attached hereto as **Exhibit "11"**, in which it proposed that the exclusion and inclusion clauses in Bill C-4 be replaced as follows:

> 26. Section 47 of the Act and the headings before it are replaced by the following:
>
> […]
>
> 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.
>
> (b) on page 19, delete lines 1 to 36; and
>
> (c) on page 20, delete lines 1 to 38.

41. In addition to proposing the foregoing amendment, among others, the Senate Committee set out the rationale for its proposed amendments. The Senate Committee explained that it proposed to delete the inclusion and exclusion clauses and replace them with a new version of section 47.1, thereby ensuring that legislative change would be required where a grain was to be included or excluded from the CWB's "jurisdiction":

> On 16 February 1998, the Minister responsible for the CWB proposed to the House of Commons that both the inclusion and exclusion clauses be deleted from Bill C-4, provided that agreement was reached on a motion "that no minister responsible for the CWB could attempt to change the wheat board's existing mandate either to enlarge it or to reduce it without first having conducted a democratic vote among the relevant producers and

> also having consulted with the wheat board's new board of directors." Because this proposal took place at third reading, it required unanimous consent; as this was denied, the proposal was never tabled.
>
> Should the inclusion and exclusion clauses be deleted from Bill C-4, legislative change would be required in the future to exclude or include grains from the CWB's jurisdiction. Parliament would be required to draft the appropriate legislation but an amendment to Bill C-4 should also ensure that the input of the proposed board of directors and the affected grain producers would be considered (emphasis added).

42. The House of Commons resumed debate on May 14, 1998 regarding the Senate Committee's proposed amendments to Bill C-4. A copy of the *Hansard* debates relating to the Senate Committee's proposed amendments to Bill C-4 are attached hereto as **Exhibit "12"**. On June 11, 1998 the House of Commons adopted the Senate Committee's proposed amendments relating to the replacement of the exclusion and inclusion clauses with the current version of section 47.1 and passed Bill C-4. Copies of Bill C-4 as passed by the House of Commons and as assented to are attached collectively hereto as **Exhibit "13"**. Section 47.1 of the Act was ultimately proclaimed into force by way of Order in Council P.C. 1999-1649 dated September 29, 1999, a copy of which is attached hereto as **Exhibit "14"**.

43. Both at the time Bills C-72 and C-4 were introduced in Parliament and following the enactment of Bill C-4, the Former Minister emphasized in various public statements and press releases that the purpose of the proposed amendments was to empower farmers and to ensure that that farmers would decide whether a grain should be removed from or included under the ambit of the CWB's single desk marketing powers. While the initial versions of Bills C-72 and C-4 were subject to amendment, it is clear to me, based on my review of press releases and other documents issued by the Former Minister, copies of which are attached collectively hereto as

Exhibit "15", that the underlying intent of the proposed amendments to the Act remained consistent from the time Bills C-72 and C-4 were introduced in the House of Commons, until Bill C-4 was passed by Parliament in June 1998.

The Government's Policy Regarding the Future of the CWB

44. On January 23, 2006 sufficient Conservative Party candidates were elected to the House of Commons to enable them to form a minority government (the "Government").

45. Upon assuming office, the Government began to promote a policy of what it variously termed as "voluntary participation" in the CWB, "marketing choice" or a "dual market" for western Canadian grain. Regardless of the term used, implementation of such a policy requires the elimination of the single desk marketing system currently provided for in the Act.

46. Beginning with its election in January 2006 and continuing until the date of this affidavit, the Government or Conservative Party Members of Parliament, have taken a number of steps in furtherance of their policy regarding the CWB, which include, among others, the following:

(a) In April 2006, the Minister wrote to the CWB advising that the Government intended to implement its stated policy of "voluntary participation" in the CWB and further, that all communication and promotional material issued on behalf of the CWB "should clearly reflect Government policy". Copies of the Minister's letter and the CWB's response are attached collectively hereto as **Exhibit "16"**;

(b) In May 2006, a Conservative Party Member of Parliament introduced a private member's bill entitled *An Act to amend the Canadian Wheat Board Act (direct sale of grain)* ("Bill C-300"), the expressed intent of which was to carve out an exception to the requirement in the Act that western Canadian producers deliver their grain to the CWB, by permitting producers to sell their grain directly to "processing" firms that were owned primarily by Canadian farmers. Bill C-300, a copy of which is attached hereto as **Exhibit "17"**, represented an incremental step toward limiting the scope of the single desk but was defeated in the House of Commons on October 25, 2006 prior to its second reading, by the combined

majority of Liberal, New Democratic and Bloc Québécois members of Parliament;

(c) In June 2006, following hearings relating to the status of the CWB, the Government members of the House Committee issued a minority report which criticized the recommendation by the majority of the Agriculture Committee that any legislative or regulatory changes to the single desk mandate of the CWB be subject to a plebiscite of producers. A copy of the Agriculture Committee's Report is attached hereto as **Exhibit "18"**;

(d) In June 2006, the Minister refused to approve the CWB's corporate plan which it is required, pursuant to section 19 of the Act, to submit annually to the Minister, on the grounds that the plan referred to the single desk and a proposal by the CWB which emphasized the importance of the single desk to producers. Copies of the relevant correspondence in this regard are attached hereto as **Exhibit "19"**;

(e) In July 2006 the Minister organized a roundtable meeting attended by individuals and organizations supportive of the Government's policy. The CWB was not invited to the meeting, which was convened for the purpose of contributing to the implementation of "dual-marketing" for western Canadian grain producers. Copies of press releases issued by the Minister in this regard are attached collectively hereto as **Exhibit "20"**;

(f) In September 2006 the Minister announced the appointment of a task force (the "Task Force") and directed it to prepare a report regarding the transition of the CWB from its current structure under the Act to a new regime where the CWB would operate without the statutory powers it currently possesses. A press release issued by the Minister relating to the Task Force is attached hereto as **Exhibit "21"**. The Task Force ultimately issued a report dated October 25, 2006, a copy of which is attached hereto as **Exhibit "22"**;

(g) In the fall of 2006, the Minister filled vacancies of government appointees on the Board with individuals who had previously expressed support for the Government's policy, after advising the CWB on at least one prior occasion that government-appointed directors should "understand and support the directions of government policy in areas affecting the CWB". Copies of relevant correspondence between the Minister and the CWB in this regard are attached hereto as **Exhibit "23"**;

The Directions Issued by the GIC and the CWB's Applications for Judicial Review

47. In addition to the foregoing, the GIC has issued two directions to the CWB pursuant to subsection 18(1) of the Act, which authorizes the GIC to issue orders directing the CWB as to

"the manner in which any of its operations, powers and duties under [the] Act shall be conducted, exercised or performed."

48. The first direction, issued October 5, 2006, purports to prohibit the CWB from expending funds to advocate in favour of the retention of the single desk (the "Advocacy Direction"). In a press release and the Regulatory Impact Analysis Statement (a "RIAS") published with the Advocacy Direction in the *Canada Gazette*, it was explained that the Advocacy Direction was intended, at least in part, to prevent the CWB from undermining the Government's policy objectives. A copy of the Minister's press release dated October 11, 2006, together with copies of the Advocacy Direction as published in the *Canada Gazette* and as delivered to the CWB, are attached hereto as **Exhibit "24"**

49. I am advised by Mr. Ritter that the majority of the Board formed the view that the Advocacy Direction is contrary to the Act and *Charter of Rights and Freedoms*, is vague and unenforceable and accordingly, represents an unlawful exercise of the GIC's authority under subsection 18(1). Further, Mr. Ritter advises that the majority of the Board believes that it is bound to comply with the provisions of the Act, rather than the particular policy objectives of the federal government as they may be defined from time to time, unless those policy objectives are validly enacted into law. The Board therefore instructed the CWB to seek judicial review of the Advocacy Direction. The matter is currently proceeding by way of application in the Federal Court under court file T-2138-06.

50. Mr. Ritter further advises me that the majority of the Board is also of the view that the second direction issued by the GIC on January 26, 2007, regarding the remuneration of the interim president of the CWB (the "President Direction"), is unlawful. A copy of the President

Direction as published in the *Canada Gazette*, together with a copy of the President Direction as delivered to the CWB, are attached collectively hereto as **Exhibit "25"**.

51. The issuance of the President Direction stemmed from the termination of Adrian Measner, the former president and CEO of the CWB. Prior to his termination, Mr. Measner received a letter from the Minister, a copy of which is attached hereto as **Exhibit "26"**, which advised that he was considering recommending that Mr. Measner be terminated as president of the CWB. Subsequent media articles referred to quotes by officials in the Minister's office which suggested that Mr. Measner could retain his job if he supported the Government's policy regarding the CWB. Copies of the media articles in this regard are attached collectively hereto as **Exhibit "27"**.

52. Notwithstanding the fact that the Board wrote to the Minister expressing strong support for Mr. Measner, he was terminated as President and CEO by way of Order in Council P.C. 2006-1671 dated December 19, 2006, a copy of which is attached hereto as **Exhibit "28"**. Copies of the CWB's correspondence to the Minister in this regard are attached collectively hereto as **Exhibit "29"**.

53. On the same day Mr. Measner was terminated, the Minister wrote a letter (the "Appointment Letter") to Greg Arason, a copy of which is attached hereto as **Exhibit "30"**, purporting to appoint him as interim president of the CWB and fix his salary. After an exchange of correspondence with the Minister in which the Board advised the Minister of its view that the Act confers on the Board, rather than the Minister, the responsibility to fix the remuneration of an interim president, the Minister caused the President Direction to be issued to the Board.

Copies of the letters exchanged by the CWB and Minister in this regard are attached collectively hereto as **Exhibit "31"**.

54. The President Direction mandates that the Board, among other things, ensure that Mr. Arason is remunerated in accordance with the terms of the Appointment Letter. Mr. Ritter advises me that the Board agreed to implement the President Direction under protest and instructed the CWB to institute an application for judicial review of the President Direction, which is proceeding in Federal Court file T-249-07.

The Barley Plebiscite

55. On October 31, 2006 the Minister issued a press release, a copy of which is attached hereto as **Exhibit "32"**, in which he announced that the Government would hold a plebiscite on the marketing of western Canadian barley (the "Barley Plebiscite"). The Minister subsequently announced that the voting period would commence on February 7, 2007, with the mailing of ballots to barley producers, and conclude on March 13, 2007, the last date on which ballots could be postmarked and accepted by KPMG LLP, who were selected to prepare the list of eligible voters and administer the vote. Copies of the Minister's press releases relating to the ballots and voters' list are attached collectively hereto as **Exhibit "33"**.

56. On January 22, 2007, the Minister announced the following three ballot options to be posed to barley producers during the Barley Plebiscite:

- The Canadian Wheat Board should retain the single desk for the marketing of barley into domestic human consumption and export markets.
- I would like the option to market my barley to the Canadian Wheat Board or any other domestic or foreign buyer.

- The Canadian Wheat Board should not have a role in the marketing of barley.

A copy of the press release in which the Minister announced the ballot options is attached hereto as **Exhibit "34"**.

57. Following the announcement of the Barley Plebiscite and during the voting period, the Minister's public comments indicated that the results of the vote would not be considered to be binding on the Minister or the Government. Copies of media articles referring to the Minister's comments regarding the non-binding nature of the Barley Plebiscite are attached hereto as **Exhibit "35"**.

58. In its Eleventh Report adopted on February 15, 2007, the House Committee referred to the three options that would be placed on the ballot in the Barley Plebiscite and recommended that the Minister rescind the "questions" and implement the Sixth Report of the House Committee adopted November 23, 2006, which listed the following options in relation to barley:

- I wish to maintain the ability to market all barley, with the continuing exception of feed barley sold domestically, through the CWB single desk system.
- I wish to remove the single desk marketing system from the CWB and sell all barley through an open market system.

Copies of the Sixth and Eleventh Reports of the House Committee are attached collectively hereto as **Exhibit "36"**.

59. It is my view and according to Mr. Ritter, the view of the majority of the Board, that the conduct of the Barley Plebiscite was seriously flawed and that even if the Minister had introduced legislation in Parliament amending the Act to remove barley from the CWB's single

desk, rather than attempting to remove barley by making the Impugned Regulations, the Minister would have failed to comply with the provisions of section 47.1 of the Act.

60. On March 26, 2007, following planning sessions by the Board in both February and March 2007 in which I participated in my capacity as COO, the CWB wrote to the Minister outlining the inherent difficulties associated with the idea that the CWB could continue to market barley in an open market. In the letter, the CWB advised the Minister that following its analysis of the alternatives, the Board had concluded that the retention of the CWB's single desk for barley would provide a "materially higher net benefit for farmers". Copies of the CWB's letter of March 26, 2007, together with the Minister's response dated May 2, 2007, are attached collectively hereto as **Exhibit "37"**.

61. On March 28, 2007, the Minister sent the CWB a letter, a copy of which is attached hereto as **Exhibit "38"**, which included the results of the Barley Plebiscite as set out below:

	MB	**SK**	**AB**	**BC**	**Overall**
Total votes cast	3,703	15,327	9,881	156	29,067
Percent of Votes					
Retain single desk	50.6	45.1	21.4	42.3	37.8
Prefer option to market to CWB or other buyer of my choice	34.6	42.1	63.4	49.4	48.4
CWB should have no role in marketing barley	14.8	12.8	15.2	8.3	13.8

62. The Minister also indicated that he planned "to recommend that barley be removed from the application of Part IV of the *Canadian Wheat Board Act* through amendments to the

Canadian Wheat Board Regulations" effective August 1, 2007 but that Part III of the Act would continue to apply to barley. On March 28, 2007, the Minister confirmed his intention to amend the CWB Regulations effective August 1st in a press release and during a tele-conference with media. Copies of the press release and a transcript of the Minister's tele-conference are attached hereto as **Exhibits "39"** and **"40"**, respectively.

The CWB's Attempts to Engage the Minister

63. On April 3, 2007, following the Minister's announcement, members of the Board and CWB management met with the Minister and his officials in Winnipeg. At the meeting, the Minister was advised that the CWB did not consider the meeting to constitute the type of consultations contemplated by the Act. In addition, I and others explained to the Minister that his March 28th announcement of his intention to take regulatory action to remove barley from Part IV of the Act, and particularly his intention to implement an open market effective August 1st, had resulted in significant uncertainty in the marketplace and had caused the following problems, among others, for the CWB, barley producers and other industry participants:

(a) the CWB's customers were delaying entering into contracts with the CWB in anticipation of being able to purchase barley for lower prices from producers in the multiple seller environment that would exist following the implementation of an open barley market;

(b) the CWB did not expect to receive its predicted pool size of 2.2 million tonnes of barley for the 2006-07 crop year with the result that the PRO would be reduced by between $8-$10 per tonne; and

(c) the CWB had already entered into contracts for the sale of 700,000 tonnes of barley for the 2007-08 crop year which would be at risk of going unfulfilled with the result that significant losses could be incurred.

64. In addition, the Minister was reminded of the circumstances surrounding the creation and subsequent unwinding of the Continental Barley Market and of the resulting losses suffered by

industry participants. The Minister was also advised that his March 28th announcement would cause the CWB, producers and other industry participants to face similar uncertainty when entering into contracts for the sale and purchase of barley. Further, CWB personnel informed the Minister that the CWB had attempted to negotiate *force majeure* clauses in its contracts with its domestic barley customers, but that they had refused to accept such terms.

65. Following the meeting with the Minister, a special meeting of the Board was convened on April 10, 2007 to consider the Minister's letter of March 28th and the repercussions of the Minister's announcement that he intended to remove barley from the application of Part IV of the Act by way of regulation, effective August 1st. At the meeting, which I attended, the Board determined that the CWB should write to the Minister and propose that the implementation date for an open barley market should be delayed to August 1, 2008 in order to address the uncertainty in the marketplace created by the Minister's March 28th announcement. This delay would also allow the Minister and CWB to cooperate in seeking direction from the court as to the validity of the Minister's decision to remove barley from the application of Part IV of the Act through amendments to the CWB Regulations, instead of an amendment to the Act.

66. On April 11, 2007 the CWB wrote two letters to the Minister. In the first letter, the CWB referred to its review of several alternative scenarios regarding the manner in which it might carry out its operations in an open barley market and enclosed a copy of the CWB's analysis and conclusions in this regard. A copy of the CWB's first letter of April 11th, together with the Minister's response dated May 8, 2007, are attached collectively hereto as **Exhibit "41"**.

67. In the second letter, the CWB explained the issues facing it as a result of the Minister's decision to implement an open market effective August 1, 2007 and proposed that the

implementation date be delayed until August 1, 2008 in order to permit the CWB and Minister to initiate a cooperative process for obtaining legal certainty regarding the validity of barley's removal from Part IV of the Act by way of regulation instead of legislation. A copy of the CWB's second letter to the Minister is attached hereto as **Exhibit "42"**.

68. On April 18, 2007 the CWB announced that due to the uncertainty surrounding the Minister's March 28th announcement and the expectation that the CWB would receive significantly fewer deliveries of barley from producers, the CWB was compelled to publish an interim PRO reducing the malting barley pool prices for the 2006-07 crop year by $8.00 per tonne. This reduction represented an overall decline in the value of the pool of approximately $15 million and will result in a loss of revenue for those producers who had already delivered to that pool. A copy of the CWB's April 18th announcement from its website is attached hereto as **Exhibit "43"**.

69. On April 21, 2007, the proposed regulations amending the CWB Regulations (the "Proposed Regulations"), together with a RIAS, were published in the *Canada Gazette* for a 30 day comment period. A copy of the Proposed Regulations and RIAS as published in the *Canada Gazette* are attached hereto as **Exhibit "44"**.

70. On April 23, 2007 the CWB received a letter from the Minister which followed an April 15th meeting between representatives of the CWB and the Minister and his officials. At the meeting, which I attended, CWB personnel had again urged the Minister to delay the implementation date to August 1, 2008 and join the CWB in a cooperative and expedited legal process in order to establish legal and market certainty. In his letter of April 23rd, a copy of which is attached hereto as **Exhibit "45"**, the Minister rejected the CWB's proposals in this

regard and criticized the CWB for what the Minister unfairly characterized as a "lack of forward planning".

71. The CWB sent a further letter to the Minister on May 9, 2007 rebutting his criticisms and requesting that he reconsider his decision not to delay implementation of an open barley market. As of the date of this affidavit, the Minister has yet to respond to the CWB's letter, a copy of which is attached hereto as **Exhibit "46"**.

72. On May 18, 2007, the CWB delivered its submissions in response to the Proposed Regulations and RIAS. In addition to emphasizing the financial, reputational and other industry-related problems caused by the Minister's announcement of the August 1st implementation date, the CWB expressed its concerns regarding the adequacy of the Barley Plebiscite, reiterated its view that legislative change was needed to remove barley from the application of Part IV of the Act and proposed a number of measures designed to mitigate the costs and inherent uncertainty caused by the Minister's determination to implement an open market for barley effective August 1, 2007. A copy of the CWB's submissions in response to the Proposed Regulations and RIAS are attached hereto as **Exhibit "47"**.

73. Also on May 18th, the Minister wrote to the CWB requesting that the CWB provide him with its recommendation for initial payment levels for the wheat, durum wheat, barley and designated (or malt) barley pool accounts for the 2007-08 crop year. A copy of the Minister's letter dated May 18, 2007 is attached hereto as **Exhibit "48".**

74. CWB personnel had previously advised the Minister both in writing and during the meetings with him, that in an open market, the CWB cannot publish an anticipated price for

barley when it cannot effectively predict how much barley it will receive from producers. Similarly, the CWB cannot make a responsible and reasoned recommendation for an initial barley payment in light of the uncertainties related to an open market. Therefore, the CWB wrote to the Minister advising that it could not make the requested recommendation. The CWB's letters dated June 4, 2007 in response to the Minister's letter are attached collectively hereto as **Exhibit "49"**.

75. On May 24, 2007 the CWB and Malting Industry Association of Canada ("MIAC") jointly wrote to the Minister expressing our shared concerns regarding the uncertainty created by the Minister's announcement of an August 1st implementation date for an open market in barley. MIAC represents the Canadian malting companies who together, purchase a significant portion of the barley sold by the CWB.

76. In addition to advising the Minister that the government's actions in relation to the implementation of an open barley market were causing, and threatened to cause, serious disruptions in the malt barley industry, customer complaints and damage to Canada's reputation as a reliable supplier of barley, the CWB and MIAC proposed certain solutions to minimize the harm associated with a transition to an open market. A copy of our joint letter is attached hereto as **Exhibit "50"**.

77. The Minister responded to the joint CWB and MIAC letter on May 30, 2007. While the Minister did not reject the proposals set out in the letter, neither did he indicate that he would accept them. Nor did the Minister suggest any other possible solutions to the disruption facing the CWB, the members of MIAC and producers as a result of his announcement to proceed with

an implementation date of August 1, 2007. A copy of the Minister's letter of May 30th is attached hereto as **Exhibit "51"**.

Implications of the August 1st Implementation Date

78. As a result of the Minister's March 28th announcement that he intended to remove barley from the application of Part IV of the Act by way of amendments to the CWB Regulations, the CWB has been hindered in its ability to fulfil its statutory duties 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.

79. In the RIAS accompanying the Proposed Regulations, it was acknowledged that the CWB might not receive sufficient barley deliveries to enable it to fulfill sales contracts with customers *after* August 1, 2007 and further, it is noted that such customers may have to pay higher prices to obtain barley from other sources or directly from producers in order to fulfill their own contracts.

80. However, the RIAS failed to mention that existing sales contracts have been put at significant risk by the Minister's March 28th announcement. Typically, at this point in the crop year, farmers who had grown and harvested malting barley the previous crop year and stored it throughout the Winter and Spring, would be delivering that barley to the CWB. However, those deliveries have decreased significantly as a result of the Minister's announcement giving rise to the likelihood that the CWB will not attract adequate supplies of grain to meet existing contractual obligations.

81. The decrease in deliveries to the CWB and the corresponding inability to obtain an adequate supply of barley, both before and after August 1, 2007, will almost certainly cause the CWB's customers to seek compensation from the CWB for the additional costs the customers will incur when forced to purchase barley from other sources to satisfy their own contractual obligations. By way of example, I have been advised by one of the CWB's biggest barley customers that they intend to hold the CWB responsible for any losses which the customer may incur as a result of the CWB's inability to fulfil its contractual obligations.

82. These types of claims and the consequential lawsuits will increase the CWB's costs, potentially causing a corresponding decline in the return it is able to provide to producers. As I noted in paragraph 11, the CWB returns all revenues, less costs, to producers. Accordingly, it is producers who will suffer if the CWB is found to be in breach of its contractual obligations.

83. In addition to the uncertainty surrounding the ability to obtain sufficient barley deliveries to meet existing contracts, since the Minister's March 28th announcement, the CWB has been obliged to forego attractive new sales opportunities for barley given the uncertainty surrounding its supply of barley. The CWB's customers have delayed purchasing barley from the CWB in the expectation that they will be able to pay less in the multiple-seller environment that will occur in an open market. In the result, the CWB has already lost market share in international barley markets.

84. The questions surrounding the CWB's ability to meet its contractual obligations to deliver barley to its customers has tarnished its reputation as a reliable supplier of quality barley. As a result of the Minister's announcement of an August 1st implementation date and the enactment of the Impugned Regulations, the CWB is losing goodwill with the industry in general

and its customers in particular. Customers in the global barley trade tend to view their supply chain as a "portfolio" of different origins for barley. A number of the CWB's customers have expressed their concerns to me regarding the current uncertainty in the Canadian marketing system and have questioned why Canada's end-use customers should continue to do business with Canada, including the CWB. Based on these conversations, I believe that the existing uncertainty in the Canadian barley market will cause customers of the CWB to diversify their "portfolios" by securing non-Canadian sources for barley.

85. The Minister's announcement of the August 1st implementation date has also compelled the CWB to suspend publication of a 2007-08 PRO for both feed and malting barley given its inability to predict, with any degree of certainty, the amount of barley that will be delivered to the CWB in an open market. The suspension of the 2007-08 pool return outlook has also resulted in the cancellation of the barley-related PPOs referred to in paragraph 15 above. The uncertainty occasioned by the Minister's announcement of an August 1st implementation date has made it impossible for the CWB to offer these programs to barley producers without the CWB assuming an unacceptable level of risk. This is unfortunate as the popularity of these programs among farmers has been steadily increasing since the Board introduced them several years ago.

86. In addition, as a result of the Minister's March 28th announcement, it is almost certain that producers, grain companies and others will begin negotiating and entering into contracts for the sale of their barley. However, similar to what occurred in the context of the Continental Barley Market, if the Impugned Regulations are found to be invalid, those producers and grain companies who entered into such contracts will face potential losses due to an inability to fulfil their contractual obligations to deliver barley to purchasers.

87. The uncertainty and risk faced by the CWB and industry participants is magnified the longer the period of legal uncertainty persists regarding the validity of the Impugned Regulations.

The Impugned Regulations

88. On May 31, 2007 the Board met to discuss, among other things, whether the CWB should be directed to seek judicial review of the expected amendments to the CWB Regulations, assuming that such amendments were substantially in the form as the Proposed Regulations published in the *Canada Gazette*. Mr. Ritter advises me that at the meeting, the Board deferred a final decision regarding an application for judicial review pending formal publication of the amendments to the CWB regulations. However, the Board determined that a final effort should be made to engage the Minister in a dialogue regarding the validity of the creation of an open barley market by way of regulation.

89. Accordingly, the CWB wrote to the Minister on June 7, 2007 advising that it intended to send its draft application materials to General Counsel of the Minister's department to facilitate a discussion between the Minister and the CWB regarding the legality of the proposed amendments to the CWB Regulations. It was emphasized in the CWB's letter to the Minister that in order to ensure that any discussions with the Minister were meaningful, it was important that they be held before any amendments to the CWB Regulations were signed into law. A copy of the CWB's letter to the Minister dated June 7, 2007 is attached hereto as **Exhibit "52"**.

90. Regrettably, the Minister did not formally respond to the CWB's letter, although I am advised by Mr. Arason that he received a call from an official in the Minister's office advising that they had received the letter and were considering it. However, on June 11, 2007 the

Minister publicly announced that the Impugned Regulations had been made and that an open barley market would be implemented effective August 1, 2007. A copy of a press release announcing the making of the Impugned Regulations is attached hereto as **Exhibit "53"**.

91. Mr. Ritter advises me that after careful consideration, the majority of the Board has determined that it is in the best interests of western Canadian producers that the CWB seek the assistance of this Honourable Court in determining whether the Impugned Regulations were validly made in accordance with the Act, given Parliament's intent, as expressed in the Act and in particular, section 47.1, that legislation preceded by consultations and a proper farmer vote is required prior to the alteration of the CWB's single desk marketing authority over barley.

SWORN before me at the City of Winnipeg in the Province of Manitoba this 19th day of June, 2007.

WARD P. WEISENSEL

A Notary Public in and for the Province of Manitoba