Date: 20080619

Docket: T-2138-06

Citation: 2008 FC 769

BETWEEN:

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

and

Docket: T-249-07

BETWEEN

THE CANADIAN WHEAT BOARD

Applicant

and

ATTORNEY GENERAL OF CANADA and
THE MINISTER OF AGRICULTURE AND AGRI-FOOD
and MINISTER OF THE CANADIAN WHEAT BOARD

Respondents

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

REASONS FOR JUDGMENT

HUGHES J.

[1] These two applications each brought by the Canadian Wheat Board relate to two different Directions made by the Minister of Agriculture under the provisions of section 18(1) of the *Canadian Wheat Board Act*, R.S., c. C-12 as amended 1998. This Court has previously Ordered that the two applications be heard together.

[2] The first of these proceedings T-2138-06 deals with a Direction dated October 5, 2006 and has been termed the "Advocacy Direction" by the Applicant Wheat Board and the "Spending Restrictions Direction" by the Respondent Attorney General. I will call it the "Advocacy/Spending Direction". The second of these proceedings T-249-07 deals with a Direction dated January 26, 2007 and is termed the "President Direction" by the Applicant Wheat Board and the "Interim President Direction" by the Respondents Attorney General and Ministers. I will call it the "Arason Direction" as that is the person named in that Direction.

[3] In each application the Wheat Board is seeking declaratory relief. The Respondents oppose each application and have raised a preliminary objection respecting the first application, T-2138-06 that it was filed out of time and, with respect to the second application T-249-07 that it is moot. For the reasons that follow, I find that an extension of time be given to regularise the filing of application T-2138-06 and that this application be allowed with costs. Application T-249-07 is dismissed without costs for mootness.

THE PRELIMINARY OBJECTIONS

1. T-2138-06

[4] The Respondent Attorney General objects to this application being heard on the basis that it was filed more than 30 days after the Direction at issue was given thus, under the provisions of section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, it is out of time. This objection was first raised in the Respondents' Memorandum of Argument filed a few days before the hearing of the application was scheduled to be heard. The Applicant amended its Notice of Application to request that the Court grant an extension of time, if necessary, under the provisions of section 18.1(2), *supra*. For the reasons set out below, I will grant that extension *nunc pro tunc* to the date of filing the original Notice of Application.

[5] The Respondent's submission is simple; the Advocacy/Spending Direction was issued and communicated to the Wheat Board on or about October 6, 2005. Without, at this time, going into detail, that Direction stated that the Wheat Board should not expend funds advocating a "single desk" system for marketing wheat. This application was not filed until December 4, 2006. Section 18.1(2) of the *Federal Courts Act* stipulates that an application to this Court for relief under sections 18 and 18.1 shall be brought within 30 days from the date that the decision in question was communicated to the Applicant.

[6] The Wheat Board raised two grounds as to why this objection should not be sustained. First, it argued that the policy implemented by Minister was an on-going policy and could be challenged at any time. Second, it argued that, under the circumstances, the interests of justice

would be best served if the Court exercised its discretion under section 18.1(2) *supra*, to extend the time so as to regularize the filing of the Notice of Application on December 4, 2006.

[7] As to the first ground, the Wheat Board says that where a decision is one which creates an on-going policy, it may be challenged at any time. It says that section 18 of the *Federal Courts Act* permits a challenge not only to a "decision or order" but also to a "matter" as discussed by the Federal Court of Appeal in *Krause v. Canada*, [1999] 2 F.C. 476 at paragraph 21. It also relies on *Sweet v. R.* (1999), 249 N.R. 17 at paragraph 11, another decision of the Federal Court of Appeal and the decision of this Court in *Canadian Association of Deaf v. R.*, [2007] 2 F.C.R. 323 at paragraph 72.

[8] I reject this first ground of argument. In *Krause supra*, the Federal Court of Appeal at paragraphs 23 and 24 of its reasons was careful to point out that what was at issue there was not the decision itself, but the acts of the Minister subsequently in implementing that decision. Similarly in *Sweet* which was a case dealing with a preliminary object on motion, and *Canadian Association of the Deaf,* what was at issue were acts done by way of implementation of a decision. While arguably there was in the present case an exchange of correspondence between the Wheat Board and the Minister as to the interpretation and effect of the Direction, this exchange does not rise to the level of implementation as discussed in the above decisions.

[9] It is on the second ground that I find in favour of the Wheat Board. Counsel for the Respondent candidly agreed that the delay was short, about 30 days, and that the record does not

show that the Respondent or anyone else has suffered any real prejudice. The Respondent's position was that the Wheat Board had not demonstrated any genuine intention at the relevant time to file proceedings indeed it had done the opposite. For this argument, a review of the relevant facts is necessary:

1. On October 5, 2006 the Minister made the Direction in question which, on October 6, 2006 was communicated to the Wheat Board;
2. The Direction was published in the Canada Gazette, Part II, Vol. 140, No. 21 dated October 18, 2006;
3. On October 10, 2006 the President of the Wheat Board sent an e-mail to all Board Offices giving his interpretation of the Direction including a statement that the Direction was "likely technically lawful"
4. On October 11, 2006 the Minister's department issued a News Release concerning the Direction;
5. On October 18, 2006 the Canadian Press published a statement attributed to the Minister's communications director as to an interpretation of the Direction;
6. On October 21, 2006 the (Regina) Leader-Post published a "clarification" as to the Direction attributed to the Minister;
7. On October 26, 2006 the Chair of the Wheat Board wrote a letter to the Minister advising that an election of some of the Board's directors would soon take place to close on December 1, 2006 with the new directors to take office on December 31, 2006. The Minister was asked to rescind the Direction to permit the new directors to take office without fear of reprisals;

8. On November 17, 2006 the Minister responded to the Wheat Board's letter of October 26, 2006 stating that he was not prepared to rescind the Direction and required the Wheat Board to remove certain material posted on its website;
9. On November 27, 2006 the Chair of the Wheat Board wrote to the Minister responding to the letter of November 17, 2006 stating that it refused to remove the material from its website and indicated that Counsel had been instructed to prepare and file an application for judicial review. The Board asked that the Minister withhold certain action as to a proposed plebiscite and so advise the Board by December 1, 2006 failing which the application to challenge the Direction would proceed;
10. On November 29, 2006 the Minister wrote to the President of the Wheat Board stating that the Minister was contemplating terminating his appointment and inviting comments;
11. An undated letter was set out by fax from the Minister to the Chair of the Wheat Board; the fax header indicates that it was sent at 7:10pm, on the evening of Friday December 1, 2006. The letter again asked for immediate removal of the material from the website. The Minister refused to suspend the Direction.
12. Monday December 4, 2006 the Wheat board filed this application, T-2138-06.

[10] I am satisfied, given the events that the Wheat Board acted in a reasonable and prudent manner in attempting first to resolve the matter directly with the Minister, failing which it promptly initiated this application. I place little weight on the President's e-mail stating that the Direction

was "likely technically lawful" as being a layperson's first response and does not indicate an intention to abandon any appropriate legal recourse.

[11] Guidance has been given by the Federal Court of Appeal in *Jakutavicius v. Canada (Attorney General)*, [2004] FCA 289 as to how the Court should approach the question of extension of time under section 18.1(2) of the *Federal Courts Act, supra*. There are a number of criteria to be considered including whether an intention to bring a timely application has been demonstrated, the length of the delay, prejudice, any explanation for the delay and whether the case is arguable. These are guidelines, not filters, the matter is one for the discretion of the Court weighing all appropriate circumstances. Rothstein JA. for the Court said at paragraph 14 to 16:

> ***14*** *The decision to allow or refuse an extension of time is discretionary in nature. The test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given sufficient weight to all relevant considerations. See Reza v. Canada, [1994] 2 S.C.R. 394 at 404.*
>
> ***15*** *In Grewal v. Minister of Employment and Immigration, [1985] 2 F.C. 263,* Thurlow C.J. *identified considerations that may be relevant in an application to extend time. These considerations include:*
>
> > *1. whether the applicant intended to bring the judicial review within the period allowed for bringing the application and whether that intention was continuous thereafter;*
> >
> > *2. the length of the period of the extension;*
> > *3. prejudice to the opposing party;*
> >
> > *4. the explanation for the delay; and*
> >
> > *5. whether there is an arguable case for quashing the order the applicant wishes to challenge on judicial review.*

> ***16*** *However, these considerations are not rules that fetter the discretionary power of the Court. At pages 277-278 of Grewal, Thurlow C.J. states:*
>
> > *But, in the end, whether or not the explanation justifies the necessary extension must depend on the facts of the particular case and it would, in my opinion, be wrong to attempt to lay down rules which would fetter a discretionary power which Parliament has not fettered.*

[12] In the present circumstances the Respondent's Counsel, as previously stated, admits that there is no prejudice to the Respondent and that the delay, 30 days or so, is brief. I am satisfied that the Wheat Board has shown the necessary intent to institute this application and that it has at least an arguable case. It best serves the interest of justice to allow an extension of time such that the application may be considered to have being properly filed and I will so provide in my Judgment.

2) <u>T-249-07</u>

[13] The Respondent argues that by reason of ensuing events since the institution of this application, T-249-07, the matters sought to be determined have become moot and that the Court should decline to determine the matter. I heard the matter on its merits nonetheless in the interest of expediency, reserving on the question of mootness. I am however satisfied that this matter is now moot and should not be determined by the Court.

[14] First, I will set out the text of the Direction which is the subject of the application, the one I call the Arason Direction dated January 29, 2007:

> *Her Excellency the Governor General in Counsel, on the recommendation of the Minister of Agriculture and Agri-Food,*

pursuant to subsection 18(1) of the Canadian Wheat Board Act, hereby directs The Canadian Wheat Board to conduct its operations under the Act in the following manner:

(a) it shall ensure that Greg Arason, appointed as interim president of The Canadian Wheat Board by the Minister of Agriculture and Agri-Food pursuant to subsection 3.11(2) of the Act, is remunerated and reimbursed for his expenses no later than February 1, 2007 in accordance with the terms and conditions of his letter of appointment, dated December 19, 2006, and that Act for the period beginning on December 19, 2006 and ending on January 24, 2007;

(b) it shall ensure that Greg Arason continues to be remunerated and reimbursed for his expenses in accordance with the terms and conditions of that letter of appointment and that Act for the duration of his appointment; and

(c) it shall ensure that the interim president is not prevented directly or indirectly by any action or inaction of the board of directors of The Canadian Wheat Board, or otherwise, from carrying out his responsibilities under that Act for the direction and management of the business and day-to-day operations of The Canadian Wheat Board, including ensuring that he has the necessary signing authorities to enable him to perform his responsibilities.

[15] The substantive relief requested by the Wheat Board in its Notice of Application filed February 7, 2007 is for declaratory relief as follows:

(a) a declaration that the Direction is unlawful and ultra vires the authority granted to GIC pursuant to subsection 18(1) of the Act;

(b) in the alternative to (a) above, a declaration that the GIC acted beyond its jurisdiction or without jurisdiction in issuing the Direction to the CWB;

(c) a declaration that the Direction is vague and unenforceable;

(d) in the alternative to (c) above, an order quashing the Direction as being vague and unenforceable;

> *(e) a declaration that prior to the appointment by the GIC of the president of the CWB or the extension of the term of the interim president of the CWB beyond 90 days, the Minister of Agriculture and Agri-Food and Minister for the Canadian Wheat Board (the "Minister") is required to consult with the board of directors of the CWB (the "Board") with respect to the qualifications required of the president and the person whom the Minister is proposing to recommend, and the Board must have fixed the remuneration to be paid to the president and informed the Minister of the remuneration, in accordance with section 3.09 of the Act;*

[16] The record shows that Mr. Arason was replaced as president of the Wheat Board effective March 31, 2008 by Mr. White. Mr. Arason no longer remains in any capacity with the Wheat Board. During Mr. Arason's term as president, December 2006 until March 2008, he was paid by the Wheat Board for his services. Initially, the Wheat Board had sought concessions from the Minister in exchange for paying Mr. Arason but this attempt was abandoned. It is conceded by Counsel for all the parties that no action or inaction of the Wheat Board occurred during Mr. Arason's term as president that would give rise to any concerns in respect of paragraph (c) of the Arason Direction.

[17] Thus, in terms of the Arason Direction, the terms (a), (b) and (c) have been satisfied and there is no continuing concern since Mr. Arason no longer occupies the position of president of the Wheat Board or any other position with that organization. The Arason Direction is entirely concerned with Mr. Arason and not otherwise.

[18] The Supreme Court of Canada has provided guidance as to whether the Court should consider a matter having regard to mootness in the case of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. More recently the Federal Court of Appeal has provided assistance in that regard in *Air Canada v Canada (Commissioner of Competition)*, [2002] 4 F.C. 598.

[19] In *Borowski supra*, Sopinka J. for the Court stated that the determination as to whether the Court should continue to hear and determine a case when the underlying issues have disappeared is a matter of discretion left to the Court. At paragraphs 29 to 42 he reviewed several criteria that provide guidelines for the exercise of that discretion. The first is that there remains an underlying adversarial interest in the outcome. The second is a concern for judicial economy. The mere fact that a matter might again arise is not sufficient, it is preferable that a genuine adversarial live issue arise. There may, however, be justification for deploying judicial resources where there is a public interest in an issue of public importance. The third criteria is that there be a recognition by the Court that it is the function of the legislative branch of government to assume the principal role of law-making and the Court should be reluctant to enter that arena without a proper dispute for resolution.

[20] The Federal Court of Appeal in *Air Canada supra*, engaged in a similar exercise. In the reasons for the Court given by Evans JA. particularly at paragraphs 16 to 28 the Court considered whether there was a continuing adversarial relationship, the temporary duration of the matter under consideration and, whether there was sufficient public interest in the matter.

[21] In the present case, the subject matter of the Direction no longer exists, Mr. Arason is no longer president, he was paid and he was able to perform his duties without apparent difficulties. There is nothing in the record to indicate that there is a similar dispute with respect to Mr. White, the current president, or that there is any reasonable prospect that such issues will arise in the foreseeable future. There is no large public interest in the issues raised, the issues are essentially unique to the parties to the dispute and unlikely to have any larger public import. The duration of the effect of the Arason Direction was short, under two years, and no lasting prejudice to any party is apparent on the Record. The parties have a history of bringing disputes to the Court and have not shrunk from engaging the Court process in live disputes. In the interests of judicial economy these present matters should not be given consideration where the issues are no longer live.

[22] Having regard, therefore to all of the above, I have determined that this Court should not hear and determine the issues raised in application T-249-07. The issues only became moot however, just three months before the hearing was scheduled to be heard. Since this application was ordered to be prepared and heard together with T-2138-06 the amount of time and expense involved in T-249-07 was less than it otherwise would have been. Therefore application T-249-07 will be dismissed without costs to any party.

SUBSTANTIVE ISSUES: T-2138-06

[23] The Wheat Board seeks certain declarations as to the propriety of the Advocacy/Spending Direction of October 5, 2006. That Direction reads:

> *Her Excellency the Governor General in Council, on the recommendation of the Minister of Agriculture and Agri-Food,*

> *pursuant to subsection 18(1) of the Canadian Wheat Board Act, hereby directs The Canadian Wheat Board to conduct its operation under the Act in the following manner:*
>
> > *(a) it shall not expend funds, directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research; and*
> >
> > *(b) it shall not provide funds to any other person or entity to enable them to advocate the retention of the monopoly powers of The Canadian Wheat Board.*

[24] As published in the Canada Gazette, *supra*, the following Regulatory Impact Analysis Statement (RIAS) was given:

> ***REGULATORY IMPACT***
> ***ANALYSIS STATEMENT***
>
> *(This statement is not part of the Order)*
>
> ***Description***
>
> *The Canadian Wheat Board Act (CWB Act) provides for the constitution and powers of the Canadian Wheat Board (CWB). The CWB is a shared-governance corporation with the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada.*
>
> *This Direction Order directs the CWB to conduct its operations under the CWB Act in the following manner:*
>
> > *(1) It shall not expend funds, directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research.*
> > *(2) It shall not provide funds to any other person or entity to enable them to advocate the retention of the monopoly powers of the CWB.*
>
> *A commitment was made during the 2006 federal election campaign to give western Canadian wheat and barley producers the option of*

participating voluntarily in the CWB. The CWB has taken a public position opposing marketing choice. It is important that the CWB, as a shared-governance entity, not undermine government policy objectives. This Governor in Council order directing the CWB not to spend money on advocacy activity will ensure that the CWB caries out its operations and duties in a manner which is not inconsistent with the federal government's policy objectives. Direction Orders of this type may be made pursuant to the authority found in section 18 of the CWB Act.

Alternatives

The alternative would be to allow the CWB to spend funds towards advocating publicly against the policy goad of the federal government to give western grain producers the freedom to make their own marketing and transportation decisions, and to allow them to participate voluntarily in the CWB.

Benefits and Costs

As the funds available to the CWB are the funds of producers, some of whom favour marketing choice, those funds should not be used for a campaign which is aimed at preserving the monopoly. Producers who are in favour of marketing choice will support action to protect producers' funds from being used to advocate for retention of the monopoly. Producers who support the continuation of the monopoly and the CWB can be expected to oppose the Direction Order. The Direction Order will ensure that the Canadian values of conducting votes that are fair and democratic and that provide equal opportunity to all positions are respected by the CWB during the consultation process for determining the future direction of the CWB.

The Direction Order does not prevent the CWB from spending funds to carry out its object of marketing grain in an orderly manner nor does it infringe on the rights of individual directors or CWB staff to make statements in public in their own name and without financial support from the CWB. It would, however, prohibit the spending of funds by the CWB for the purpose of advocating the retention or its monopoly powers and would prohibit the CWB from funding third parties for that purpose.

> ***Consultation***
>
> *No consultations, prior to final approval of the Direction Order, are necessary.*
>
> ***Compliance and Enforcement***
>
> *Subsection 18(1.2) of the CWB Act specifies that "Compliance by the Corporation with directions is deemed to be in the best interests of the Corporation".*
>
> *Subsection 3.12(2) of the CBW Act also specifies that "The directors and officers of the Corporation shall comply with this Act, the regulations, the by-laws of the Corporation and any directions given to the Corporation under this Act".*

[25] The substantive relief as claimed by the Wheat Board in its Notice of Application is for:

> *(a) a declaration that the Direction is unlawful and ultra vires the authority granted to the GIC pursuant to subsection 18(1) of the Act;*
>
> *(b) in the alternative to (a) above, a declaration that the GCI acted beyond its jurisdiction or without jurisdiction in issuing the Direction to the CWB;*
>
> *(c) a declaration that the GIC acted contrary to law by issuing the Direction for the improper purpose of prohibiting the CWB from making public statements opposing the Government of Canada's policy regarding the future of the CWB and from communicating with western Canadian wheat and barley producers regarding the CWB's statutory object;*
>
> *(d) an order declaring that the Direction contravenes subsection 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11, and is therefore of no force and effect;*
>
> *(e) a declaration that the Direction is vague and unenforceable;*
>
> *(f) in the alternative to (e) above, an order quashing the Direction as being vague and unenforceable;*

[26] There has been no dispute raised by the parties that the Direction is a matter or decision or order that can be reviewed by this Court under sections 18 and 18.1 of the *Federal Courts Act, supra* and, if appropriate, the relief requested can be granted.

[27] Underlying a resolution of this application is a determination as to the true nature of the Wheat Board, particularly since amendments to *The Wheat Board Act supra,*, in 1998, and the role that the board of directors and the Minister each play in the conduct of the affairs of the Wheat Board. Disputes between the Wheat Board and the government have previously been considered by this Court in *Archibald v. The Queen* (1997), 146 D.L.R. (4th) 499 which dealt with matters prior to the 1998 amendments and in *The Canadian Wheat Board v. Canada (Attorney General),* 2007 FC 807, affirmed on appeal 2008 FCA 76.

[28] According to a history of the Wheat Board prepared by Dr. John Herd Thompson entitled "Farmers, Government and the Canadian Wheat Board: An Historical Perspective 1919-1987", Exhibit 1 to the Affidavit of Measner, the genesis of the Wheat Board as an entity is found in an Order in Council, PC 1589, issued under the *War Measures Act* on July 31, 1919 the preamble of which stated that abnormal conditions resulting in price uncertainty and market instability made the Wheat Board necessary. Dr. Thompson describes the Wheat Board, at page 2, as "uniquely Canadian in concept and operation". That Wheat Board had a temporary monopoly on the sale of wheat that was short lived; its operation was suspended in August 1920. Political debate continued for several years as to whether there should be an open market for wheat, a "single desk" system whereby the Wheat Board had a monopoly or some form of dual system or no Board at all.

[29] On July 5, 1935, the *Canadian Wheat Board Act* received Royal Assent creating the Wheat Board as a permanent institution which has a limited monopoly with respect to wheat and acted as a Crown agency. In 1947, the *Act* was amended to permit the Board to deal with grains other than wheat and extending certain of its monopoly powers.

[30] The Wheat Board continued to act as a Crown agency until the *Act* was amended in 1998, S.C. 1998, c. 17. The summary provided at the beginning of the amending *Act* says:

> *This enactment makes changes to the Canadian Wheat Board in the areas of corporate governance and operational flexibility. It replaces the commissioner structure of senior management with the board of directors and a president. Once the first directors elected to the board assume office, the Canadian Wheat Board ceases to be an agent of Her Majesty; however, borrowings will continue to be guaranteed by the federal government. In the area of operations, the Canadian Wheat Board will be authorized to buy grain and reimburse farmers for grain on more flexible terms. A contingency fund, established by the Canadian Wheat Board, will support certain of these operations.*

[31] The 1998 amendments provide for a board of directors of fifteen persons, ten are elected, on a rotating basis, by producers, four are appointed by the Governor-in-Council on the recommendation of the Minister and, the other director is the President appointed by the Governor-in-Council on the recommendation of the Minister with prior consultation with the board. Section 3.01(1) provides that the board "shall direct and manage the business and affairs of the Corporation" and is "vested with all the powers of the Corporation".

> *3.01(1) The board of directors shall direct and manage the business and affairs of the Corporation and is for those purposes vested with all the powers of the Corporation.*

[32] Sections 3.12(1)(a) and (b) require that the director and officers shall act honestly and in good faith and in the <u>best interest of the Corporation</u>. Section 3.12(2) provides that the directors and officers shall <u>comply with any directions</u> given to the Corporation.

> *3.12(1) The directors and officers of the Corporation in exercising their powers and performing their duties shall*
>
> *(a) act honestly and in good faith with a view to the best interests of the Corporation; and*
>
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*
>
> *(2) The directors and officers of the Corporation shall comply with this Act, the regulations, the by-laws of the Corporation and any directions given to the Corporation under this Act.*

[33] Section 4(2) added in 1998 provides that the Corporation (Wheat Board) is not an agent of Her Majesty nor a Crown corporation:

> *(2) The Corporation is not an agent of Her Majesty and is not a Crown corporation within the meaning of the Financial Administration Act.*

[34] Section 18(1) of the *Act* was unchanged by the 1998 amendments; it provides that the Governor-in-Council may by order give directions to the Corporation as to its "operations, powers and duties". However subsections 18(1.1) and (1.2) were added in 1998 to say that the directors shall cause the directions to be implemented and will not, thereby, incur liability and that such implementation is deemed to be in the best interests of the Corporation (apparently referring to section 3.12(1)(a) *supra*). Section 18 after the 1998 amendments therefore reads:

> *18.(1) The Governor in Council may, by order, direct the Corporation with respect to the manner in which any of its*

> *operations, powers and duties under this Act shall be conducted, exercised or performed.*
>
> *(1.1) The directors shall cause the directions to be implemented and, in so far as they act in accordance with section 3.12, they are not accountable for any consequences arising from the implementation of the directions.*
> *(1.2) Compliance by the Corporation with directions is deemed to be in the best interests of the Corporation.*
>
> *(2) Except as directed by the Governor in Council, the Corporation shall not buy grain other than wheat.*

[35] Thus we have, replacing a previous Crown corporation, a new Corporation, with a board of fifteen directors who are charged with the task of directing and managing the affairs of the Corporation, but nonetheless, obliged to follow directions given by government of the day. Such directions were previously provided for when the Corporation was a Crown corporation, but linger in the *Act*, and clearly recognized by the addition of subsections 18 (1.1) and (1.2) to remain.

[36] Thus the *Act* provides for extinguishment of the Crown corporation status of the Wheat Board and administration of the Wheat Board by a board of directors, a two to one majority of whom are elected by producers of grain such as wheat. These are no shareholders as such. The *Act* provides that the Board is to receive, handle and sell grain and distribute the proceeds, after deductions to the producers. The government is required to guarantee certain funds during certain periods, it gets paid out once most money is received from sales and will suffer liability only if there is a shortfall. Thus the producers provide the stock-in-trade of the Wheat Board-grain- and the government guarantees funding. Unlike a private corporation, therefore, there are no shareholders, no preferred shareholders, no bondholders or the like.

[37] There is in evidence, Exhibit 2 to the affidavit of Measner, a collection, as best can be done, of all directions given in the past. Those directions deal with a variety of matters including payment of expenses, substitution of certain Ministers in the absence of others, contracting for provision of railway equipment and services, restriction of sales to the Soviet Union and delivery of advances under a Spring Credit program. No previous direction has dealt with how the board is to conduct itself with respect to advocacy, distribution of information, or entering into policy debates.

[38] The Minister's Counsel argues that the government has financial exposure under the *Act* and is therefore entitled to protect its financial interests by way of direction. Section 7(3) of the *Act* provides that losses not otherwise provided for are to be paid by Parliament. I agree that it would be reasonable, should the Minister perceive that there is some reasonable expectation that Parliament may have to provide more than a small or temporary amount of money, that it would be prudent to make an appropriate direction genuinely concerned with the preservation of funds or reduction of risk of loss. The Minister also argues that he has a duty to safeguard the funds of the producers that may be at risk. I do not find such a duty set out directly or by reasonable implication to the *Act*. To the contrary, the provision of a board of directors, ten of fifteen of whom are elected by the producers, places the duty to safeguard the producers interests with the board, not the Minister.

[39] It is a fundamental tenet of a free and democratic society that the citizens of a country agree to be governed and obey the laws if proper and fairly imposed, and that the government conduct itself in accordance with those laws and the principles of natural justice and the jurisprudence. It is a bargain that must be kept by both sides.

[40] The decision of the Supreme Court of Canada in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 clearly sets out the principles by which those entrusted to govern are to be constrained in the use of the powers and discretion given to them. Justice Rand at page 140 said:

> *In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant; regardless of the nature or purpose of the statute. Fraud or corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute in intended to operate; and any clear departure from its lines of object is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.*

And at page 143 he said:

> *"Good faith" is this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with the improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen or an incident of his civil status.*

[41] More recently the Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 addressed the constraints upon the exercise of a statutory power given to the Governor in Council who must stay within the provisions of the law failing which the Court must exercise its supervisory function. At page 752 Estey J. for the Court said:

> *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.*

[42] Thus, while it may well be appropriate for a direction to be given where there is a reasonable concern that government funds are at risk, the direction at issue here must be examined as to its true nature and intent. The text reads:

> *Her Excellency the Governor General in Council, on the recommendation of the Minister of Agriculture and Agri-Food, pursuant to subsection 18(1) of the Canadian Wheat Board Act, hereby directs The Canadian Wheat Board to conduct its operations under that Act in the following manner:*
>
> > *(a) it shall not expend funds, directly or indirectly, on advocating the retention of is monopoly powers, including the expenditure of funds for advertising, publishing or market research; and*
> >
> > *(b) it shall not provide any funds to any other person or entity to enable them to advocate the retention of the monopoly powers of The Canadian Wheat Board.*

[43] The direction is couched in terms of expenditure of funds, however nowhere in the record is there any evidence that genuine consideration was given to the nature or extent of funds that were in issue or at risk. Attention was drawn to two studies done in respect of the Wheat Board, one done in 1993, the other in 2006, however it was acknowledged that whatever funds were necessary to conduct these studies had already been spent. The expense in putting these studies on the Internet or distributing them by e-mail is trivial yet the Minister, by letter of November 17, 2006, relying on the

direction, insisted that such material be removed from the website of the Wheat Board. That letter also stated that "all forms of spending, including salaries and non-pay operating expenditures" would, if the time of Board members were engaged in the targeted activities, constitute expenditure of funds.

[44] There has been a clear dispute between the Minister of the present government and the Wheat Board as to whether the Wheat Board should retain its monopoly powers, that is, operate as a "single desk", a view taken by a majority of the board of directors of the Wheat Board, or whether there should be an open market or some form of dual marketing as an intermediate position. The position of the present government was made clear in a letter from the Minister to the President of the Wheat Board dated April 11, 2006:

> *The new Conservative government has been clear on its intent to allow for voluntary participation in the Canadian Wheat Board. Once implemented, this policy will allow farmers the freedom to make their own marketing and transportation decisions. As the Minister responsible for the Board's conduct, I would appreciate the co-operation of the Board's management and directors in complying with this new direction, the policy of the Government of Canada.*
>
> *I would note that all communication and promotional material issued on behalf of the Board should clearly reflect Government policy. In addition, it is inappropriate for an agency of the Government to spend producers' money on activities that could be regarded as partisan in nature. The recent advertising campaign encouraging producers to write the Minister could be regarded as a political activity.*
>
> *I look forward to working with you and the Board in a transition plan to ensure a strong marketing option for farmers who choose to make use of the Canadian Wheat Board.*

[45] There followed a series of letters in which the Wheat Board declined to "reflect Government policy" and the Minister continuing to request that it do so and that it desist from promoting a "single desk" policy. There was little reference to any serious economic concern by the Minister, the only reference being to the spending of the producers, not government money .

[46] It is entirely clear, therefore, that the directive is motivated principally to silencing the Wheat Board in respect of any promotion of a "single desk" policy that it might do. There is no mention in the direction to any promotion that the Wheat Board might do, for instance, to support the Minister's preference for an open market or market choice. If the Minister were truly concerned about the cost of such promotions, and there is no evidence of any genuine grounds for concern, then surely the Minister should have dealt with promotion for or against the Minister's preferred position, and not just against. In this regard the Minister's letter to his newly chosen replacement president, Mr. Arason, of December 19, 2006 is of interest in that it states:

> *In carrying out these duties, you should focus on marketing grain on behalf of western Canadian farmers. In so doing, you should refrain from taking a public position for or against any proposal for changes in the statutory powers of the Corporation.*

[47] Where a statute has delegated powers to another body, such as here where the *Wheat Board Act*, *supra*, delegated the power to make a direction to the Governor-in-Council, under section 18(1) of the *Act,* the exercise of that power by the delegate must be in accordance with the purposes and objects of the *Act* notwithstanding any apparent broad or unrestricted nature of the delegated authority. As stated by Justice Cory when he was sitting in the Ontario Court of Appeal in *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 at page 174:

> *The issue to be determined is whether the Minister or Lieutenant-Governor in Council is exercising a royal prerogative which is not, per se, subject to Court review, or whether the act or acts are done pursuant to the exercise of a statutory power and thus subject to Court review. In Border Cities Press Club v. A.-G. Ont., [1955] O.R. 14 at p. 19, [1955] 1 D.L.R. 404 at p. 412, Chief Justice Pickup said:*
>
>> *In exercising the power referred to, the Lieutenant-Governor in council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.*
>
> *It has been held that even if made in good faith and with the best of intentions, a departure by a decision-making body from the objects and purposes of the statute pursuant to which it acts is objectionable and subject to review by the Courts.*

[48] This is particularly so where the order, although apparently directed to one purpose, is really directed to a different purpose not within the scope of the enabling statute, properly construed. Such was the case in *Re Heppner and Minister for the Environment for Alberta* (1977), 80 D.L.R. (3d) 112 a decision of the Alberta Court of Appeal. In the Judgment of the Court delivered by Lieberman JA. the Court said at page 120:

> *Notwithstanding the purpose expressed in the preamble to Order-in-Council 1062/76, it is apparent from the evidence that the main and compelling purpose in passing it was to create a transportation and utility corridor. I have come to this conclusion in light of the letter of The Minister of the Environment, dated December 23, 1976, Exhibit D, the letter of the Assistant Deputy Minister, dated October 5, 1976, Exhibit B, and the other documents before me, combined with the fact that the Order-in-Council was promulgated very shortly after Dome's application for a permit to construct a pipe line and in view of the narrow strip of land which was to comprise the R.D.A.*

and 122:

> *I repeat that in my judgment the primary purpose and the motivating force behind the promulgation of the Order-in-Council being impugned in this appeal was the creation of "a transportation and utility corridor," a purpose not authorized by the Act, and therefore the Order-in-Council and the regulations purported to be issued thereunder are invalid. The fact that in accomplishing this invalid purpose, a peripheral purpose falling within the strict terms of the Act may be accommodated does not render valid what would otherwise be invalid subordinate legislation.*

[49] Here, as discussed, it may well be appropriate for a direction to be issued to constrain or direct the expenditure of funds for a proper purpose where it has been demonstrated that there is a real concern that the obligation of Parliament to make good upon a significant shortfall of money is likely to occur. No such situation has been demonstrated on the evidence in the record.

[50] Even if there had been evidence on the record in regard to such a shortfall, and even if the evidence were that any advocacy by the Board in respect of a monopoly or otherwise was a material contributor to that shortfall, to restrain the Board in one respect only, that is, from advocating a position contrary to the policy of the government in power, is inconsistent with any aim or objective established in the *Wheat Board Act*, *surpra*. If advocacy was of serious financial concern, then all advocacy for or against, would be the only sound basis for dealing with that concern. A declaration will be granted that the direction is *ultra vires* and of no effect.

CHARTER

[51] The Applicants raise a second and different ground in seeking a declaration as to the invalidity of the Advocacy/Spending Direction. They rely on the *Charter of Rights and Freedoms*, section 2(b) which states:

> *"Everyone has the following fundamental freedoms…freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication…"*

[52] In view of my finding above it is unnecessary to consider this matter as well however I will do so in the event that one of the parties may seek appellate review.

[53] There is no doubt that the *Charter* serves to protect individuals against the excesses of the government. There is also no doubt that for many of the purposes of the *Charter* a corporation may be considered to be in the same position as an individual when seeking the protection of the *Charter*. The issue here is whether the Wheat Board is an entity that can seek the protection of the *Charter*.

[54] If the Wheat Board could seek and obtain the protection afforded by the *Charter* then it could invoke the right of freedom of expression provided by section 2 in the matter as expressed by the Supreme Court of Canada in *Libman v. Quebec (Procureur general)*, [1997] 3 S.C.R. 569. The Court gave a unanimous decision not ascribed to any particular individual judge. At paragraph 29 it said:

> ***29*** *In Keegstra, supra, at pp. 763-64, Dickson C.J. stressed the paramount importance for Canadian democracy of freedom of expression in the political realm:*

> *Moving on to a third strain of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.*

At paragraph 30 it summarized the test:

> ***30*** *Irwin Toy, supra, laid down the tests for infringement of freedom of expression. The Court must ask, first, whether the form of expression at issue is protected by s. 2(b) and, second, whether the purpose or effect of the impugned legislation is to restrict that form of expression.*

[55] There is no doubt that the purpose and effect of the Advocacy/Spending Direction is to restrict a particular form of expression namely, advocacy against government policy respecting the Wheat Board. If the Wheat Board were an entity entitled to invoke the Charter undoubtedly the Direction would be invalid for that reason.

[56] It is generally conceded by Counsel that the Charter does not serve the protect the government against the government, a point made in *Cosgrove v. Canada*, a decision of the

Canadian Judicial Council Inquiry, December 16, 2004 at paragraph 48 - subsequently considered but not on this point, by this Court (2006) 1 F.C.R. 327 and the Federal Court of Appeal 2007 FCA 103.

[57] Counsel were unable to refer to any judicial determination where a body having some of the trappings of government had sought the protection of the *Charter*. There are several cases respecting a reverse situation where individuals or organizations sought the protection of the *Charter* against the actions of an entity having some of the trappings of government. In those cases an examination was made to determine how much of the government trappings an entity must have before it can be said that its actions are constrained by the Charter. The Supreme Court of Canada entered into a lively debate on the subject, principally between LaForest J. and Wilson J. That debate culminated in *Godbout v. Longueil*, [1997] 3 S.C.R. 844. The reasons of LaForest J. (for himself L'Heureux-Dubé and McLachlin JJ.) at paragraph 47 provide a good summary as to where matters stand in this regard:

> ***47*** *Comparing McKinney, Harrison and Stoffman on the one hand to Douglas and Lavigne on the other makes clear what I take to be an important idea governing the application of the Canadian Charter to entities other than Parliament, the provincial legislatures or the federal or provincial governments; namely, that where such entities are, in reality, "governmental" in nature -- as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform -- they cannot escape Charter scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. This is not to say, of course, that the Charter applies only to those entities (other than Parliament, the provincial legislatures and the federal and provincial governments) that are, by their nature, governmental.*

> *Indeed, it may be that particular entities will be subject to Charter scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as "governmental" per se; see, e.g., Re Klein and Law Society of Upper Canada (1985), 50 O.R. (2d) 118 (Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the Charter in performing what amount to governmental functions. Rather, it is simply to say that where an entity can accurately be described as "governmental in nature", it will be subject in its activities to Charter review. Thus, the Charter applied to Douglas College (in Douglas) and to the Council of Regents (in Lavigne) because those bodies were wholly controlled by government and were, in essence, emanations of the provincial legislatures that created them. Since the same could not be said of the institutions under examination in McKinney, Harrison and Stoffman (and since none of those institutions was implementing a specific government policy or programme in adopting its mandatory retirement regulations), the Charter did not apply in those cases.*

[58] What the Supreme Court is recognizing is that an entity other than that which is not strictly the government or one of its agencies, can be said to be the government if certain factors such as degree of control, are evident. It must therefore be equally true that an entity that is not clearly the government or one of its agency that is <u>subject to</u> government control over what would otherwise be independent action, must be <u>in those circumstances</u>, able to invoke the Charter.

[59] Here the Wheat Board since the 1998 amendments to its *Act* is expressly not a Crown corporation or agent of the government. It has a board of directors, a two to one majority of which comprise private persons not otherwise connected to the government. The government, through the power of a direction, is given authority in respect of activity that would otherwise freely be carried out by an individual or corporate entity or, in this case, the board of directors of the Wheat Board.

For this purpose a direction that is not in accordance with the objects and purpose of the *Act*, as I have found, and impinges on freedom of expression, is in violation of section 2 (b) of the *Charter*, and I so find in these circumstances.

[60] The Minister argues that the Direction is justified under section1 of the *Charter*. I do not find that section 1 provides any justification for the Direction. There has been no demonstration of any pressing or substantial economic objective, the only true objective is to constrain the advocacy of the Board against government policy. Given the true objective, there is no rational connection to economic considerations. The impairment on the Board's activities may be minimal but the clear public interest against stifling public debate overwhelms that consideration. There is no proportional balance to show an overwhelming necessity to stifle the Board in respect of policy debate. The Direction does not preclude the activity of the Board in most respects but it makes its activities uncertain. The Minister's letter of November 17, 2008 makes it clear that the Minister intends to make an overzealous interpretation of the Direction precluding any person on Board time from any speaking out on the topic and insisting on removal from the website of material even though no use of funds in that respect has been demonstrated. I find that nothing has been shown to demonstrate that the government can avail itself of the saving provisions of section 1 of the *Charter*.

VAGUENESS

[61] The Wheat Board argues as a further ground respecting the Direction that it is vague and incapable of any adequate interpretation such that it can be understood. It relies on the Supreme

Court of Canada decision in *Nova Scotia Pharmaceutical Society v. The Queen*, [1992] 2 S.C.R. 606. It quotes from the reasons of Justice Gonthier at 639:

> *A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion.*

[62] The Wheat Board points to words such as "directly or indirectly" and "advocating" as being unclear and points to different interpretations made by Mr. Measner, its president, the Minister's staff and the Minister as evidencing the difficulties in interpreting the Direction.

[63] The Respondent cites two decisions of the Supreme Court of Canada to argue that absolute precision rarely exists and simply because there may be difficulties does not render a provision invalid. The first is *Irwin Toy Ltd. v. Quebec (PG)*, *supra*, per Dickson J. at page 983:

> *"Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".*

[64] The second is *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 per McLachlin J. at paragraph 130:

> *That is not to say that the alleged vagueness of the standard set by the provision is irrelevant to the s. 1 analysis. For reasons discussed below, I am of the opinion that the difficulty in ascribing a constant*

> *and universal meaning to the terms used is a factor to be taken into account in assessing whether the law is "demonstrably justified in a free and democratic society". But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard.*

[65] I do not perceive that the phrase “directly or indirectly” or the word “advocating” are so unclear or equivocal so as to render the Direction incapable of understanding. I agree that the Minister, his officials and the Wheat Board have different understandings as to what may fall within the scope of the Direction, but one or more of those understandings may well be incorrect. I have already characterized the Minister’s interpretation as overzealous. Therefore I do not find the Direction invalid for vagueness.

COSTS – T-2138-06

[66] The Wheat Board has been successful in its application; T-2138-06. Counsel for the parties indicated in argument that they had no understanding between them as to costs or any particular submissions to make. By an Order of the Court dated March 27, 2008 it was provided that applications T-2138-06 and T-249-07 should be heard together and a single memorandum of fact and law be prepared by each party covering both applications. I have awarded no costs in T-249-07 however I will award costs in favour of the Wheat Board in T-2138-06 to be assessed at the upper end of Column IV having regard to the complexity of the matter. To the extent that costs and disbursements attributable to one application cannot be separated from the other they shall be apportioned half and half such that the Wheat Board will recover one half of such costs and disbursements.

IN SUMMARY

[67] Having regard to the foregoing I have determined that:

1. An extension of time is granted to the Wheat Board to regularize the timeliness of its filing of its Notice of Application in T-2138-06;
2. I decline to hear and determine application T-249-07 by reason of mootness, therefore that application will be dismissed without costs;
3. I will allow application T-2138-06 with costs to be assessed at the upper end of Column IV in accordance with these reasons and will grand the relief requested in paragraph 1(a), (c), (d), (h) and (i) of the Amended Notice of Application.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2138-06
STYLE OF CAUSE:	THE CANADIAN WHEAT BOARD v. ATTORNEY GENERAL OF CANADA
DOCKET:	T-249-07
STYLE OF CAUSE:	THE CANADIAN WHEAT BOARD v. ATTORNEY GENERAL OF CANADA and THE MINISTER OF AGRICULTURE AND AGRI-FOOD and MINISTER OF THE CANADIAN WHEAT BOARD
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	June 16, 2008
REASONS FOR JUDGMENT:	HUGHES J.
DATED:	June 19, 2008

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